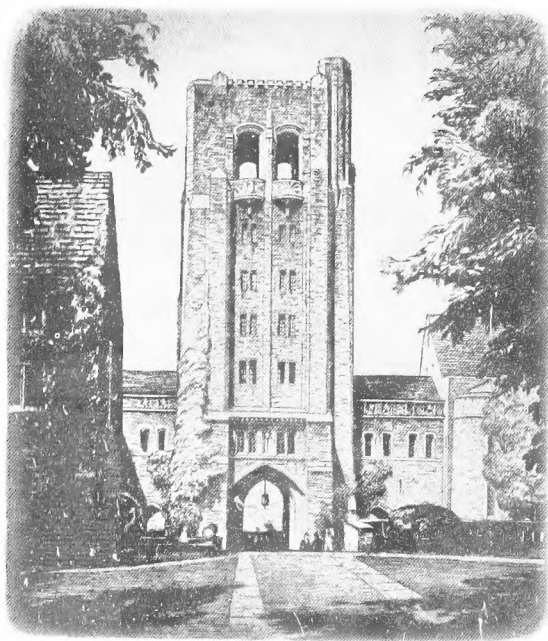


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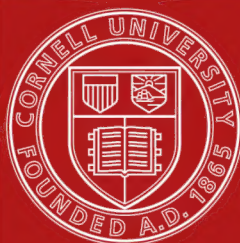
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A treatise on the modern law of evidence



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A TREATISE
ON THE
MODERN
LAW OF
EVIDENCE

BY
CHARLES FREDERIC CHAMBERLAYNE, ESQUIRE
Of the Boston and New York Bars

American Editor of Best's Principles of the Law of Evidence,
American Editor of the International Edition of Best on Evidence,
American Editor of Taylor on Evidence.

VOL. IV
RELEVANCY



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THE
MODERN LAW OF EVIDENCE

VOLUME IV

INTRODUCTORY.

Attention has been given, in the immediately preceding volume, to the underlying rule in the law of evidence that all facts which are relevant are potentially admissible (§ 1711), and that no others are to be received. Attention has been further called to certain general canons of relaxation (§§ 1740d *et seq.*) or of requirement (§ 1742a *et seq.*) practically employed by judicial administration in moulding to particular forensic situations the comprehensive principle of relevancy thus briefly stated. This ascertained administrative equivalence between Relevancy and Admissibility has been regarded as indicating the conclusion that the law of evidence consists mainly in a statement of the circumstances under which this general principle fails to apply, relevant facts being excluded. These rejections have been found, speaking generally, to have been formulated into four procedural rules, those excluding Opinion, Hearsay, Res Inter Alios Actae and evidence of Character. Following the line previously indicated (§ 64) as our proposed order of examining the topics embraced in the law of evidence, that of the increasing influence of Administration as compared to the operation of Procedure, by far the greater part of the third volume has been devoted to the examination of the treatment accorded by judicial administration to the exclusionary rule relating to Opinion, Reasoning by Witnesses. The conclusion in this connection has been reached that the mental act of a witness constitutes, as compared with proof of the phenomena observed, a secondary grade of evidence, to be received when, for any reason, the primary evidence necessary to proof of the proponent's case can not properly be placed before the jury.

The present volume considers, from the same point of view, i.e., that of judicial administration, the remaining procedural rules of exclusion. Hearsay, Res Inter Alios Actae and Character Evidence. The topics will be examined in this order. It may, at first sight, be doubted whether, as compared with the permeating influ-

ence of rational administration, characteristic of the rules relating to Opinion, the operation of administration in connection with the topics treated in the following chapters has not diminished rather than increased. The core of the rule relating to Hearsay, for example, is obviously procedural. It still presents an anomaly absolutely defying the established principles of a sound judicial administration. Throughout the necessary consideration of these later exclusionary rules are to be found, moreover, serious breaks in logical classification and arrangement, procedural equivalences between facts irrespective of rational value, and the like.

It should, however, constantly be borne in mind that in dealing with the rules against Hearsay, *Res Inter Alios Actae* and Character Evidence, we are, as contrasted with Opinion, dealing with rules of an earlier and more archaic type. The administrative canons relating to Opinion are, speaking generally, of comparatively modern growth, the outcome of an age of reason, a period characterized by the development of scientific thought. On the contrary, the exclusionary rules to which attention is now to be given are, so to speak, the children of Procedure. They are the natural development of a time when the law of evidence, formulating, as it were, its maxims of prudence and caution in dealing with ignorant or wayward juries, into rigid rules, sought to establish prohibitions and restrictions upon the use of the reasoning faculty, declaring that certain facts, in themselves relevant, *should not* be considered in judicial proceedings.

It follows that if the influence of a judicial tendency may properly be measured by the obstacles which it has successfully overcome, the result with regard to these great procedural exclusions of Hearsay, *Res Inter Alios Actae* and Character Evidence may well be considered as a concession to the power of rational administration as shown in the modern law of evidence. In case of the exclusions other than that relating to Hearsay, the effect of rationalizing tendencies has been to treat the discredited fact as secondary evidence, to be used when necessary to proof of the proponent's case, i.e., in the event that he is unable to produce more primary evidence. Indeed, it has become difficult to find, in case of these exclusions, instances where evidence which is both necessary and relevant is rejected. The same assertion cannot, it is true, properly be made in case of Hearsay. The latter rule still stands forth as the Gibraltar of procedure in the midst of more liberalizing

tendencies. However necessary may be a hearsay statement to the proponent's case, and however absolute his inability to produce more primary evidence, unless the statement falls within the scope of some recognized exception, the hearsay rule may interpose an absolute bar to its reception (§ 2702). Yet even here, rational administration will be found to have produced an appropriate effect. The established exceptions, Declarations against Interest (§§ 2762-2789), Declarations as to Matters of Public and General Interest (§§ 2790-2810), Dying Declarations (§§ 2811-2869), Declarations in Course of Business (§§ 2870-2909), Declarations concerning Pedigree (§§ 2910-2981), follow, with substantial accuracy, the rule of sound administration that the unsworn statement may, under the established conditions of Necessity (§ 473) and Relevancy (§ 473 n. 3), be used as secondary evidence of the facts asserted. These so-called "exceptions," moreover, will be found to have greatly broadened in scope, earlier procedural requirements and limitations having been removed or considerably modified.

This is by no means all. The operation of the basic rule that relevant facts are eligible to admissibility has done more to admit the unsworn statement in certain cases as *secondary evidence*. When certain particularly strong forms of relevancy are presented to the tribunal the unsworn statement is treated as *primary* evidence of the facts asserted. In this highly significant circumstance is indicated not so much the creation of additional "exceptions" to the hearsay rule as the establishment of an administrative connection between Relevancy and Admissibility inconsistent with the reasoning upon which the rule against hearsay itself is based. All hearsay statements, extrajudicial declarations used as evidence of the facts asserted, must, moreover, carefully be distinguished from the use of unsworn statements as facts which are independently relevant (§§ 2574-2697), i.e., relevant regardless of their truth or falsity. Here, also, the evidence of the unsworn statement is treated as primary. The judicial reasoning, however, upon which the admissibility is based will be seen to be radically different in the two cases, the independently relevant statement not being regarded as within the scope of the procedural exclusion relating to Hearsay. In an effort to make clear the distinction thus indicated, it has been deemed advisable to go some-

what further into the general nature of the evidence furnished by verbal or written statements.

In itself considered, the existence of any statement, sworn or unsworn, i. e., judicial or extrajudicial, differs in no essential particular from any other fact. Until this is fully recognized and conceded, confusion in this branch of the law of evidence cannot fail to result. At present, judicial recognition is but partial. Procedure seeks to distinguish the employment of a statement when relevant in and of itself, i.e., independently relevant (§§ 2574-2697), from its use where the declaration is claimed to be admissible by reason of the relevancy of the fact which it asserts (§§ 2698-2761). More briefly, the attempt is made to establish a forensic difference between an unsworn statement in its independently relevant and in its assertive capacity. Such a distinction, however, is futile (§ 2580). The true line of cleavage for administrative purposes would seem to be between unsworn statements which are relevant, however this attribute of relevancy may have come into being, and those which are not. The inference from the existence of a statement, sworn or unsworn, that it declares the truth may arise in the mind as logically and compel belief as inevitably as any other deduction from the same fact. Under appropriate circumstances, the declaration may fairly be regarded, in many instances, as circumstantially probative of the truth of the facts stated. In such cases, rational administration requires that it should be accorded its true value. Indeed, the nature of the mind appears to be such that, in the absence of some positive inhibition, it *must* concede such an influence. That the distinction attempted by procedure is futile, as well as unsound, seems amply demonstrated in the numerous instances where a statement admitted as independently relevant also asserts the existence of a material fact. Thus, the direct statement by one possessed of adequate knowledge, "I propose to remain in X from now on," would be admissible, on a question of domicile (§ 2665), as independently relevant evidence of intent. At the same time, the mind finds it difficult to resist the conviction that the statement is also true. So the exclamation of an injured person, "I have a terrible pain in my back," would be undoubtedly regarded as furnishing independently relevant evidence of present suffering (§§ 2625 *et seq.*), from which a jury could scarcely fail to draw the further inference that the statement declares the fact correctly.

It will, nevertheless, be seen that, in the present state of the law, it is only in connection with the use of such independently relevant statements that the nature of a declaration as being that of a fact, like any other, is fully appreciated by judicial administration. Leaving out of account the numerous exclusions where the true ground of judicial rejection is irrelevancy rather than any objection to the evidence because it is an unsworn statement, it may be said that in all cases where the relevancy of a declaration lies in the mere fact of its having been made, it will be received. This relevancy may be, as in other connections (§§ 1712 *et seq.*), one of three kinds. (1) A declaration may be a fact in the *res gestae*, i. e., exhibit a constituent relevancy (§§ 2594 *et seq.*), as where an oral statement is made the basis of an action of slander, or is claimed to set forth a parol contract. (2) The relevancy of the statement may be probative (§§ 2635 *et seq.*), as in cases where the declaration tends to prove the existence of pain, knowledge or some other physical or psychological state or condition. (3) Its relevancy may be deliberative (§§ 2679 *et seq.*), as where evidence is offered of a statement by a witness said to be inconsistent with his present testimony. In all this no anomaly is presented. A verbal act has precisely the same forensic position as any other.

When, however, the tribunal is asked to draw from the existence of an unsworn statement the inference that it is true, a declaration being offered in its "assertive" capacity, procedure at once takes alarm and interposes, between the jury and the danger of their being misled, the prohibition of the Hearsay rule. Only to the statement, when used as evidence of the facts asserted, does the Hearsay exclusion affect to apply. Such an attempted distinction seems, for the reasons stated, to be unsound in point of principle. As has been already said, the true discrimination is between statements which are relevant for a given purpose and those which are not, rather than between the purposes themselves for which the declaration is offered. In other words, in this connection, an unsworn statement ought properly to be received in support of the truth of its assertion whenever it rationally and logically tends to ground that inference in a normal mind. Otherwise, it should be rejected, not by virtue of any special rule but simply as an irrelevant fact.

Certain secondary considerations are, however, not without

weight. It should be at once conceded, that while there is, in the nature of things, no substantial distinction between the various logical inferences to which the existence of an unsworn statement may give rise, there are certain forensic differences in the position of such a declaration when used in its "assertive" capacity, which may well modify the administrative treatment properly accorded to it. As distinguished from other inferences naturally to be drawn from the existence of an unsworn statement, that of truth varies, in main, in two important particulars.

(1). In its independently relevant capacity, the unsworn statement is primary evidence (§ 2596). When employed as "Hearsay," i.e., in its assertive capacity, the evidence, though relevancy be assumed, is in many, if not most, instances, unmistakably of a secondary nature. With statements of the first class, there is no better way of proving the fact. It is usually the only way in which this can be accomplished. In the second it is readily perceived that the testimony in court of the declarant as to facts observed by him constitutes a superior grade of proof. On the other hand, the hearsay statement, not only is devoid of the procedural sanction of an oath (§ 2712), but suffers in probative force from the absence of the testing and possible strengthening normally furnished by cross-examination (§ 2713), while the circumstances attending its presentation to the tribunal tend naturally to discredit it (§ 2711). For example, as the basis of an action for defamation of character brought by A against B, there is no better way of proving that B has said "A forged the will," than by introducing the evidence of a witness who says that he heard B say so. To establish, however, the fact that A actually did forge the will the primary proof obviously consists of the testimony of those who observed the *res gestae* in the matter. The assertion of B that A forged the will, even if relevant, would constitute a distinctly secondary method of proving the fact alleged.

(2) A second obvious difference is this. The relevancy of the fact of the making of a statement, usually is entirely clear, and the subjective qualifications of the declarant but little regarded. The same cannot well be said of the statement when viewed in its assertive capacity. The existence of a declaration becomes relevant in support of its truth, only when certain subjective qualifications on the part of the declarant are affirmatively shown to exist. Thus, to take the instance cited above, on an action

for slander brought by A against B for having falsely accused the plaintiff of forgery, the relevancy of the statement, "A forged the will," is in no way dependent on the subjective state of B's mind. The declaration is constitutently relevant, however much B may have known as to the matter and whatever may have been his mental attitude toward A. The relevancy of the extrajudicial statement in its assertive capacity, however, fails to arise until suitable evidence is furnished upon these points. There must be convincing proof of at least two important facts, (1) B would not have believed the statement to be true, had it not actually been so, (2) he never would have made such a statement had he not believed such to be the fact. In other words, it must appear that he had both Adequate Knowledge and that there was an Absence of a Controlling Motive to Misrepresent the truth. To the second of these subjective qualifications, the attention of procedure is almost exclusively devoted. The first, the step between subjective and objective truth or actual existence (§ 1774), though of great administrative consequence, receives but slight procedural consideration. Apparently the assumption which runs through the discussions on the subject is to the effect that if a witness has no controlling motive to misrepresent, he will tell the truth. Probably, this feeling, which persists down to the present day, draws much of its vitality from the sacramental character attached to the early oath, the conception that the oath-ordeal was an appeal to the judgment of God who would certainly have punished perjury. However this may be, procedure apparently goes on the theory that if a witness fails to tell the truth it must be because he intends not to do so, or is prevented by bias, or other prejudice from doing so. In most cases, the essential connection between subjective truth and objective reality is apparently thought to be secured by insistence upon the general requirement that all witnesses should possess Adequate Knowledge regarding the matter as to which they propose to testify. Procedure drops the matter at this point. All which can be done has been done. Greater attention is devoted to the question of Motive to Misrepresent. If this be obviously absent, the relevancy of the unsworn statement is regarded as probable. If the declarant's mind can be shown to have been unaffected by emotion, interest or prejudice, he may fairly be assumed to be telling the truth. Such a conception seems to be at the basis, for example, of the persistent procedural requirement that

the unsworn statement to be admissible in its assertive capacity should have been made *ante litem motam* (§ 2920). In pursuance of the same line of thought, the relevancy of the unsworn statement is regarded as still more apparent where the interest of the declarant seems to consist in *not* making the statement, e.g., where the declaration is against his apparent interest (§§ 2762-2789). Finally, relevancy or, under the earlier conception, the confidence of procedure, has been accorded to the unsworn statement where the subjective truth of the assertion is guaranteed by another consideration, one particularly potent in creating the later law on this subject. What procedure, and subsequently, judicial administration, apparently dreads is the *volitional* perversion of the truth, the tendency of men to seek their own interests, or to gratify their passions or prejudices. So far, therefore, as the reflex, intuitive or automatic action of the mind replaces the volitional, danger is felt to be removed. As in other connections (§ 1840), judicial administration trusts an utterance which springs instinctively to the lips or flows automatically from the pen. How far this confidence is justified, need not be considered at this time. Spontaneous utterance is preferred to deliberate. As automatism replaces reflection, the relevancy of the unsworn statement becomes clear. Admissibility follows. For example, where, in the course of the *res gestae* of an accident, spontaneous ejaculation is made by an injured person, such a declaration is regarded as showing what we have called the Relevancy of Spontaneity (§§ 2982-3050). It is accordingly received. So, when one is in the constant habit, become automatic by regular repetition, of making, in course of business or public or private duty and without motive to misrepresent, certain entries, these unsworn statements, under what it has seemed proper to call the Relevancy of Regularity (§§ 3051-3149) have been admitted as primary evidence of the facts asserted.

In connection with this now recognized administrative principle, that when these particular forms of Relevancy are presented an unsworn statement will be received in its assertive capacity, it has been thought appropriate to consider the intricate subject of the relation of such statements to the *res gestae* and certain of the reasons for the great extension given by American Courts to the use of the phrase itself. In no connection is the logical difficulty of attempting to separate the inference of truth, when it properly

arises from the existence of an extrajudicial statement, from the other inferences rationally to be drawn from it greater than in connection with the *res gestae*. In Hackett's case (Com. v. Hackett, 2 Allen [Mass.] 136 [1866]), to select an example almost at random, the exclamation of the injured man, "I'm stabbed—I'm gone—Dan Hackett has stabbed me," is admissible as an independently relevant fact. As part of the *res gestae*, this relevancy is constituent. But it is difficult to avoid the conviction that the statement is a true one. It may, in other words, be regarded as having a probative capacity in establishing the truth of that which it asserts. In the great majority of American courts the jury would be permitted to regard it in this light. It is important to bear in mind, however, that the relevancy of the declaration just quoted rests on a different basis, according as the statement is being used, in its constituent or in its probative capacity. Independent constituent relevancy is due entirely to the position of the statement among the *res gestae*. Remove it from this position and its constituent relevancy is gone. Probative, assertive relevancy seems rather to be due to the spontaneous nature of the declaration. This relevancy would be precisely the same should it accompany any relevant fact. It is not at all necessary that the latter should be one of the *res gestae*. Practically the same thing is true of an independently relevant statement which has also an assertive probative effect under the Relevancy of Regularity. Obviously, to group both forms of relevancy, with much else, under the general statement that the declaration is "part of the *res gestae*" would be to embrace many relevant facts under the term *res gestae* which do not properly belong there. Yet this would appear to be precisely what has been done, to the well-nigh inextricable confusion of the subject. The idea would seem to be that as an unsworn statement in the *res gestae* may be relevant, any unsworn statement which is relevant must be so because it is part of the *res gestae*. It will be seen (§ 2998) to be probable that the great writer on the law of evidence, Professor Greenleaf, entertained the sound opinion that some general principle, like that of the relevancy of automatic statements, in reality underlies the established law relating to the use of unsworn statements in their assertive capacity. In § 108 of his first volume, he announces the proposition that owing to the intricate causal correlation of human affairs declarations may become so connected with evidentiary facts as fairly to throw light

upon them, and are therefore received in the sound discretion of the presiding judge, "It being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description." Evidently, this is practically equivalent to saying, to employ more modern terminology, that an unsworn statement, which is made relevant by its connection with some principal material fact, is admissible in evidence as primary proof of the fact which it asserts. This correct statement of the present position of the law is considered, so far as it relates to the *res gestae*, properly so called, in its appropriate place (§§ 2984 *et seq.*). Unfortunately, Prof. Greenleaf saw fit to speak of this form of Relevancy in many instances of facts prior or subsequent to the time of the actual *res gestae* as being received on the "principle of the *res gestae*," a phrase, which, as Prof. Thayer has well said, is a thing hard to understand. In large part, it is this use of the term *res gestae* by so eminent an authority which has led the great majority of American courts into the deplorable habit of speaking of *res gestae* as practically embracing all relevant facts. When so employed, a useful term having a specific meaning (§ 47) is deprived of all true significance by being applied equally to the facts out of which a right or liability grows and to the probative ones by which the true *res gestae* may be sought to be established (§§ 3026 *et seq.*). Yet it must be obvious that, in the nature of things, there cannot be two sets of *res gestae* for the same transaction, one being placed before the tribunal where the evidence is said to be "direct", the other where it is circumstantial. Under the so-called principle of the *res gestae*, Prof. Greenleaf is seen to have included unsworn statements of the most diverse administrative relations, it being merely required that the declaration should be contemporaneous with the act and be of such a nature as to characterize it (1 Greenl. Ev., 15th Ed. § 108 *et seq.*). The only common feature presented by these various forms of statement is that they are found to rest, in part at least, upon a probative force other than that of the general credit of the declarant. It is regrettable, however, that this partial announcement by Prof. Greenleaf of this sound general principle should have been so formulated by him as to expand the meaning of the term *res gestae* to so great an extent that its usefulness is seriously impaired.

The exclusionary rules, other than that relating to Hearsay, *Res Inter Alios Actae* and Character Evidence can scarcely be said to furnish under modern conditions, exceptions to the fundamental principle that relevant facts are competent and that all others should be excluded (§ 1711). These two important rules or principles are alike in this, that in connection with them administration is called upon to deal with what may be called the Relevancy of Similarity, the inference that a certain event occurred or certain conduct took place because under similar circumstances a like event happened or the individual in question acted in a particular way. In other words, attention is here given to the argument that similar causes produce like results in the world of nature or in that of mind, to the force of the reasoning by analogy that things which resemble each other in a given number of particulars will correspond in others. The probative force of similar occurrences or acts will be found to vary greatly according as the operation of the uniformity invoked is that of nature or that of mind. When the uniformity is that of the natural order (§§ 3150-3206) a very high degree of proof may often be developed under the operation of certain recognized canons of Induction (§§ 3177 *et seq.*). In the mental realm, however, when Moral Uniformity (§§ 3207-3353) is the ultimate major premise of the proposed inference, the line of causal connection becomes so involved, faint or otherwise difficult to trace that the relevancy of proof of a particular habit or mental trait is seldom more than deliberative (§ 1714). Upon sound administrative principles, therefore, the inference of conduct from character is ordinarily excluded in civil causes (§ 3274) and employed on criminal proceedings, as a survival of an early rule in *favorem vitae*, in case the defendant sees fit to inject that issue into the trial.

If Relevancy be shown (§§ 3151, 3215), the administrative principles applied to facts whose relevancy is that of similarity are found to be few and familiar. In respect to the inference of actual occurrence on a particular occasion, evidence of the happenings under similar states of fact at another time is circumstantial and, consequently, secondary (§ 466, n. 1), rather than direct and primary. This being so, the proponent is properly required to show that the evidence is necessary (§§ 3163, 3213) to proof of the *res gestae* of his case (§ 338, n. 1), and, of course, that the collateral occurrence is relevant (§§ 3166-3215). Much the same

administrative situation will be found to be presented where a fact, the relevancy of which rests upon natural or moral uniformity, is relied upon in support of some inference other than that of a physical occurrence or conduct on another occasion. This may be, for example, to identify the doer of a particular act (§ 3256), to show knowledge (§ 3228), intent (§ 3222), design (§ 3243) or the like. Here indeed the evidence is primary. There is no superior grade available in this connection. Its use involves, however, the obvious administrative danger of raising collateral issues (§ 3154). To warrant administration encountering this hazard, it is as essential that the proponent should show that such evidence is necessary to prove his case, as it would be in order to warrant judicial administration in receiving evidence of an inferior grade, or in running any other risk. As will be abundantly seen, the claim of the proponent to prove his case is so far regarded as paramount, in this connection as in many, over the others considered by administration, as to require that the evidence of similar facts be admitted should such proof appear to be fairly necessary to secure to the proponent a reasonable opportunity to exercise this important right.

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- objective relevancy*, 2695.
- subjective relevancy*, 2696.
- reporting evidence must be competent*, 2697.

§ 2574. Hearsay Rule as a Distinctive Anomaly.—The exclusionary rule which forbids the reception in evidence of unsworn statements used in their assertive capacity is the distinctive anomaly of the English law of evidence. Whatever may be the soundness, in point of principle or practical usefulness, of the reasons upon which it rests, so much cannot be questioned. Notwithstand-

ing the influence of earlier forms of procedure or of judicial conceptions since abandoned or modified through which the English law of evidence traces its long descent, it presents, at the present day, a fairly systematized appearance. Postulating the fundamental principle that relevant facts are admissible and no others will be received,¹ certain grades of primary and secondary evidence² have been established requiring, in furtherance of justice, that he who undertakes to prove a fact in Court should do so by the use of the primary evidence,³ if fairly within his power to produce it, but permitting him, in the exercise of his paramount right to prove his case,⁴ to employ secondary evidence for the purpose where this is the only probative proof under his control. Into this fairly orderly system the Hearsay Rule introduces an anomaly, creating, in many instances, an absolute bar to the reception of any evidence on the given point, however relevant or necessary to the proponent in the proof of his case.⁵

§ 2575. (*Hearsay Rule as a Distinctive Anomaly*); Reasons for the Anomaly; (1) The Rights of a Litigant.—Reserving for discussion at another place¹ the general arguments assigned in support of the Hearsay Rule, it cannot be questioned that a large body of authoritative professional opinion still regards the rule as a salutary one and seeks to confer upon it the position of a principle. The rights of a litigant are not so much to prove his case by any relevant testimony, the best procurable being preferred to establish it according to certain rules, sacrosanct in their nature. Among these is the requirement of proceedings that all testimonial facts designed to influence the jury should be given under the sanction of an oath, *Nemo creditur in judicio nisi juratus*. Against this principle, judicial reception of hearsay, an unsworn statement in its assertive capacity, would offend. Again, it is conceived to be the absolute right of the party against whom evidence is offered to test it by cross examination. Finally, the evidence is of such a questionable nature that there is danger lest the jury be misled by it, according to it more weight than it is rationally entitled to receive. Assuming that these fairly summarize the arguments in favor of absolutely excluding hearsay, it may be here

§ 2574-1. § 1711.

2. § 466.

3. § 464.

4. §§ 334 *et seq.*

5. § 2702.

§ 2575-1. §§ 2711 *et seq.*

suggested that (1) the Argument proves too much and (2) even if the suggested danger actually exists, the remedy proposed for it is not the right one.

§ 2576. (*Hearsay Rule as a Distinctive Anomaly; Reasons for the Anomaly*); (2) Argument proves too much.—Such an argument, however, proves too much. Neither the sanction of an oath nor the tests of cross-examination are present in case of declarations against interest, concerning pedigree, or the other so-called exceptions to the hearsay rule. Yet the argument in favor of the main rule would give some warrant over-ruling all such exceptions. If, on the other hand, these exceptions are well grounded in reason why should it be regarded as beyond the power of later judges to add to the exceptions which their predecessors have formulated or even to decline to employ the hearsay rule to the exclusion of any relevant statement which may be necessary to proof of the proponent's case.

Nor can it fairly be contended that there is any principle or canon or administration which excludes necessary evidence merely because it tends to mislead the jury. Clearly, it is the duty of a presiding judge so to administer the rules of evidence as to avoid this danger, so far as practicable.¹ The judge may check the unnecessary appeals to emotion, may seek to guide the evidence into safer channels but when the proponent presents perfectly relevant evidence which cannot well be separated from the objectionable features and the court sees that he can prove his case in no other way, his right to be heard would seem unquestionable. Yet, if the argument advanced in favor of rejecting a hearsay statement be sound, all such evidence should be automatically excluded.

§ 2577. (*Hearsay Rule as a Distinctive Anomaly; Reasons for the Anomaly*); (3) False Remedy Proposed.—In proposing absolute exclusion of relevant unsworn statements necessary to the proponent's case on the ground that it is liable to mislead the jury an unduly drastic remedy is suggested. In case a citizen demand justice from his government it is no light matter to reject the only evidence which he has to offer and which men are constantly accepting as the basis of their conduct. Such a course by no means

conduces to the general popular respect for law in which resides the safety of a free people.

That the rejection of hearsay, an unsworn statement in its assertive capacity, is an anomaly in the English law of evidence is due to the rationalizing tendencies which have swept away its associates. In the era of technical procedure, it was part of a system. Now, it stands alone. Nothing is regarded as more calculated to mislead the jury than the testimony of parties and other persons interested in the result of the litigation. Yet the insistence upon the right to obtain justice by the only available means became so stern and widespread that every English-speaking jurisdiction has removed the exclusion of interest, except in rare cases.

The true forensic position of hearsay, when relevant, would seem to be that of secondary evidence. The infirmative considerations which attend its use as proof are obviously impressive. The light which it throws upon the path of truth is often faint or flickering. This, however, seems to furnish no reason for excluding whatever little light there is. When the unsworn statement in its assertive capacity is necessary to proof of the proponent's case and is so far relevant that a jury might reasonably act upon it, either standing alone or in connection with other facts, it should be received. This seems to be practically the position occupied by the recognized exceptions to the hearsay rule.¹

§ 2578. (*Hearsay Rule as a Distinctive Anomaly*); Scope of the Anomaly.—The mischiefs attendant upon the exclusion of hearsay statements is greatly limited by the narrow scope of the anomaly. Only to the unsworn statement when used *in its assertive capacity*, i.e., as proof of the truth of the facts asserted, does the rule against hearsay apply.¹ Wherever the existence of a statement is independently relevant,² i.e., by reason of its mere existence an unsworn statement is a relevant fact, the hearsay rule, so called, has no application. A verbal act is a fact, like any other. Thus, on an indictment for perjury, the speaking of the

§ 2577-1. §§ 2762 *et seq.*

§ 2578-1. *People v. Lem You*, 97 Cal. 224, 32 Pac. 11 (1893); *Stainbrook v. Drawyer*, 25 Kan. 383 (1881); *Shaw v. People*, 3 Hun (N. Y.) 272, 5 Thomps. & C. (N. Y.) 439 (1874). See *Jennings v. Rooney*, 183 Mass. 577, 67 N. E. 665 (1903).

2. Definition.—Independent Relevancy may be defined as that form of relevancy which is not dependent upon the truth or falsity of the fact asserted. A statement is said to be independently relevant when the mere fact of its existence has an evidential value.

words alleged to constitute the offence may be proved in the same way as any other fact.³ In other words, the anomaly of the exclusionary rules against hearsay would disappear were the exceptions to it extended so as to cover the entire scope of the rule. For while the independently relevant statement is primary evidence,⁴ there being no superior grade of proof in this connection, the testimony of the original declarant constitutes, as compared to the evidence furnished by a report of what he has said, a superior grade of proof.

§ 2579. (*Hearsay Rule as a Distinctive Anomaly; Scope of the Anomaly*); A Narrow Field.—While the anomaly of the hearsay rule is intensely active and controlling within its distinctive field of operation, the field, itself is an extremely narrow one. The intensity of the hearsay rule is great; its extension is small. All inferences which may logically be drawn from the existence of an unsworn statement, save only that the statement asserts the truth, may, if relevant, be relied upon by the proponent. The inference, that the facts asserted in an unsworn statement actually exist is placed under the ban of the rule against "hearsay,"¹ and is accordingly rejected. Only to the unsworn state-

3. *People v. Lem You*, 97 Cal. 224, 32 Pac. 11 (1893).

4. *Connecticut*.—*Wilcox v. Green*, 28 Conn. 572 (1859).

Indiana.—*Pulaski County v. Shields*, 130 Ind. 6, 29 N. E. 385 (1891).

Maine.—*Baring v. Calais*, 11 Me. 463 (1834).

Maryland.—*Wolfe v. Hauver*, 1 Gill 84 (1843).

Massachusetts.—*Fitzgerald v. Williams*, 184 Mass. 462, 20 N. E. 100 (1889).

New Hampshire.—*Badger v. Story*, 16 N. H. 168 (1844).

New York.—*Dodge v. Weill*, 158 N. Y. 346, 53 N. E. 33 (1899).

Pennsylvania.—*Brolaskey v. McClain*, 61 Pa. St. 146 (1869); *Sheaffer v. Eakman*, 56 Pa. St. 144 (1867).

See § 2596.

Misleading the jury.—The administrative duty of the judge will ex-

tend to excluding perfectly relevant statements where the jury will be apt to be misled into using the statements as proof of the facts asserted. Thus, a witness will not be allowed to give information which he has received from the unsworn statements of third persons, although the facts asserted in these statements may have constituted the reasons which influenced the witness to do a relevant act, e. g., hold an interview. *Wolfe v. Hauver*, 1 Gill (Md.) 84 (1843); *Chicago Travelers' Ins. Co. v. Mosley*, 8 Wall (U. S.) 397, 19 L. ed. 437 (1869).

Self-serving statements.—If an unsworn statement be independently relevant, it will not be rejected merely because self-serving. *Dodge v. Weill*, 158 N. Y. 346, 53 N. E. 33 (1899). But see *Tilk v. Parsons*, 2 C. & P. 201, 12 E. C. L. 527 (1825).

§ 2579-1. Hearsay defined.—Hear-

ment when tendered in its assertive capacity does the hearsay rule affect to apply.² Other inferences stand at their precise logical value, unaffected by the procedural rule of exclusion.

say may be shortly defined as an extra-judicial statement offered as proof of the facts asserted in it.

2. Alabama.—Thompson v. State, 122 Ala. 12, 26 So. 141 (1898); Morris Min., etc., Co. v. Knox, 96 Ala. 320, 11 So. 207 (1891); Louisville, etc., R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710 (1888) (notice).

Arkansas.—Tatum v. Mohr, 21 Ark. 349 (1860).

California.—People v. Hill, 123 Cal. 571, 56 Pac. 443 (1899); People v. Johnson, 91 Cal. 265, 27 Pac. 663 (1891); People v. McCrea, 32 Cal. 98 (1867).

Colorado.—Gilpin v. Gilpin, 12 Colo. 504, 21 Pac. 612 (1889) (effect of influence).

Connecticut.—Sears v. Hayt, 37 Conn. 406 (1870).

Delaware.—Wilkins v. Wilmington, 2 Marv. 132, 42 Atl. 418 (1895) (exclamations of pain).

Georgia.—Mallery v. Young, 94 Ga. 804, 22 S. E. 142 (1894) (intention); Kuglar v. Garner, 74 Ga. 765 (1885) (notice).

Indiana.—Allen v. Davis, 101 Ind. 187 (1884) (contradictory statements).

Kentucky.—Louisville, etc., R. Co. v. Carothers, 65 S. W. 833, 66 S. W. 385, 23 Ky. L. Rep. 1673 (1902) (exclamations indicating effect on the mind); French v. Com., 7 Ky. L. Rep. 748 (1886) (remarks of bystanders); Dozier v. Barnett, 13 Bush 457 (1877) (contradictory statements); Cave v. Cave, 13 Bush 452 (1877) (contradictory statements); Tumey v. Knox, 7 T. B. Mon. 88 (1828) (exclamations of pain).

Maine.—State v. Benner, 64 Me. 267 (1874) (contradictory statements); Gilbert v. Woodbury, 22 Me.

246 (1843) (contradictory statements).

Massachusetts.—Com. v. Fagan, 108 Mass. 471 (1871); Wesson v. Washburn Iron Co., 13 Allen 95, 90 Am. Dec. 181 (1866) (reasons assigned); Nutting v. Page, 4 Gray 581 (1855) (reasons assigned).

Michigan.—Canadian Bank of Commerce v. Coumbe, 47 Mich. 358, 11 N. W. 196 (1882). But see, People v. Stanley, 101 Mich. 93, 59 N. W. 498 (1894).

Minnesota.—Faribault v. Sater, 13 Minn. 223 (1868) (reasons assigned).

Missouri.—Birge v. Bock, 44 Mo. App. 69 (1890) (reasons assigned); Gordon v. Ritenour, 87 Mo. 54 (1885); State v. Halecomb, 86 Mo. 371 (1885) (purpose); O'Neil v. Crain, 67 Mo. 250 (1878) (reasons assigned); State v. Shermer, 55 Mo. 83 (1874) (motive).

New Hampshire.—Wiggin v. Plumer, 31 N. H. 251 (1855).

New York.—Mooney v. New York El. R. Co., 16 Daly 145, 9 N. Y. Suppl. 522, 30 N. Y. St. Rep. 561 (1890) (reasons assigned); Lewis v. Andrews, 3 Silv. Supreme 165, 6 N. Y. Suppl. 247, 24 N. Y. St. Rep. 1001 (1889), *affirmed* in 127 N. Y. 673, 27 N. E. 1044, 3 Silv. Ct. App. 481; Webber v. Hoag, 8 N. Y. Suppl. 76, 55 Hun 605, 28 N. Y. St. Rep. 630 (1889); West v. Manhattan R. Co., 56 N. Y. Super. Ct. 590, 1 N. Y. Suppl. 519, 16 N. Y. St. Rep. 886 (1888).

North Carolina.—State v. Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449 (1894).

Ohio.—Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397 (1878) (reasons assigned).

Oregon.—Garrison v. Goodale, 23

§ 2580. (*Hearsay Rule as a Distinctive Anomaly*); A Futile Distinction.—The attempt of procedure to distinguish between the inference of truth from the other deductions which may properly arise from the existence of an unsworn statement is one which can scarcely attain success.¹ Subjective qualifications on the part of the declarant as to his knowledge and absence of motive to misrepresent may require more careful scrutiny. But should the circumstances be such as to make the existence of a statement relevant to the effect that it is true, the mind of the court and judges will draw the inference, whatever may be the position of the rule against hearsay. To draw any hard and fast line between equally logical conclusions from an unsworn statement seems an impossible task. A man, for example, in the midst of bodily pain exclaims "I'm stabbed in the side! Oh, how it hurts!" Such an exclamation would be independently relevant as to the existence of present suffering.² At the same time, to exclude the conviction that the speaker is right in saying that he has been stabbed and that he is actually in pain, seems impossible. Much the same thing is true

Oreg. 307, 31 Pac. 709 (1892) (purpose).

South Carolina.—Walker v. Meetze, 2 Rich. 570 (1846) (reasons assigned).

Tennessee.—Grigsby v. State, 4 Baxt. 19 (1874); Kirby v. State, 9 Yerg. 383, 30 Am. Dec. 420 (1836) (corroborative statements).

Texas.—Hicks v. Galveston, etc., R. Co., 96 Tex. 355, 72 S. W. 835 (1903) (exclamations of pain); Yeary v. State, (Cr. App. 1902) 66 S. W. 1106 (motive); Murphy v. State, 41 Tex. Cr. 120, 51 S. W. 940 (1899); Mallory v. State, 37 Tex. Cr. 482, 36 S. W. 751, 66 Am. St. Rep. 808 (1896); Tillman v. Wetzel, (Civ. App. 1895) 31 S. W. 433 (reasons assigned); Felder v. State, 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145 (1887) (remarks of bystanders).

Vermont.—State v. Howard, 32 Vt. 380, 78 Am. Dec. 609 (1860) (purpose).

Washington.—State v. Power, 24

Wash. 34, 63 Pac. 1112, 63 L. R. A. 902 (1901) (intention); State v. Caella, 3 Wash. 99, 28 Pac. 28 (1891) (contradictory statements).

Wisconsin.—O'Toole v. State, 105 Wis. 18, 80 N. W. 915 (1899).

United States.—Hand v. Alvira, 11 Fed. Cas. No. 6,015, Gilp. 60 (1829) (contradictory statements).

England.—Thomas v. Connell, 1 H. & H. 189, 7 L. J. Exch. 306, 4 M. & W. 267 (1838) (knowledge).

§ 2580-1. Yet the discrimination is one upon which learned writers have insisted.

It is in distinguishing between facts that are communicated to us by language, on the one hand, and facts that either actually consist in the utterance of language, or are legitimately deducible from the fact of its utterance, on the other, that most of the difficulty encountered in the application of the science of evidence to practice consists. Gulson, *Philosophy of Proof*, § 198.

2. §§ 2625 et seq.

where an unsworn statement is admissible as independently relevant evidence of a given mental state or condition while at the same time a speaker, subjectively qualified, asserts the existence of a relevant fact.³ Thus, on a question of a change of domicile, it would be independently relevant to show that the person in question had declared, "I intend to go to the town of A and remain there indefinitely."⁴ At the same time, the inference that the declarant is stating the truth cannot well fail to arise. In reality, each extrajudicial statement should properly be taken as the basis for any inference whatever to which it logically gives rise. No distinction, therefore, in point of reason, can be drawn between the inference that any extrajudicial declaration is true and other inferences which rationally arise from its existence. In practical administration, the varying circumstances of particular cases may render more than one inference logically possible. Perhaps the most prominent example of this is where the presence of spontaneity adds the inference of truth to a declaration already independently relevant for some other purpose. Thus, the exclamation of pain may properly be received as indicative of bodily sensation.⁵ Under the circumstances showing that pain was presumably so great as to remove all reflection or premeditation, making the utterance an intuitive one, the unsworn statement may properly be received as evidence of its truth, under the so-called Relevancy of Spontaneity.⁶

Adopting as the basis of treatment the distinction which procedure takes between unsworn statements in their independently relevant and in their assertive capacity, it may be convenient to examine extrajudicial declarations in this order. The present chapter, therefore, will be devoted to the independent relevancy

3. California.—*Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791 (1899).

Connecticut.—*State v. Hawley*, 63 Conn. 47, 27 Atl. 417 (1893).

Kentucky.—*Thompson v. Stewart*, 5 Litt. 5 (1824) (intention).

Montana.—*State v. Dotson*, 26 Mont. 305, 67 Pac. 938 (1902) (intention).

England.—*Gale v. Halfknight*, 3 Stark. 56, 3 E. C. L. 592 (1821) (intention).

But compare *Com. v. Fetch*, 132 Mass. 22 (1881).

Invalid Documents.—When a written statement is introduced as independently relevant, i. e., not as proof of facts asserted, it is immaterial that the document containing it is not valid for the purpose for which it was designed. *State v. Behrman*, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449 (1894).

4. § 2665.

5. §§ 2625 *et seq.*

6. §§ 2982 *et seq.*

of unsworn statements. The immediately succeeding chapters will consider the hearsay rule, the recognized "exceptions" to its operation and the instances under which the modern law of evidence reinstates extrajudicial declarations in the position of primary evidence. The relevancy of such unsworn statements may be constituent,⁷ probative⁸ or deliberative.⁹

§ 2581. Independent Relevancy of Unsworn Statements; Meaning of *Res Gestae*.—The independent relevancy of an unsworn statement may be constituent.¹ This occurs where the extrajudicial declaration is one of the *res gestae*, a relevancy of such facts being constituent of the right or liability asserted in the action. When so employed, the existence of a statement is treated simply as a fact, and, being relevant, is deemed admissible, in the current phrase, as relevant *per se*.

Before considering, in some detail, the typical cases in which the unsworn statement is independently and constitutively relevant as part of the *res gestae*, it would seem appropriate to examine somewhat into the meaning of the term *res gestae*. Unfortunately, the common use of the phrase is such as to deprive it of all distinctive meaning. Without attempting at the present time to consider the causes which have contributed to so regrettable a result, it may be said that the action of American courts must be checked and corrected by their judges if a useful phrase is not to be lost to the service of the law. Probably in no connection is the judicial use of a single term in several cognate but distinct senses more confusing or more persistent than with regard to the term *res gestae*.² The *res gestae* of any case properly consist of that

7. §§ 2581 *et seq.*

8. §§ 2624 *et seq.*

9. §§ 2679 *et seq.*

§ 2581-1. § 1713.

2. Roman meaning of *res gestae*.—

Little light is thrown on the present meaning of the phrase by its use in the Roman law. During the course of a most valuable general discussion of the meaning of the phrase and of the rules of evidence in connection with which it has commonly been employed, Prof. Thayer observes:

"This phrase in one or another form,—*res gesta*, *res acta*, *res gestae*,

—was familiar in classical Latin literature, as one may see by any dictionary. It is found, also, in the *Corpus Juris*. . . . The meaning of the term seems to have been quite untechnical; it imported simply a fact, a transaction, an event. The plural sometimes indicated not so much the plural of the English equivalent—facts, transactions—as the details or particulars of which a single fact or transaction might be composed. It would seem that either form was quite legitimately used as meaning what we should express by

portion of the actual world happenings out of which the right or liability claimed or asserted in the proceeding necessarily arises, if at all. Apparently, the phrase is too well established in the law of evidence to be dropped, however strong may be the claims for doing so made by scientific precision. It is necessary, therefore, to select for adoption, as has been already done,³ one among the numerous meanings which have been assigned to this term. While no precise line can apparently be drawn it may fairly be said, in a general way, that there are two views maintained by the courts, with varying degrees of consistency. (1) The restricted or English view, and, (2) The broad or American attitude on the subject. The fundamental difference between the two seems to be that the English view restricts the term *res gestae* to the scope of the world's happenings out of which the right or liability in question arises. The American rule so extends the term as to cover all the probative facts by which the *res gestae* are reproduced to the tribunal where the direct evidence of witnesses or perception by the court is unattainable.

§ 2582. (*Independent Relevancy of Unsworn Statements; Meaning of Res Gestae*); English View of Meaning.—In its English or restricted meaning, *res gestae* imports the conception of action, by some person producing the effects for which liability is sought to be enforced in the action.¹ While the language of the decisions is by no means uniform, constant advantage being

the singular form,—an occurrence, a transaction.” XV American Law Review 5, 6 (1881).

3. §§ 6, 47.

§ 2582-1. Hyde v. Palmer, 3 B. & S. 657, 32 L. J., Q. B. 126, 7 L. T. 823, 11 W. R. 433 (1863); Lewis v. Rogers, 1 C. M. & R. 48, 2 Anstr. 579, 4 Tyr. 872, 3 L. J., Ex. 326 (1834); Doe v. Arkwright, 5 Car. & P. 575, 1 N. & M. 731, 2 A. & E. 182, 2 L. J. K. B. 102 (1833); Fellowes v. Williamson, M. & M. 306 (1829); Vacher v. Cocks, 1 B. & Ad. 145, M. & M. 353 (1829); Herbert v. Wilcocks, Moo. & M. 355, n. (1829); Tull v. Parlett, 1 M. & M. 472, 31 R. R. 751 (1829); Prideaux v. Collier, 2

Stark. 57 (1817); Bruce v. Hurly, 1 Stark. 24 (1815); Bateman v. Bailey, 5 T. R. 512 (1794); Thompson v. Trevanion, Skin. 402 (1693); Bull. N. P. 291; 1 Phill. on Ev., 10th Ed. 152; Roscoe's Nisi Prius Evidence, 18th Ed. 51; 1 Starkie, 149, note; 1 Cowen and Hill's notes 776. “It is no doubt true, as is said in 1 Phillips on Evidence, 152, 10th ed., words and declarations are properly admissible when they accompany some act, *the nature, object or motives of which are the subject of inquiry.*” Hyde v. Palmer, 3 B. & S. 657, 661, 32 L. J. Q. B. 126, 7 L. T. 823, 11 W. R. 433 (1863), per Blackburn, J.

taken of the convenient obscurity of the phrase to cover loose thinking, a tendency is distinctly visible to limit the expression to the acts or events which are the direct subject of the consideration of the tribunal, those out of which the responsibility of one of the parties or the right of another is said to arise.² In the prevailing English view, however, as was said by the Court of Appeals in Virginia,³ "Facts which constitute the *res gestae* must be such, as are so connected with the very transaction or fact under investigation as to constitute a part of it." In a marked degree, this is true of the criminal liability of a defendant.⁴ The

2. Time, space and causation.—No uniformity exists in the length of time over which the *res gestae* shall properly be held to extend. For example, in case of direct evidence as to an oral contract entered into at a particular interview, the *res gestae* may cover but a few minutes. Should the agreement of the parties have been reached by a series of negotiations extending over months or even years the time covered by the most direct proof of the *res gestae* will be extended to the same limits.

Nor has any limitation been imposed as to the territorial boundaries within which the *res gestae* facts must occur. Those of a sudden quarrel, a shooting and immediate surrender to justice may, for example, occur in the limited space of a hotel bar. They may on the other hand cover the breadth of a continent, or even extend from one hemisphere to the other.

The relative complexity between the causal relations of any two cases may well reveal marked differences. Causal sequences between the parts of the *res gestae* may be clear. They may, on the contrary, present a baffling problem, where conduct seems almost without motive, so deeply hidden lie the springs of action.

3. Haynes v. Com., 28 Gratt. (Va.) 942 (1877).

4. Lord Cockburn's definition.—An

interesting contribution to the defining of this difficult term was made during the discussion which arose as to the propriety of Lord Cockburn's ruling in *R. v. Bedingfield*, 14 Cox Cr. C. 341 (1879). The facts are thus summarized by Prof. Thayer (14 Am. Law. Rev. 817):

"Bedingfield was indicted for the murder of a neighbor, a widow by the name of Rudd, with whom he had intimate relations. He had conceived a resentment against her, and had threatened to cut her throat. She was a laundress, and had, in her business, two women assistants. On the morning of her death, the accused came to her house earlier than he had ever been there before, and they were together in a room for some time. He went out, and she was found by one of the assistants lying senseless on the floor, her head resting on a footstool. He went to a shop and bought some spirits, which he carried back to the room where Mrs. Rudd was, both the assistants being at that time in the yard. 'In a minute or two the deceased came suddenly out of the house towards the women with her throat cut, and on meeting one of them she said something, pointing backward to the house. In a few minutes she was dead.'" This statement of the woman while running away from her assailant was excluded by the Lord Chief Justice as not properly part of

obligation of the criminal to respond to society must come into being, if at all, by virtue of certain *res gestæ* which the prosecution seeks to place before the jury either by the testimony of eye-witnesses who observed their occurrence or, as far as direct evidence is unattainable, by proof of facts which circumstantially

the *res gestæ*, "For it was not part of anything done, or something said while something was being done, but something said after something done. It was not as if while being in the room, and while the act was being done, she had said something which was heard." At a later stage of the trial, the statement of the deceased woman was again rejected, his Lordship observing, "Anything uttered by the deceased at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as 'Don't, Harry!' But here, it was something stated by her after it was all over, whatever it was, and after the act was completed."

The propriety of these rulings having been attacked, the Lord Chief Justice replied to his critics in a pamphlet of his own. They had, he said, been previously submitted to Mr. Justice Field and Mr. Justice Manisty, his associates in the Queen's Bench Division, and received their approval. The Chief Justice adds: "I am firmly persuaded, and I do not speak unadvisedly," that the Court of Criminal Appeal, if the question had been carried up, would have held the excluded evidence inadmissible. The American cases are spoken of by the writer as establishing the doctrine that "if the declaration is connected with or grows out of the act, though not contemporaneous with it, but happening after the lapse of some time, it is admissible as part of the *res gestæ*,—a doctrine certainly not yet recognized in our law." The Lord Chief Justice concludes an entertaining review of the authorities as to the

meaning of the term *res gestæ*, by formulating a definition of his own: "Looking to the law as it exists, . . . what is the meaning of the term *res gestæ*, as applied to a criminal case? To this I should propose to answer thus: Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in, the principal act charged as an offense against the accused, from its inception to its consummation or final completion, or its prevention or abandonment,—whether on the part of the agent or wrongdoer, in order to its performance, or on that of the patient or party wronged, in order to its prevention,—and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive,—as, e. g., in the case of flight or applications for assistance,—form part of the principal transaction, and may be given in evidence as part of the *res gestæ*, or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrong-doer,—such as, e. g., statements made with a view to the apprehension of the offender,—do not form part of the *res gestæ*, and should be excluded." Quoted by Prof. Thayer in XIV Am. Law Rev., 817-822.

tend to establish the nature and character of the *res gestae* themselves. Provided that an act takes place within the time, space and causal limits allotted to the *res gestae*, the person by whom a particular act was done is not regarded as a material circumstance.⁵ This use of the phrase *res gestae* seems to be a reasonable as well as the original one, and has accordingly been adopted in the present work.

§ 2583. (*Independent Relevancy of Unsworn Statements; Meaning of Res Gestae*); American View of Meaning.—In America, the phrase *res gestae* is by no means limited in meaning, as by the better opinion in England, to actual series of world happenings out of which the right or liability necessarily arises, if at all.¹ It goes much further and covers all relevant facts necessary to the specific proof of the *res gestae*, properly so-called.² As

5. Range of the *res gestae*.—The thought of *action* something done or carried on implied in the phrase is not, however by any means confined to action by any special one of the parties or by either of them. So far as anything in the *res gestae* is done, it may be done by any one. How far, in time, space or causation the *res gestae* in any given case may properly extend is evidently a question of administration. No arbitrary line can be drawn on the subject. Each case is to be decided upon its own circumstances.

§ 2583-1. Probably no American jurisdiction would fail to concede that the world's happenings out of which the right or liability arises which the English rule designates as *res gestae* were properly so classified. The peculiarity of the American jurisprudence in this connection is, that it extends the scope of the definition very much further;—covering by it not only the direct, primary evidence of the *res gestae* themselves but also the circumstantial, secondary (§ 466, n. 1), facts by which it is sought to reproduce the *res gestae* so far as direct proof of them is unattainable. It necessarily re-

sults that a large number of facts are classed as *res gestae* under the American view, which are simply treated as probative facts under the English.

An early tendency.—This tendency is not a new one, nor entirely confined to America. Even as early as *Wright v. Tatham*, to which reference has already been made (§ 2582), Judge Vaughan in delivering his opinion to the house of lords, 4 Bing. N. Cas. 489, 548, 33 E. C. L. 821 (1838), lays down the rule as to the statements part of the *res gestae* as follows: "Where any facts are proper evidence upon an issue, all oral or written declarations which can explain such facts may be received in evidence."

2. Alabama.—*Evans v. State*, 62 Ala. 6 (1878).

Arkansas.—*Carr v. State*, 43 Ark. 99 (1884).

California.—*Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (1903).

Connecticut.—*Hall v. Connecticut River Steamboat Co.*, 13 Conn. 319 (1839).

Georgia.—*Barrow v. State*, 80 Ga. 191, 5 S. E. 64 (1887).

may be seen from our previous discussion concerning the use

Illinois.—Baird v. Jackson, 98 Ill. 78 (1881).

Indiana.—Place v. Baugher, 159 Ind. 232, 64 N. E. 852 (1902).

Iowa.—State v. Gainor, 84 Iowa 209, 50 N. W. 947 (1892).

Kansas.—Haskett v. Auhl, 3 Kan. App. 744, 45 Pac. 608 (1896).

Kentucky.—Petrie v. Cartwright, 114 Ky. 103, 70 S. W. 297, 24 Ky. L. Rep. 954, 59 L. R. A. 720 (1902).

Louisiana.—State v. Harris, 45 La. Ann. 842, 13 So. 199, 40 Am. St. Rep. 259 (1893).

Maryland.—Waters v. Riggin, 19 Md. 536 (1862).

Michigan.—Evans v. Montgomery, 95 Mich. 497, 55 N. W. 362 (1893).

Mississippi.—Newcomb v. State, 37 Miss. 383 (1859).

Missouri.—State v. Fitzgerald, 130 Mo. 407, 32 S. W. 1113 (1895).

New Hampshire.—Willey v. Portsmouth, 64 N. H. 214, 9 Atl. 220 (1886).

New York.—Nugent v. Breuchard, 91 Hun 12, 36 N. Y. Suppl. 102, 71 N. Y. St. Rep. 389 (1895).

Pennsylvania.—Crooks v. Bunn, 136 Pa. St. 368, 20 Atl. 529 (1890).

South Carolina.—Blakely v. Frazier, 20 S. C. 144 (1883).

Tennessee.—Cornwell v. State, Mart. & Y. 147 (1827).

Vermont.—Aiken v. Kennison, 58 Vt. 665, 5 Atl. 757 (1886).

Virginia.—Nicholas v. Com., 91 Va. 741, 21 S. E. 364 (1895).

West Virginia.—Corder v. Talbott, 14 W. Va. 277 (1878).

Wisconsin.—Prentiss v. Strand, 116 Wis. 647, 93 N. W. 816 (1903).

United States.—Chicago Terminal Transfer R. Co. v. Stone, 118 Fed. 19, 55 C. C. A. 187 (1902); Kerr v. M. W. of A., 117 Fed. 593, 54 C. C. A. 655 (1902).

A regrettable confusion.—It is greatly to be regretted that it should have been regarded as reasonable to denote by the term *res gestae* a cer-

tain range of extension in the scope of proof when the evidence establishing them is direct and quite a different and far more extended one when proof of the same facts is circumstantial. In the nature of things, there can be but one set of *res gestae* or constituent facts in any given transaction in connection with the existence of any particular liability. The phrase *res gestae*, by this varied use, is deprived of all distinctive meaning. Should direct evidence which judicial administration treats as primary, § 466, be satisfactorily shown to be unavailable, a familiar canon of administration protecting the right of a party to prove his case by the best evidence in his power, § 334, permits the introduction of secondary evidence, in the form of circumstantial proof.

In the same way, and under the same canon, where a formal document has been lost, destroyed or otherwise rendered unavailable parol evidence of its execution and contents is customarily received. Best on Ev. (Chamberlayne's ed.) p. 215. Yet it still remains to be suggested that when such a document is to be proved by secondary evidence that the substituted proof thereupon becomes the document itself. It is fully recognized in this connection that an essential difference exists between the constituent document and the probative facts by which it may be sought to fill the vacancy caused by its loss. The substituted oral testimony has at no time been regarded as more, in case of a document, than an administrative expedient, practically compelled by the situation, for replacing the missing constituent fact, proving rather than exhibiting it. When replaced by evidence, it is the constituent facts, rather than the probative ones which tend to establish them, to which as is generally agreed the law gives force and effect. In the same way,

of inferences the scope of the law of evidence³ is the establishment of facts necessary to proof of the *res gestae*. The American use of the term is apparently broad enough to cover any probative, certainly any material, fact within the entire range of the evidence, where the proof is circumstantial.⁴ Under such circumstances, it may be held to embrace not only occurrences at the stage of action,

the propriety appears for applying a single term, *res gestae*, indifferently to the actual physical happenings which the direct evidence of an eye-witness could have placed before the court, and to the evidence furnished by probative facts from the existence of which the occurrence and nature of the physical happenings themselves may be inferred. It has seemed that so broad a significance has practically no meaning at all, and that only the restricted use of the term, as proposed, has juridical value.

3. § 1733 n. 4.

4. *Alabama*.—*Evans v. State*, 62 Ala. 6 (1878); *Masterson v. Phinizy*, 56 Ala. 336 (1876).

Arkansas.—*Carr v. State*, 43 Ark. 99 (1884).

California.—*Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (1903).

Connecticut.—*Hall v. Connecticut River Steamboat Co.*, 13 Conn. 319 (1839).

Georgia.—*Barrow v. State*, 80 Ga. 191, 5 S. E. 64 (1888); *Thorpe v. Wray*, 68 Ga. 359 (1882); *Monroe v. State*, 5 Ga. 85 (1848).

Illinois.—*Bohrer v. Stumpff*, 31 Ill. App. 139 (1888); *Baird v. Jackson*, 98 Ill. 78 (1881); *Haskins v. Haskins*, 67 Ill. 446 (1873); *Stark v. Corey*, 45 Ill. 431 (1867); *Brennan v. People*, 15 Ill. 511 (1854) (intent).

Indiana.—*Place v. Baugher*, 159 Ind. 232, 64 N. E. 852 (1902); *Chicago, etc., R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218 (1892).

Iowa.—*State v. Gainor*, 84 Iowa,

209, 50 N. W. 947 (1892); *State v. Struble*, 71 Iowa 11, 33 N. W. 1 (1887).

Kansas.—*Haskett v. Auhl*, 3 Kan. App. 744, 45 Pac. 608 (1896).

Kentucky.—*Petrie v. Cartwright*, 114 Ky. 103, 70 S. W. 297, 24 Ky. L. Rep. 954, 102 Am. St. Rep. 274, 59 L. R. A. 720 (1902).

Louisiana.—*State v. Harris*, 45 La. Ann. 842, 13 So. 199, 40 Am. St. Rep. 259 (1893).

Maryland.—*Waters v. Riggin*, 19 Md. 536 (1862).

Michigan.—*Evans v. Montgomery*, 95 Mich. 497, 55 N. W. 362 (1893); *Davidson v. Kolb*, 95 Mich. 469, 55 N. W. 373 (1893); *McKeown v. Harvey*, 40 Mich. 226 (1879).

Mississippi.—*Newcomb v. State*, 37 Miss. 383 (1859).

Missouri.—*State v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113 (1895); *Randolph v. Hannibal, etc., R. Co.*, 18 Mo. App. 609 (1885); *State v. Ramsey*, 82 Mo. 133 (1884); *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337 (1871).

New Hampshire.—*Willey v. Portsmouth*, 64 N. H. 214, 9 Atl. 220 (1886); *Hersom v. Henderson*, 23 N. H. 498 (1851); *Simonds v. Clapp*, 16 N. H. 222 (1844).

New York.—*Nugent v. Breuchard*, 91 Hun 12, 36 N. Y. Suppl. 102, 71 N. Y. St. Rep. 389 (1895); *Casey v. New York Cent., etc., R. Co.*, 6 Abb. N. Cas. 104, 8 Daly 220 (1879); *Trimmer v. Trimmer*, 13 Hun 182 (1878).

North Carolina.—*Faulcon v. Johnston*, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737 (1889).

but any relevant facts at that of preparation, such as facts, in a criminal case, showing motive, design or purpose, the procuring of the means employed in the commission of an offense,⁵ and the like.⁶ In the same way, it covers relevant acts done or events occurring

Pennsylvania.—Crooks v. Bunn, 136 Pa. St. 368, 20 Atl. 529 (1890).

South Carolina.—Blakely v. Frazier, 20 S. C. 144 (1883).

Tennessee.—Cornwell v. State, Mart. & Y. 147 (1827).

Vermont.—Aiken v. Kennison, 58 Vt. 665, 5 Atl. 757 (1886).

Virginia.—Nicholas v. Com., 91 Va. 741, 21 S. E. 364 (1895); Mendum v. Com., 6 Rand. 704 (1828).

West Virginia.—Corder v. Talbott, 14 W. Va. 277 (1878).

Wisconsin.—Prentiss v. Strand, 116 Wis. 647, 93 N. W. 816 (1903); Reed v. Madison, 85 Wis. 667, 56 N. W. 182 (1893).

United States.—Kerr v. M. W. of A., 117 Fed. 593, 54 C. C. A., 655 (1902).

And see *Chicago Terminal Transfer R. Co. v. Stone*, 118 Fed. 19, 55 C. C. A. 187 (1902).

5. *Smith v. State*, 88 Ala. 73, 7 So. 52 (1889) (hostility); *McManus v. State*, 36 Ala. 285 (1860) (intention); *People v. Roach*, 17 Cal. 297 (1861) (motive); *State v. Gainor*, 84 Iowa 209, 50 N. W. 947 (1892) (hostility).

Res inter alios.—In the same way, statements made on distinctly other occasions which tend to establish a concerted plan of operations, *State v. Halpin*, 16 S. D. 170, 91 N. W. 605 (1902), are also embraced under the same sweeping expression.

6. *State v. Lucey*, 24 Mont. 295, 61 Pac. 994 (1900) (conversation to induce fatal journey). See also § 3026.

A wide range of inquiry.—Where the *res gestae* are to be reproduced by secondary evidence, a wide range of inquiry is permitted and practically required. Limitations of time,

space or causal connection, which the presiding judge reasonably imposes upon the admissibility of testimony, § 358 are frequently, with equal administrative propriety disregarded in this connection. The claim for forensic indulgence in the attempt to make affirmative proof under these circumstances is, in many cases, greatly reinforced by the consideration that it may be necessary not only to construe an affirmative case but also to negative various plausible explanations, consistent with his own innocence which one accused of crime may have sought, with painstaking care, to establish. Psychological conditions,—carefully concealed, perhaps, and provable only by minute and often equivocal manifestations in speech or act may be an essential element of any convincing affirmative hypothesis. It must, as a necessary condition upon the validity of such an hypothesis, be shown that the guilty party was not only in the psychological condition of yielding to the influence of a particular *motive* but the further facts must appear that this influence had *hardened* into a definite purpose, and that the alleged perpetrator of the crime possessed the necessary *opportunity* for carrying out his purpose through the use of the *means* actually employed. All these, and similar facts, may reasonably be required for satisfactory proof of the actual *res gestae*. If so, the prosecution may properly be permitted to prove them.

Poisoning.—A particularly broad latitude seems to be accorded by the courts in cases involving the use of poison. *State v. Thompson*, 132 Mo. 301, 34 S. W. 31 (1896).

at what may be called the stage of escape, the concealment,⁷ change of name, subornation of perjury in witnesses, and so forth.⁸ So comprehensive is the American use of the term that it includes, in a civil case, both the occurrences attending a sale and the act of the bookkeeper in entering the evidence of it upon his daybook. So, in case of a contract, it covers both the negotiations of the parties and the subsequent conduct by which the interpretation of one of them is corroborated or discredited. In other words, there is one set of *res gestae* acts where the evidence is direct or the court views the conduct for itself, and another and quite different one where circumstantial evidence must be relied upon to reproduce the *res gestae* to the mind of the tribunal. To borrow an expression from pleading, precisely the same phrase is used to designate the alleged facts and the evidence by which they are to be circumstantially established.⁹

7. *State v. Phillips*, 118 Iowa 660, 92 N. W. 876 (1902); *State v. Vinso*, 171 Mo. 576, 71 S. W. 1034 (1903); *State v. Sanders*, 76 Mo. 35 (1882).

8. *California*.—*People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697 (1895) (threatening letters).

Georgia.—*Thorpe v. Wray*, 68 Ga. 359 (1882) (arrest, imprisonment and attempts to get bail).

Indiana.—*Jones v. State*, 64 Ind. 473 (1878) (threatening letters).

Iowa.—*State v. Phillips*, 118 Iowa 660, 92 N. W. 876 (1902) (capture); *State v. Struble*, 71 Iowa 11, 32 N. W. 1 (1887) (loitering near stolen property).

Louisiana.—*State v. Horton*, 33 La. Ann. 289 (1881) (failed to deny guilt).

Missouri.—*State v. Vinso*, 171 Mo. 576, 71 S. W. 1034 (1903) (resisting arrest); *State v. Thompson*, 132 Mo. 301, 34 S. W. 31 (1896); *State v. Sanders*, 76 Mo. 35 (1882) (attempts to escape).

North Carolina.—*State v. McCourry*, 128 N. C. 594, 38 S. E. 883 (1901) (did not deny guilt); *State v. Mace*, 118 N. C. 1244, 24 S. E. 798 (1896) (unnatural behavior); *State*

v. Brabham, 108 N. C. 793, 13 S. E. 217 (1891) (unnatural conduct).

Ohio.—*State v. Brooks*, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109 (1851) (resisted arrest).

Texas.—*Willingham v. State*, (Cr. App.) 26 S. W. 834 (1894) (resisting arrest); *Tooney v. State*, 8 Tex. App. 452 (1880) (resisted arrest). See also §§ 3027 *et seq.*

9. **The analogy of pleading.**—Speaking generally, a pleader who asserts a right or liability is required to state facts, rather than the evidence by which he proposes to prove them. In other words, the party in his pleading is asked to assert the existence of the *res gestae*, properly so-called, or constituent facts upon which he relies. The relevancy of facts so stated is constituent. A demurrer to the statement of them raises a question of law. Should the pleader, on the contrary state the evidence by which the *res gestae* are to be proved, the relevancy of such a declaration would be probative, raising a question of logic, i. e., of reason. Only as this evidence is regarded as establishing the *res gestae* can the legal sufficiency

A further extension.—But the American view broadens the scope of the phrase still further. Not only is *res gestae* extended from the primary facts in the world's happenings from which the right or liability in question arises so so as to cover secondary facts of a probative nature which tend to reproduce the *res gestae* themselves, but the phrase is frequently used as synonymous with admissibility. It is customary for certain courts to speak of any fact which is for some procedural reason admissible, as part of the *res gestae*. Under this practice the admissions of a party,¹⁰ or those of an agent,¹¹ will be received in evidence as part of the *res gestae*. Certainly the breaking down of a valuable phrase of established meaning could hardly be more complete.

§ 2584. (Independent Relevancy of Unsworn Statements; Meaning of Res Gestae; American View of Meaning); No Implication of Action.—It will readily be observed that under this broad American definition (or lack of definition) of *res gestae* the conception or implication of action which seems to have formed part of the original meaning of the phrase, is in large measure eliminated. The *res gestae* fact, in the American view,

of the evidence be passed upon by the court. Thus, on an indictment for homicide, for example, it would be alleged that the defendant made an assault upon the deceased and inflicted a grievous bodily wound upon his head, shoulders, etc., with a deadly weapon, to wit, a knife, etc., of the length, etc., thus stating, with various degrees of minuteness, the actual specific world happenings out of which the defendant's liability is claimed to arise. *Mutatis mutandis*, substantially the same thing would be true in case of a bill in equity or a complaint under code pleading.

It would make no difference, so far as the necessity for stating these *res gestae* is concerned, whether the evidence to establish them were direct or circumstantial, whether there were eye-witnesses or only an incriminating set of facts. In either event, there can, in the nature of things, be but

one *res gestae*. Only what a party has actually done or has really omitted to do can determine his liability. The particular way in which his acts or omissions must be proved is a matter of detail. The peculiarity of the American use of the term *res gestae* consists largely in applying the term not only to the ultimate *facta probanda*, but also to the extra-judicial evidentiary facts, *facta probantes*, by which it may become necessary to prove the *facta probanda* themselves.

10. *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097 (1889); *O'Mara v. Com.*, 75 Pa. St. 424 (1874); *Gantier v. State*, (Tex. Cr. App. 1893) 21 S. W. 255; *Weathersby v. State*, 29 Tex. App. 278, 15 S. W. 823 (1890).

11. *Louisville, etc., R. Co. v. Landers*, 135 Ala. 504, 33 So. 482 (1902); *Haggart v. California Borough*, 21 Pa. Super. Ct. 210 (1902).

may be simply an attendant circumstance in the case, exerting no influence on the actual *res gestae*, i. e., the transaction itself.¹

§ 2584-1. *Alabama*.—Hainsworth v. State, 136 Ala. 13, 34 So. 203 (1902) (appearance); Hereford v. Combs, 126 Ala. 369, 28 So. 582 (1899) (appearance); Gunter v. State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17 (1895) (appearance of deceased); Goodwin v. State, 102 Ala. 87, 15 So. 571 (1893) (physical conditions); Prince v. State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28 (1893) (appearance). See also, Louisville, etc., R. Co. v. Landers, 135 Ala. 504, 33 So. 482 (1902).

California.—People v. Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295 (1884) (condition of body and clothing of deceased).

Georgia.—Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18 (1890) (appearance); Moughon v. State, 57 Ga. 102 (1876) (appearance).

Illinois.—Chicago, etc., R. Co. v. Kinnare, 76 Ill. App. 394 (1898) (speed of a train); Citizens' Gas-Light, etc., Co. v. O'Brien, 118 Ill. 174, 8 N. E. 310 (1886) (lack of repair of certain premises). See also Hoffman v. Chicago Title, etc., Co., 198 Ill. 452, 64 N. E. 1027 (1902).

Indiana.—Davidson v. State, 135 Ind. 254, 34 N. E. 972 (1893) (physical conditions around body of deceased).

Maine.—State v. Wagner, 61 Me. 178 (1873) (outcries of a person in same burglary).

Massachusetts.—Com. v. Holmes, 157 Mass. 233, 3 N. E. 6, 34 Am. St. Rep. 270 (1892) (condition of body of deceased).

Michigan.—Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333 (1899) (intoxication); People v. Foley, 64 Mich. 148, 31 N. W. 94 (1887) (appearance of body of deceased).

Mississippi.—Brown v. State, 72 Miss. 997, 17 So. 278 (1895) (appearance).

Missouri.—State v. Fitzgerald, 130 Mo. 407, 32 S. W. 1113 (1895) (condition of locus and clothing of deceased); State v. Ramsey, 82 Mo. 133 (1884) (deceased "looked scared").

Montana.—State v. Donyes, 14 Mont. 70, 35 Pac. 455 (1893) (physical features of the locus of a crime).

Nebraska.—Clough v. State, 7 Nebr. 320 (1878) (appearance of accused on discovery of homicide).

New Hampshire.—Murray v. Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495 (1903); Willey v. Portsmouth, 64 N. H. 214, 9 Atl. 220 (1886); Wyman v. Perkins, 39 N. H. 218 (1859); Tucker v. Peaslee, 36 N. H. 167, 181 (1858); Willis v. Quimby, 31 N. H. 485 (1855).

New York.—People v. Fitzgerald, 20 N. Y. App. Div. 139, 46 N. Y. Suppl. 1020 (1897) (appearance); People v. Minisci, 12 N. Y. St. 719 (1887) (blood on ground); De Long v. Delaware, etc., R. Co., 37 Hun 282 (1885) (appearance); McKee v. People, 36 N. Y. 113, 1 Transcr. App. 1, 3 Abb. Pr. (N. S.) 216, 34 How. Pr. 230 (1867); People v. Robinson, 2 Park. Cr. 235 (1885) (condition of a third person partaking of same liquor as deceased).

Pennsylvania.—Com. v. Twitchell, 1 Brewst. 551 (1869) (appearance).

Texas.—Gray v. State, (Cr. App. 1903) 72 S. W. 169 (presence of other minors at a sale of liquors to an alleged minor); Garner v. State, (Cr. App. 1901) 64 S. W. 1044 (intoxication); Martinez v. State, (Cr. App. 1900) 57 S. W. 383 (appearance); Gibson v. State, 23 Tex. App. 414, 5 S. W. 314 (1887) (locus of crime); Miller v. State, 18 Tex. App. 232

Thus, in a criminal case, the personal appearance of the accused,² his physical condition³ or that of some other person,⁴ have been spoken of as part of the *res gestae*. In the same way, the condition of the ground around a given place,⁵ or of certain articles of clothing,⁶ has been similarly classified. It is evident, however, that no right or liability could arise out of such facts and that they are, at least, merely probative as to what were the actual *res gestae*.

Even a purely explanatory circumstance may be designated by the courts as part of the *res gestae*.⁷

(1885) (appearance); *Jeffries v. State*, 9 Tex. App. 598 (1880); *Williams v. State*, 4 Tex. App. 5 (1873).

Utah.—*State v. Hayes*, 14 Utah 118, 46 Pac. 752 (1896).

Vermont.—*State v. Taylor*, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673 (1896).

Virginia.—*Tilley v. Com.*, 89 Va. 136, 15 S. E. 526 (1892) (*locus of crime*); *Barbour v. Com.*, 80 Va. 287 (1885) (blood on hands, etc.).

See § 2584.

2. *Georgia*.—*Moughon v. State*, 57 Ga. 102 (1876).

Michigan.—*People v. Foley*, 64 Mich. 148, 31 N. W. 94 (1887).

Mississippi.—*Brown v. State*, 72 Miss. 997, 17 So. 278 (1895).

Missouri.—*State v. Ramsey*, 82 Mo. 133 (1884).

Nebraska.—*Clough v. State*, 7 Nebr. 320 (1878).

New York.—*People v. Fitzgerald*, 20 N. Y. App. Div. 139, 46 N. Y. Suppl. 1020 (1897).

Pennsylvania.—*Com. v. Twitchell*, 1 Brewst. 551 (1869).

Texas.—*Martinez v. State*, (Cr. App. 1900), 57 S. W. 838.

See also *Hereford v. Combs*, 126 Ala. 369, 28 So. 582 (1899).

3. *Goodwin v. State*, 102 Ala. 87, 15 So. 571 (1893); *Com. v. Holmes*, 157 Mass. 233, 3 N. E. 6, 34 Am. St. Rep. 270 (1892); *Garner v. State*, (Tex. Cr. App. 1901) 64 S. W. 1044 (intoxication); *Barbour v. Com.*, 80 Va. 287 (1885).

4. *People v. Majors*, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295 (1884); *People v. Robinson*, 2 Park. Cr. (N. Y.) 235 (1855); *Com. v. Mudgett*, 174 Pa. St. 211, 34 Atl. 588 (1896).

5. *Indiana*.—*Davidson v. State*, 135 Ind. 254, 34 N. E. 972 (1893).

Missouri.—*State v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113 (1895).

Montana.—*State v. Donyes*, 14 Mont. 70, 35 Pac. 455 (1893).

New York.—*People v. Minisci*, 12 N. Y. St. 719 (1887) (blood).

Texas.—*Gibson v. State*, 23 Tex. App. 414, 5 S. W. 314 (1887).

Virginia.—*Tilley v. Com.*, 89 Va. 136, 15 S. E. 526 (1892).

6. *People v. Majors*, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295 (1884).

7. *Alabama*.—*Jackson v. State*, 59 So. 171 (1912) (location of accused).

Arkansas.—*Appleton v. State*, 61 Ark. 590, 33 S. W. 1066 (1896).

Georgia.—*Barrow v. State*, 80 Ga. 191, 5 S. E. 64 (1887) (fixing time by a remark); *Doyal v. State*, 70 Ga. 134 (1883).

Indiana.—*Welker v. Appleman*, 44 Ind. App. 699, 90 N. E. 35 (1909).

Iowa.—*State v. Peffers*, 80 Iowa 580, 46 N. W. 662 (1890).

Maryland.—*State v. Ridgley*, 2 Harr. & M. 120, 1 Am. Dec. 372 (1785).

Minnesota.—*State v. Mims*, 26 Minn. 183, 2 N. W. 494, 683 (1879).

Missouri.—*Thomas v. Macon*

§ 2585. (*Independent Relevancy of Unsworn Statements; Meaning of Res Gestae; American View of Meaning*); Contemporaneousness Not Demanded.—To repeat, in a slightly different form, that which has been already said,¹ it is by no means essential in the American view of the scope of the *res gestae* that the probative or otherwise admissible fact so designated should bear any intimate or indeed any special relation in point of time to the *res gestae* properly so-called.² Such a probative fact may precede, even by a considerable interval, the principal transaction. Its logical relation to the actual *res gestae* may, indeed, be that of a mere preliminary.³

County, 175 Mo. 68, 74 S. W. 999 (1903).

Montana.—State v. Lucey, 24 Mont. 295, 61 Pac. 994 (1900) (conversation planning a journey).

New York.—Hoffman v. Edison Electric Illuminating Co., 87 N. Y. App. Div. 371, 84 N. Y. Suppl. 437 (1903).

Pennsylvania.—Shannon v. Castner, 21 Pa. Super. Ct. 294 (1902).

South Carolina.—Puryear v. Ould, 81 S. C. 456, 62 S. E. 863 (1908).

Tennessee.—Garber v. State, 4 Coldw. 161 (1867).

Texas.—Gibson v. State, 23 Tex. App. 414, 5 S. W. 314 (1887); Harrison v. State, 20 Tex. App. 387, 54 Am. Rep. 529 (1886).

In case the meaning of the facts is so clear that no explanation is necessary, the evidence may be rejected. Oder v. Com., 4 Ky. L. Rep. 18 (1882).

§ 2585-1. § 2583.

2. McMahan v. Chicago City Ry. Co., 239 Ill. 334, 339, 88 N. E. 223 (1909) *affg.* 143 Ill. App. 608 (1908).

3. *Alabama*.—Viberg v. State, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22 (1902); Hainsworth v. State, 136 Ala. 13, 34 So. 203 (1902); Ryan v. State, 100 Ala. 105, 14 So. 766 (1893); Evans v. State, 62 Ala. 6 (1878).

Arkansas.—Trulock v. State, 70

Ark. 558, 69 S. W. 677 (1902); Carr v. State, 43 Ark. 99 (1884).

California.—Rogers v. Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348 (1903).

Georgia.—Williams v. State, 72 Ga. 180 (1883).

Illinois.—McMahon v. Chicago City R. Co., 143 Ill. App. 608 (1908) *affd.* 239 Ill. 334, 88 N. E. 223 (1909); Chicago, etc., R. Co. v. Kinmare, 76 Ill. App. 394 (1898); Brand v. Henderson, 107 Ill. 141 (1883).

Iowa.—State v. Hunter, 118 Iowa 686, 92 N. W. 872 (1902); State v. Bigelow, 101 Iowa 430, 70 N. W. 600 (1897); State v. McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599 (1887); State v. Porter, 34 Iowa 131 (1871).

Kentucky.—Petrie v. Cartwright, 114 Ky. 103, 70 S. W. 297, 24 Ky. L. Rep. 903, 59 L. R. A. 720, 102 Am. St. Rep. 274 (1902); Howard v. Com., 69 S. W. 721, 24 Ky. L. Rep. 612 (1902); Shotwell v. Com., 68 S. W. 403, 24 Ky. L. Rep. 255 (1900); Louisville, etc., R. Co. v. Pilkerton, 15 Ky. L. Rep. 607 (1894); Renfro v. Com., 11 S. W. 815, 11 Ky. L. Rep. 246 (1889); Robinson v. Com., 16 B. Mon. 609 (1855).

Massachusetts.—Com. v. Hayes, 140 Mass. 366, 5 N. E. 264 (1886).

Michigan.—People v. Hughes, 116 Mich. 80, 74 N. W. 309 (1898); People v. Marble, 38 Mich. 117 (1878);

On the other hand, a fact classified as *res gestae* under this sweeping definition, may *follow* the happening of the actual *res gestae*,⁴ even by a considerable time.⁵ Of this nature, may be

Maher v. People, 10 Mich. 212, 81 Am. Dec. 781 (1862).

Missouri.—*Shaefer v. Missouri*, etc., R. Co., 98 Mo. App. 445, 72 S. W. 154 (1902); *State v. Kennade*, 121 Mo. 405, 26 S. W. 347 (1894).

Nebraska.—*McCormick v. State*, 66 Nebr. 337, 92 N. W. 606 (1902).

New York.—*Kenney v. South Shore Natural Gas & Fuel Co.*, 119 N. Y. Suppl. 363, 134 App. Div. 859 (1909); *Campbell v. Wright*, 44 Hun 623, 8 N. Y. St. Rep. 471 (1887), *affirmed* in 118 N. Y. 594, 23 N. E. 914.

Pennsylvania.—*Kehoe v. Com.*, 85 Pa. St. 127 (1877).

Texas.—*Western Union Tel. Co. v. Uvalde Nat. Bank*, (Civ. App. 1903) 72 S. W. 232, *affirmed* 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805; *Thomas v. State*, 44 Tex. Cr. R. 344, 72 S. W. 178 (1902); *Johnson v. State*, 29 Tex. App. 150, 15 S. W. 647 (1890).

Wisconsin.—*Mack v. State*, 48 Wis. 271, 4 N. W. 449 (1880).

United States.—*Chicago Terminal Transfer R. Co. v. Stone*, 118 Fed. 19, 55 C. C. A. 187 (1902); *Choctaw, etc., Nations v. U. S.*, 34 Ct. Cl. 17 (1899), *reversed* in 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291, 36 Ct. Cl. 573 (1900).

Yet occasionally an element of confusion is introduced here, as elsewhere, by the similarities to and divergencies from the present rule shown by that regulating the use of statements part of the *res gestae* when employed as evidence of the truth of the matters therein asserted. § 2984 *et seq.* Thus, the Supreme Court of Appeals of West Virginia speak of the statement introduced as evidence of some fact other than the truth of the assertion as required

to be "contemporaneous." *State v. Abbott*, 8 W. Va. 741 (1875).

4. *Alabama*.—*Domingus v. State*, 94 Ala. 9, 11 So. 190 (1891); *Jordan v. State*, 81 Ala. 20, 1 So. 577 (1886), *affirmed* in 82 Ala. 1, 2 So. 460; *Armor v. State*, 63 Ala. 173 (1879).

California.—*People v. Winthrop*, 118 Cal. 85, 50 Pac. 390 (1897); *People v. Majors*, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295 (1884). *Compare Rulafson v. Billings*, 140 Cal. 452, 74 Pac. 35 (1903).

Georgia.—*Mitchell v. State*, 71 Ga. 128 (1883); *Stiles v. State*, 57 Ga. 183 (1876).

Idaho.—*Anderson v. Great Northern Ry. Co.*, 15 Idaho 513, 99 Pac. 51 (1908).

Indiana.—*State v. Lusk*, 68 Ind. 264 (1879).

Iowa.—*Du Bois v. Luthmer*, 147 Iowa 315, 126 N. W. 147 (1910).

Kansas.—*Ott v. Cunningham*, 9 Kan. App. 886, 58 Pac. 126 (1899).

Kentucky.—*Fidelity & Casualty Co. v. Cooper*, 137 Ky. 544, 126 S. W. 111 (1910); *Illinois Cent. R. Co. v. Cotter*, 31 Ky. Law Rep. 679, 103 S. W. 279 (1907).

Louisiana.—*State v. Harris*, 45 La. Ann. 842, 13 So. 199, 40 Am. St. Rep. 259 (1893); *State v. Horton*, 33 La. Ann. 289 (1881).

Maine.—*State v. Pike*, 65 Me. 111 (1876).

Michigan.—*People v. Stewart*, 75 Mich. 21, 42 N. W. 662 (1889); *People v. Bemis*, 51 Mich. 422, 16 N. W. 794 (1883); *People v. Long*, 44 Mich. 296, 6 N. W. 673 (1880) (result of search of accused); *People v. Marble*, 38 Mich. 117 (1878); *People v. Potter*, 5 Mich. 1, 71 Am. Dec. 763 (1858).

said to be facts ascertained by searches instituted for the discovery of incriminating evidence.⁶ Into the same category would seem to fall any emotion,⁷ or lack of it,⁸ shown by one accused of crime. These are facts, indeed, from which a logical inference may well be drawn. They are, therefore, properly speaking, probative facts which tend to throw light backward as it were upon the true *res gestae* in much the same way that the preliminary facts may be said to throw light forward upon them.

Missouri.—State v. Gabriel, 88 Mo. 631 (1886).

New York.—People v. Buchanan, 145 N. Y. 1, 39 N. E. 846 (1895) (gratification at decease of wife); People v. Kief, 58 Hun 337, 11 N. Y. Suppl. 926, 12 N. Y. Suppl. 896, 34 N. Y. St. Rep. 527 (1890), *affirmed* in 126 N. Y. 661, 27 N. E. 556, 4 Silvernail Ct. App. 448; Greenfield v. People, 85 N. Y. 75, 39 Am. Rep. 636 (1881) (indifference to wife's death); Lindsay v. People, 63 N. Y. 143 (1875); People v. Gonzalez, 35 N. Y. 49 (1866).

North Carolina.—State v. McCourry, 128 N. C. 594, 38 S. E. 883 (1901); State v. Brabham, 108 N. C. 793, 13 S. E. 217 (1891) (result of search of prisoner's premises); State v. Davis, 87 N. C. 514 (1882); State v. Adair, 66 N. C. 298 (1872) (surprise).

Oregon.—State v. Moran, 15 Oreg. 262, 14 Pac. 419 (1887).

Pennsylvania.—Com. v. Mudgett, 174 Pa. St. 211, 34 Atl. 588 (1896) (results of search for murdered persons); Kehoe v. Com., 85 Pa. St. 127 (1877).

South Carolina.—Shelton v. Southern Ry. Co., 86 S. C. 98, 67 S. E. 899 (1910).

Texas.—Martin v. State, 44 Tex. Cr. 538, 72 S. W. 386 (1903); Wil-
lingham v. State, (Cr. App. 1894)
26 S. W. 834; Weathersby v. State,
29 Tex. App. 278, 15 S. W. 823
(1890); Jump v. State, 29 Tex. App.
459, 11 S. W. 461 (1883) (collecting
money due deceased).

Virginia.—Williams v. Com., 85 Va. 607, 8 S. E. 470 (1889); Briggs v. Com., 82 Va. 554 (1886).

Washington.—Walters v. Spokane I. R. Co., 58 Wash. 293, 108 Pac. 593 (1910).

The finding of incriminating tools in a house where larceny has been committed has been spoken of as part of the *res gestae*. People v. Winthrop, 118 Cal. 85, 50 Pac. 390 (1897). So, finding on an accused person a pistol of the same calibre as that which fired the fatal shot, has seemed to some courts to stand in the same position. Williams v. Com., 85 Va. 607, 8 S. E. 470 (1889). The condition of the body and clothing of the deceased has been spoken of in the same way. People v. Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295 (1884) Com. v. Mudgett, 174 Pa. St. 211, 34 Atl. 588 (1896).

5. Stiles v. State, 57 Ga. 183 (1876).

6. *California.*—People v. Winthrop, 118 Cal. 85, 50 Pac. 390 (1897).

Michigan.—People v. Long, 44 Mich. 296, 6 N. W. 673 (1880).

North Carolina.—State v. Brabham, 108 N. C. 793, 13 S. E. 217 (1891).

Pennsylvania.—Com. v. Mudgett, 174 Pa. St. 211, 34 Atl. 588 (1896).

Virginia.—Williams v. Com., 85 Va. 607, 8 S. E. 470 (1889).

7. People v. Buchanan, 145 N. Y. 1, 39 N. E. 846 (1895).

8. Greenfield v. People, 85 N. Y. 75, 39 Am. Rep. 636 (1881).

§ 2586. (*Independent Relevancy of Unsworn Statements; Meaning of Res Gestae; American View of Meaning*); Contiguity, Intimate Relation, etc., Excused.—Other differences between the actual *res gestae* and those admitted under the American rule are apparent. *Contiguity*, for example, or nearness in point of space to the *locus* of the real *res gestae* is not required under the American definition of the phrase. The acts may have been done or the events occurred at widely separated points,¹ yet both be equally part of the *res gestae*.² The actor or declarant in the probative transaction may have taken no part whatever in the actual *res gestae*.³ In the American view every relevant fact is, *ipso facto*, part of the *res gestae*. This test is single and universal.⁴ So well settled has this habit of treating the subject become that not only is it said of every relevant fact that it is part of the *res gestae*, but the statement is frequently reversed and the negative form of assertion employed, it being said of any fact deemed irrelevant that it is not part of the *res gestae*, or perhaps, that it is no part of the *res gestae*.⁵ It may fairly be said therefore that *res gestae* and

§ 2586-1. *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315 (1899); *Com. v. Eaton*, 8 Phila. (Pa.) 428 (1869).

2. *State v. Sexton*, 147 Mo. 89, 48 S. W. 452 (1898).

3. *Oakley v. State*, 135 Ala. 15, 33 So. 23 (1902); *Beckham v. State*, (Tex. Cr. App. 1902) 69 S. W. 534; *Cook v. State*, 22 Tex. App. 511, 3 S. W. 749 (1886).

4. *Alabama*.—*Webb v. State*, 135 Ala. 36, 33 So. 487 (1902).

California.—*People v. Henderson*, 28 Cal. 465 (1865).

Georgia.—*Cox v. State*, 64 Ga. 374, 37 Am. Rep. 76 (1879).

Indiana.—*Wood v. State*, 92 Ind. 269 (1883).

Kentucky.—*Powers v. Com.*, 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494, 24 Ky. L. Rep. 1007, 1186, 1350 (1902).

Maryland.—*State v. Ridgely*, 2 Harr. & M. 120, 1 Am. Dec. 372 (1785).

Missouri.—*State v. Hoffman*, 78 Mo. 256 (1883).

Montana.—*State v. Tighe*, 27 Mont. 327, 71 Pac. 3 (1903).

Ohio.—*Stewart v. State*, 19 Ohio 302, 53 Am. Dec. 426 (1850).

Pennsylvania.—*Com. v. Mudgett*, 174 Pa. St. 211, 34 Atl. 588 (1896).

Tennessee.—*Turner v. State*, 89 Tenn. 549, 15 S. W. 838 (1891).

Texas.—*Williamson v. State*, 36 Tex. Cr. 225, 36 S. W. 444 (1896).

5. *Alabama*.—*Allen v. State*, 111 Ala. 80, 20 So. 490 (1896); *Fonville v. State*, 91 Ala. 39, 8 So. 688 (1891); *Cleveland v. State*, 86 Ala. 1, 5 So. 426 (1889) (subsequent assault as motive for prior); *Shelton v. State*, 73 Ala. 5 (1882).

California.—*People v. Lane*, 100 Cal. 379, 34 Pac. 856 (1893).

Colorado.—*Murphy v. People*, 9 Colo. 435, 13 Pac. 528 (1887) (repentance and forgiveness).

Connecticut.—*Townsend v. Ward*, 27 Conn. 610 (1858).

Georgia.—*Harrell v. State*, 75 Ga. 842 (1885) (that person assaulted declined to prosecute).

Illinois.—*Collins v. People*, 194 Ill.

relevant are equivalent expressions in the usage of the American states adopting the extended scope of the phrase.⁶

To the general result reached that relevant extrajudicial statements should be received, as other facts, when necessary to the proponent's case, no fair objection can be urged in point of principle. The method of reaching this end seems open to criticism.

506, 62 N. E. 902 (1902); *Montag v. People*, 141 Ill. 75, 30 N. E. 337 (1892) (not admissible even when nearly contemporaneous with the principal events); *Davison v. People*, 90 Ill. 221 (1878); *Perteet v. People*, 70 Ill. 171 (1873) (uncommunicated threats).

Indiana.—*Hampton v. State*, 160 Ind. 575, 67 N. E. 442 (1903); *Huntington First Nat. Bank v. Arnold*, 156 Ind. 487, 60 N. E. 134 (1901); *Wood v. State*, 92 Ind. 269 (1883).

Iowa.—*Laird v. Equitable L. Assur. Soc.*, 98 Iowa 495, 67 N. W. 385 (1896); *State v. Dillon*, 74 Iowa 653, 38 N. W. 525 (1888) (subsequent information); *Shuck v. Vanderverter*, 4 G. Greene 264 (1854).

Kansas.—*Eagon v. Eagon*, 60 Kan. 697, 57 Pac. 942 (1899).

Kentucky.—*Eversale v. Com.*, 95 Ky. 263, 26 S. W. 816, 16 Ky. L. Rep. 143 (1894) (subsequent conduct); *Messer v. Com.*, 20 S. W. 702, 14 Ky. L. Rep. 492 (1892) (subsequent criminal intimacy with deceased's wife).

Louisiana.—*State v. Madison*, 47 La. Ann. 30, 16 So. 566 (1895) (admitting to bail in murder); *State v. Johnson*, 41 La. Ann. 574, 7 So. 670 (1889) (admitting to bail co-defendants on indictment for murder); *State v. Baker*, 30 La. Ann. 1134 (1878).

Michigan.—*People v. McBride*, 120 Mich. 166, 78 N. W. 1076 (1899); *Tolbert v. Burke*, 89 Mich. 132, 50 N. W. 803 (1891).

Minnesota.—*Hathaway v. Brown*, 18 Minn. 414 (1872)

Missouri.—*State v. Hudspeth*, 159

Mo. 178, 60 S. W. 136 (1900); *State v. Hudspeth*, 150 Mo. 12, 51 S. W. 483 (1899); *State v. Punshon*, 133 Mo. 44, 34 S. W. 25 (1896); *State v. Umfried*, 76 Mo. 404 (1882).

Montana.—*Territory v. Drennan*, 1 Mont. 41 (1868).

Nebraska.—*Caw v. People*, 3 Nebr. 357 (1874) (subsequent threats).

New Hampshire.—*Judd v. Brentwood*, 46 N. H. 430 (1866).

North Carolina.—*State v. Moore*, 104 N. C. 743, 10 S. E. 183 (1889); *State v. Matthews*, 78 N. C. 523 (1878).

Pennsylvania.—*Lyon v. Lyon*, 197 Pa. St. 212, 47 Atl. 193 (1900).

Texas.—*Dwyer v. Bassett*, 1 Tex. Civ. App. 513, 21 S. W. 621 (1892); *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591 (1889); *Brooks v. State*, 26 Tex. App. 184, 9 S. W. 562 (1888); *Rye v. State*, 8 Tex. App. 163 (1880); *Carlson v. State*, 5 Tex. App. 194 (1878) (subsequent information).

6. The range of this relevancy, as to time and space, is subject to the requirement that reason be employed, a matter of administration.

Alabama.—*Webb v. State*, 135 Ala. 36, 33 So. 487 (1903); *Armor v. State*, 63 Ala. 173 (1879); *Steel v. State*, 61 Ala. 213 (1878); *Jackson v. State*, 52 Ala. 305 (1875).

California.—*People v. Henderson*, 28 Cal. 465 (1865).

Georgia.—*Cox v. State*, 64 Ga. 374, 37 Am. Rep. 76 (1879).

Indiana.—*Wood v. State*, 92 Ind. 269 (1883).

Kentucky.—*Powers v. Com.*, 114 Ky. 237, 70 S. W. 644, 1050, 71 S.

§ 2587. (*Independent Relevancy of Unsworn Statements; Meaning of Res Gestae; American View of Meaning*); Partial Explanations.—It would be a serious error and unjust to the able judges and text writers who have assisted, both in England and America, in this extension in meaning of the term *res gestae* to assume that the result has been due either to ignorance or accident. On the contrary, it is not difficult to see both the operation of sound administrative principles for the doing of justice and of that desire to adhere to precedent and avoid the appearance of judicial legislation which is so marked a feature of English law. Cases were constantly arising in practice where the anomaly of the hearsay prohibition was a menace to the doing of justice. The proponent of an extrajudicial statement might well find it necessary to proof of his case. To recognize that the statement was relevant might be a matter of no difficulty. In accordance with the principles of good judicial administration, the unsworn statement must be received. Yet the rule against hearsay stood squarely in the way. Unless some exception to that rule could be found under which the evidence could be received, justice must fail. Of all avenues of escape from a result so abhorrent to the judicial mind the most obvious was clearly that of the rule which admits, as an exception to the rule against hearsay, unsworn statements “part of the *res gestae*.” Other exceptions to the hearsay rule were fairly specific, consequently, difficult to enlarge without observation. The *res gestae* exception, on the contrary, was delightfully vague, capable of practically unlimited extension. The precision in outline of other exceptions to the hearsay rule will be found to have suffered greatly from the same cause. It is clear, however, that the rule relating to the *res gestae* has suffered by far the most.

W. 494, 24 Ky. L. Rep. 1007, 1186, 1350 (1902); Terrell v. Com., 13 Bush. 246 (1877).

Maryland.—State v. Ridgely, 2 Harr. & M. 120, 1 Am. Dec. 372 (1785).

Missouri.—Shaefer v. Missouri Pac. R. Co., 98 Mo. App. 455, 72 S. W. 154 (1903); State v. Hoffman, 78 Mo. 256 (1883); State v. Umfried, 76 Mo. 404 (1882); State v. Swain, 68 Mo. 605 (1878); State v. Evans, 65 Mo. 574 (1877).

Montana.—State v. Tighe, 27 Mont. 327, 71 Pac. 3 (1903); State v. Biggerstaff, 17 Mont. 510, 43 Pac. 709 (1896); State v. King, 9 Mont. 445, 24 Pac. 265 (1890).

Ohio.—Stewart v. State, 19 Ohio 302, 53 Am. Dec. 426 (1850).

Pennsylvania.—Com. v. Mudgett, 174 Pa. St. 211, 34 Atl. 588 (1896).

Tennessee.—Turner v. State, 89 Tenn. 547, 15 S. W. 838 (1891).

Texas.—Williamson v. State, 36 Tex. Cr. 225, 36 S. W. 444 (1896).

Yet the object sought to be reached was worthy of all praise. The proponent of a relevant unsworn statement which is necessary to proof of his case should have it received in evidence in support of any inference which it logically tends to establish. Apparently, the simple and direct way of proceeding would be to announce some general rule of this sort. The objection is that such a ruling would be contrary to the hearsay prohibition and amount to judicial legislation. Therefore, consciously or unconsciously, an expedient was adopted, to which attention has already been called,¹ and which has done much to create the ambiguities in meaning of familiar terms which infest the English law of evidence. A phrase of established meaning, here, "*res gestae*," is translated into something else, often swelled beyond all intelligent recognition. The appearance of judicial legislation is avoided. The old cases may still be cited, with most apparent unconsciousness, in support of the new phrase. Yet a change in the law has in fact taken place and its detection is often the despair of the student.

§ 2588. (*Independent Relevancy of Unsworn Statements; Meaning of Res Gestae*); Distinct Criminal Offences.—Whatever may be the proper scope of the *res gestae*, the right to establish them is unfettered in at least one direction. It is, in general, no ground for excluding proof of a legitimate *res gestae* fact that the evidence also incidentally tends to prove that the actor subjected himself to other liability.¹ In a criminal case, for example, assum-

§ 2587-1. § 267.

§ 2588-1. *Alabama*.—Ray v. State, 126 Ala. 9, 28 So. 634 (1899); Horn v. State, 102 Ala. 144, 15 So. 278 (1893).

California.—People v. Gleason, 127 Cal. 323, 59 Pac. 592 (1899); People v. Adams, 85 Cal. 231, 24 Pac. 629 (1890); People v. Rogers, 71 Cal. 565, 12 Pac. 679 (1887).

Florida.—Wallace v. State, 41 Fla. 547, 26 So. 713 (1899); Robertson v. State, 40 Fla. 509, 24 So. 474 (1898).

Illinois.—Williams v. People, 196 Ill. 173, 63 N. E. 681 (1902); Parkinson v. People, 24 N. E. 772 (1890). See McDonald v. People, 25 Ill. App.

350 (1887), reversed 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547.

Indiana.—Cross v. State, 138 Ind. 254, 37 N. E. 790 (1894); Frazier v. State, 135 Ind. 38, 34 N. E. 817 (1893); Fletcher v. State, 49 Ind. 124, 19 Am. Rep. 673 (1874).

Kansas.—State v. Cowen, 56 Kan. 470, 43 Pac. 687 (1896); State v. Folwell, 14 Kan. 105 (1874); McFarland v. State, 4 Kan. 68 (1866).

Louisiana.—State v. Fontenot, 48 La. Ann. 305, 19 So. 111 (1896); State v. Munco, 12 La. Ann. 625 (1857).

Massachusetts.—Com. v. Harrison, 11 Gray 308 (1858); Com. v. Call, 21 Pick. 515 (1839).

ing that the accused is not required to criminate himself, it is no sufficient ground for rejecting unsworn statements or other facts classified as *res gestae* that they tend to establish the commission of a distinct offence other than the one under consideration.² Two distinct offences may be so inseparably connected that the proof of one necessarily involves proving the other, and in such a case on a prosecution for one evidence proving it cannot be excluded

Michigan.—People v. Marble, 38 Mich. 117 (1878).

Minnesota.—State v. Madigan, 57 Minn. 425, 59 N. W. 490 (1894).

Missouri.—State v. Braunschweig, 38 Mo. 587 (1866).

New York.—People v. Van Tassel, 156 N. Y. 561, 51 N. E. 274 (1898); People v. Schooley, 89 Hun 391, 35 N. Y. Suppl. 429, 11 N. Y. Cr. R. 28, 69 N. Y. St. Rep. 841, *affirmed* 149 N. Y. 99, 43 N. E. 536 (1896); People v. Jones, 34 Hun 620, 3 N. Y. Cr. 252 (1885), *affirmed* 99 N. Y. 667, 2 N. E. 49; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460 (1881); Weed v. People, 56 N. Y. 628 (1874); Copperman v. People, 56 N. Y. 591 (1874); Watson v. People, 64 Barb. 130 (1872); Stout v. People, 4 Park. Cr. 71 (1858).

North Carolina.—State v. Summers, 98 N. C. 702, 4 S. E. 120 (1887) (fornication, adultery and rape).

Oregon.—State v. Baker, 23 Oreg. 441, 32 Pac. 161 (1893); State v. Roberts, 15 Oreg. 187, 13 Pac. 896 (1887).

Pennsylvania.—Shaffner v. Com., 72 Pa. St. 60, 13 Am. Rep. 649 (1872).

South Dakota.—State v. Halpin, 16 S. D. 170, 91 N. W. 605 (1902); State v. Phelps, 5 S. D. 480, 59 N. W. 471 (1894).

Texas.—English v. State, 34 Tex. Cr. 190, 30 S. W. 233 (1895); Jones v. State, 33 Tex. Cr. 492, 26 S. W. 1082, 47 Am. St. Rep. 46 (1894); Musgrave v. State, 28 Tex. App. 57, 11 S. W. 927 (1889); Perigo v.

State, 25 Tex. App. 533, 8 S. W. 660 (1888); Blakely v. State, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912 (1888); Williams v. State, 15 Tex. App. 104 (1883).

Virginia.—Burr v. Com., 4 Gratt. 534 (1847).

Washington.—State v. Morris, 27 Wash. 453, 67 Pac. 983 (1902); State v. Craemer, 12 Wash. 217, 40 Pac. 944 (1895).

United States.—Moore v. U. S., 150 U. S. 57, 14 S. Ct. 26, 37 L. ed. 996 (1893).

England.—Reg. v. May, 1 Cox Cr. C. 236 (1845).

2. *Alabama*.—Hawes v. State, 88 Ala. 37, 7 So. 302 (1889); Hobbs v. State, 75 Ala. 1 (1883); Gassenheimer v. State, 52 Ala. 313 (1875); Mason v. State, 42 Ala. 532 (1868).

Arkansas.—Doghead Glory v. State, 13 Ark. 236 (1853).

California.—People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269 (1897); People v. Nelson, 85 Cal. 421, 24 Pac. 1006 (1890); People v. Chin Bing Quong, 79 Cal. 553, 21 Pac. 951 (1889); People v. Rogers, 71 Cal. 565, 12 Pac. 679 (1887).

Colorado.—Piela v. People, 6 Colo. 343 (1882).

Georgia.—Prichett v. State, 92 Ga. 65, 18 S. E. 536 (1893).

Illinois.—Lyons v. People, 137 Ill. 602, 27 N. E. 677 (1891); Hickam v. People, 137 Ill. 75, 27 N. E. 88 (1891); Cross v. People, 47 Ill. 152, 95 Am. Dec. 474 (1868).

Indiana.—Starr v. State, 160 Ind. 661, 67 N. E. 527 (1903); Kennedy

because it also proves the other.³ An accused person is not furnished with immunity from the consequences of a crime because

v. State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99 (1886); *Gallaher v. State*, 101 Ind. 411 (1884); *Harding v. State*, 54 Ind. 359 (1876).

Iowa.—*State v. Dooley*, 89 Iowa 584, 57 N. W. 414 (1894); *State v. McCahill*, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599 (1887).

Kansas.—*State v. Labertew*, 55 Kan. 674, 41 Pac. 945 (1895).

Kentucky.—*Renfro v. Com.*, 11 S. W. 815, 11 Ky. L. Rep. 246 (1889); *Smart v. Com.*, 11 S. W. 431, 10 Ky. L. Rep. 1035 (1889).

Louisiana.—*State v. Desroches*, 48 La. Ann. 428, 19 So. 250 (1896).

Maine.—*State v. Wagner*, 61 Me. 178 (1873).

Maryland.—*Kernan v. State*, 65 Md. 253, 4 Atl. 124 (1885).

Massachusetts.—*Com. v. Sturdivant*, 117 Mass. 122, 19 Am. Rep. 401 (1875).

Michigan.—*People v. Foley*, 64 Mich. 148, 31 N. W. 94 (1887); *People v. Marble*, 38 Mich. 117 (1878).

Mississippi.—*Mask v. State*, 32 Miss. 405 (1856).

Missouri.—*State v. Taylor*, 118 Mo. 153, 24 S. W. 449 (1893); *State v. Sanders*, 76 Mo. 35 (1882).

Nebraska.—*Neal v. State*, 32 Nebr. 120, 49 N. W. 174 (1891).

New York.—*People v. Pallister*, 138 N. Y. 601, 33 N. E. 741 (1893); *People v. Parker*, 137 N. Y. 535, 32 N. E. 1013 (1893); *Haskins v. People*, 16 N. Y. 344 (1857).

North Carolina.—*State v. Gooch*, 94 N. C. 987 (1886); *State v. White*, 89 N. C. 462 (1883).

Oregon.—*State v. Porter*, 32 Ore. 135, 49 Pac. 964 (1897).

Pennsylvania.—*Brown v. Com.*, 76 Pa. St. 319 (1874).

South Carolina.—*State v. Nathan*, 5 Rich. Law 219 (1851).

Tennessee.—*Knoxville, etc., R. Co. v. Wyrick*, 99 Tenn. 500, 42 S. W. 434 (1897); *Logston v. State*, 3 Heisk. 414 (1872); *Powers v. State*, 4 Humphr. 274 (1843).

Texas.—*Matt v. State*, (Cr. App. 1899) 51 S. W. 368; *Hargrove v. State*, 33 Tex. Cr. 431, 26 S. W. 993 (1894); *Willingham v. State*, (Cr. App. 1894) 26 S. W. 834; *Wilkerson v. State*, 31 Tex. Cr. 86, 19 S. W. 903 (1892); *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757 (1891); *Fernandez v. State*, 4 Tex. App. 419 (1878); *Richards v. State*, 3 Tex. App. 423 (1878); *Weaver v. State*, 24 Tex. 387 (1859).

3. *Michigan*.—*People v. Marble*, 38 Mich. 117 (1878).

Oregon.—*State v. Roberts*, 15 Ore. 187, 13 Pac. 896 (1887).

Tennessee.—*Links v. State*, 13 Lea 701 (1884).

Texas.—*Bonnors v. State*, (Cr. App. 1896) 35 S. W. 650; *Crews v. State*, 34 Tex. Cr. 533, 31 S. W. 373 (1895); *Hargrove v. State*, 33 Tex. Cr. 431, 26 S. W. 993 (1894); *Wilkerson v. State*, 31 Tex. Cr. 86, 19 S. W. 903 (1892); *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757 (1891); *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398 (1890), *affirmed* 139 U. S. 462, 11 S. Ct. 577, 35 L. ed. 225.

Utah.—*People v. Coughlin*, 13 Utah 58, 44 Pac. 94 (1896)).

Virginia.—*Reed v. Com.*, 98 Va. 817, 36 S. E. 399 (1900); *Heath v. Com.*, 1 Rob. 735 (1842).

Washington.—*State v. Craemer*, 12 Wash. 217, 40 Pac. 944 (1895).

History of the case.—The existence of the collateral offense may be part of the "history of the case." *Knoxville, etc., R. Co. v. Wyrick*, 99 Tenn. 500, 42 S. W. 434 (1897). See also *State v. Sanders*, 76 Mo. 35 (1882).

he has probably committed another.⁴ Fairness to a person not on trial and so not properly affected by certain testimony may require administrative action by the court for his protection. But no such considerations intervene in favor of the defendant on trial. Extrajudicial statements, though tending to show the probable existence of another crime, will be received provided that such declarations can fairly be said to be among the *res gestæ* of the case at bar. Sufficient administrative necessity for exposing the accused to being convicted of having committed one offence upon evidence that he has perpetrated another, must, however, be shown to exist, and no valid reason can well be assigned for rejecting it. Certainly this is the rule when a fact can satisfactorily be proved in no other way.⁵ Where proof of guilt is circumstantial,—and these are the cases in which distinct offenses are most often incidentally proved,⁶—it would greatly impair the cogency of the incriminating proof to attempt the elimination of evidence of statements or other acts tending to show that the crime in question was not the only one committed by the accused at or about the same time.⁷ “It frequently happens, however, that as the evidence of circumstances must be resorted to for the purpose of proving the commission of the particular offense charged, the proof of those circumstances involves the proof of other acts, either criminal or apparently innocent. In such cases, it is proper that the chain of evidence should be unbroken. If one or more links of that chain consist of circumstances, which tend to prove that the prisoner has been guilty of

4. *Florida*.—Killins v. State, 28 Fla. 313, 9 So. 711 (1891).

Georgia.—Johnson v. State, 88 Ga. 203, 14 S. E. 208 (1891).

Iowa.—State v. Gainor, 84 Iowa 209, 50 N. W. 947 (1892).

Massachusetts.—Com. v. Scott, 123 Mass. 222, 25 Am. Rep. 81 (1877).

Michigan.—People v. Mead, 50 Mich. 228, 15 N. W. 95 (1883).

New York.—People v. Lewis, 62 Hun 622, 16 N. Y. Suppl. 881, 9 N. Y. Cr. R. 340, 42 N. Y. St. Rep. 768 (1891), *affirmed* 136 N. Y. 633, 32 N. E. 1014.

Texas.—Hargrove v. State, 33 Tex. Cr. 341, 26 S. W. 993 (1894); Davis v. State, 32 Tex. Cr. 377, 23 S. W.

794 (1893); Wilkerson v. State, 31 Tex. Cr. 86, 19 S. W. 903 (1892).

5. *Missouri*.—State v. Sanders, 76 Mo. 35 (1882).

Tennessee.—Links v. State, 13 Lea 701 (1884).

Texas.—Boonnors v. State, (Cr. App. 1896) 35 S. W. 650.

Utah.—People v. Coughlin, 13 Utah 58, 44 Pac. 94 (1896).

Virginia.—Reed v. Com., 98 Va. 817, 36 S. E. 399 (1900).

Washington.—State v. Craemer, 12 Wash. 217, 40 Pac. 944 (1895).

6. Walker v. Com., 1 Leigh (Va.) 574, 576 (1829).

7. State v. Craemer, 12 Wash. 217, 40 Pac. 944 (1895).

other crimes than that charged, this is no reason why the court should exclude those circumstances. They are so intimately connected and blended with the main facts adduced in evidence that they cannot be departed from, with propriety, and there is no reason why the *criminality* of such intimate and connected circumstances should exclude them, more than other facts apparently innocent.⁷⁸

While, as has been said, it is no ground for rejecting proof of the *res gestae* that it results in showing other offenses, the latter must be connected in some logical or causal relation with the liability sought to be enforced in the proceeding itself. An entirely separate and disconnected offense is not admissible merely because it occurred at or about the same time as the *res gestae* of the offense on trial.⁹ This merely restores the original proposition. The excluded evidence would not be relevant to the issue raised in the main case, while the danger of prejudicing the accused is one that the court, as a matter of administration,¹⁰ would be prompt to notice.

Use for a collateral purpose.—It is not, however, required that the proof of the additional offenses should be involved in the direct establishment of the crime on trial and relevant for that purpose. Should the proof carrying evidence of the other offence be relevant for a legitimate collateral deliberative object, as, for example, to

8. *Walker v. Com.*, 1 Leigh (Va.) 574, 576 (1829).

9. *Alabama*.—*Oakley v. State*, 135 Ala. 15, 33 So. 23 (1902); *Smith v. State*, 88 Ala. 73, 7 So. 52 (1889).

California.—*People v. Lane*, 100 Cal. 379, 34 Pac. 856 (1893); *People v. Rogers*, 71 Cal. 565, 12 Pac. 679 (1887).

Illinois.—*Farris v. People*, 129 Ill. 521 21 N. E. 821, 16 Am. St. Rep. 283, 4 L. R. A. 582 (1889).

Indiana.—*Starr v. State*, 160 Ind. 661, 67 N. E. 527 (1903).

Iowa.—*State v. McCahill*, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599 (1887).

Kentucky.—*Saylor v. Com.*, 97 Ky. 184, 30 S. W. 390, 17 Ky. L. Rep.

100 (1895); *Green v. Com.*, 33 S. W. 100, 17 Ky. L. Rep. 943 (1895).

Mississippi.—*McGee v. State*, 22 So. 890 (1898).

Nebraska.—*Neal v. State*, 32 Nebr. 120, 49 N. W. 174 (1891).

Pennsylvania.—*Brown v. Com.*, 76 Pa. St. 319 (1874).

Texas.—*Crews v. State*, 34 Tex. Cr. 533, 31 S. W. 373 (1895); *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757 (1891); *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398 (1890), *affirmed* 139 U. S. 462, 11 S. Ct. 577, 35 L. ed. 225; *Fernandez v. State*, 4 Tex. App. 419 (1878).

Virginia.—*Joyce v. Com.*, 78 Va. 287 (1884); *Heath v. Com.*, 1 Rob. 735 (1842).

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corroborate¹¹ or contradict¹² a witness, to explain an apparent conflict in the testimony,¹³ or the like, it will be regarded as sufficient.

§ 2589. (*Independent Relevancy of Unsworn Statements; Meaning of Res Gestae; Distinct Criminal Offences*); Assault.

— Perhaps the most common instance of the incidental proof of an additional offence while proceeding with the necessary and legitimate establishing the *res gestae* of a case on trial is in connection with assault. Thus, homicide is frequently accompanied by an assault on the deceased or upon some third person.¹ So a rape involves, in many cases, an assault on the injured woman or upon some one else.² The collateral offence may even take the grave form of robbery.³ Indeed, many crimes involving serious personal violence include and embrace the offence of a simple assault.⁴ Such incidentally proved crimes may be either simple

11. *Toll v. State*, 40 Fla. 169, 23 So. 942 (1898); *Gallison v. State*, 37 Tex. Cr. 211, 39 S. W. 300 (1897).

12. *Bryant v. State*, 97 Ga. 103, 25 S. E. 450 (1895); *State v. Harris*, 100 Iowa 188, 69 N. W. 413 (1896); *Gilmore v. State*, 37 Tex. Cr. 178, 39 S. W. 105 (1897).

13. *Reg. v. Chambers*, 3 Cox C. C. 92 (1848); *Reg. v. Briggs*, 2 M. & Rob. 199 (1839).

§ 2589-1. *Alabama*.— *Seams v. State*, 84 Ala. 410, 4 So. 521 (1887).

California.— *People v. Gilmore*, 17 Cal. App. 737, 121 Pac. 697 (1912).

Maine.— *State v. Pike*, 65 Me. 111 (1876).

Missouri.— *State v. Sanders*, 76 Mo. 35 (1882).

New York.— *People v. Pallister*, 138 N. Y. 601, 33 N. E. 741 (1893); *People v. Parker*, 137 N. Y. 535, 32 N. E. 1013 (1893).

North Carolina.— *State v. Gooch*, 94 N. C. 987 (1886).

Texas.— *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398 (1890) *affirmed* 139 U. S. 462, 11 S. Ct. 577, 35 L. ed. 225.

2. *Thompson v. State*, 11 Tex. App. 51 (1881).

3. *State v. Taylor*, 118 Mo. 153, 22 S. W. 806, 24 S. W. 449 (1893); *Compton v. State*, (Tex. Cr. App. 1912) 148 S. W. 580; *Harris v. State*, 32 Tex. Cr. 279, 22 S. W. 1037 (1893).

4. *Arkansas*.— *Byrd v. State*, 69 Ark. 537, 64 S. W. 270 (1901).

California.— *People v. Chin Bing Quong*, 79 Cal. 553, 21 Pac. 951 (1889).

Colorado.— *Piela v. People*, 6 Colo. 343 (1882).

Iowa.— *State v. McCahill*, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599 (1887).

Kentucky.— *Burton v. Com.*, 119 Ky. 664, 60 S. W. 526, 22 Ky. L. Rep. 1315 (1901).

Texas.— *Hamilton v. State*, 41 Tex. Cr. 644, 56 S. W. 926 (1900); *Richards v. State*, 34 Tex. Cr. 277, 30 S. W. 229 (1895); *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398 (1890) *affirmed* 139 U. S. 462, 11 S. Ct. 577, 35 L. ed. 225; *Thompson v. State*, 11 Tex. App. 51 (1881).

or coupled with circumstances of aggravation, e. g., the use of duress,⁵ attempt to kill⁶ or the like.⁷

§ 2590. (*Independent Relevancy of Unsworn Statements; Meaning of Res Gestae; Distinct Criminal Offences*); Homicide.—To establish the *res gestae* of a particular homicide, it may be necessary to prove other homicides. This may occur either where the evidence is circumstantial¹ or direct.² It may happen in connection with affirmative proof of the *res gestae* of the offence³ or where the effort of the proponent is to negative some theory advanced by the defence.⁴

§ 2591. (*Independent Relevancy of Unsworn Statements; Meaning of Res Gestae; Distinct Criminal Offences*); Larceny.—Every-day experience shows that, in making proof of the *res gestae* of a particular larceny, it may be natural and even practically unavoidable to show that other offences were committed at

5. *Britt v. State*, 9 *Humphr.* (Tenn.) 31 (1848).

6. *State v. Sanders*, 76 *Mo.* 35 (1882).

7. *Pritchett v. State*, 92 *Ga.* 65, 18 *S. E.* 536 (1893) (resisting an officer); *O'Neal v. State*, 32 *Tex. Cr.* 42, 22 *S. W.* 25 (1893) (carrying concealed weapons).

§ 2590-1. *Alabama*.—*Hawes v. State*, 88 *Ala.* 37, 7 *So.* 302 (1889).

Arkansas.—*Dog Head Glory v. State*, 13 *Ark.* 236 (1853).

Illinois.—*Lyons v. People*, 137 *Ill.* 602, 27 *N. E.* 677 (1891); *Hickam v. People*, 137 *Ill.* 75, 27 *S. E.* 88 (1891).

Kentucky.—*Smart v. Com.*, 11 *S. W.* 431, 10 *Ky. L. Rep.* 1035 (1889).

Massachusetts.—*Com. v. Sturivant*, 117 *Mass.* 122, 19 *Am. Rep.* 401 (1875).

Michigan.—*People v. Foley*, 64 *Mich.* 148, 31 *N. W.* 94 (1887); *People v. Marble*, 38 *Mich.* 117 (1878).

Nebraska.—*Neal v. State*, 32 *Nebr.* 120, 49 *N. W.* 174 (1891).

Pennsylvania.—*Brown v. Com.*, 76 *Pa. St.* 319 (1874).

Texas.—*Crews v. State*, 34 *Tex. Cr.* 533, 31 *S. W.* 373 (1895); *Hargrove v. State*, 33 *Tex. Cr.* 431, 26 *S. W.* 993 (1894); *Morris v. State*, 30 *Tex. App.* 95, 16 *S. W.* 757 (1891); *Fernandez v. State*, 4 *Tex. App.* 419 (1878).

Utah.—*People v. Coughlin*, 13 *Utah* 58, 44 *Pac.* 94 (1896).

Virginia.—*Heath v. Com.*, 1 *Rob.* 735 (1842).

Washington.—*State v. Craemer*, 12 *Wash.* 217, 40 *Pac.* 944 (1895).

Finding other dead bodies may negative an otherwise plausible theory of the case. *Smart v. Com.*, 11 *S. W.* 431, 10 *Ky. L. Rep.* 1035 (1889); *Logston v. State*, 3 *Heisk. (Tenn.)* 414 (1872).

2. *People v. Prantikos*, (Cal. 1912) 127 *Pac.* 1029; *State v. Simon*, (La. 1912) 59 *So.* 975 (attempt).

3. *Logston v. State*, 3 *Heisk. (Tenn.)* 414 (1872).

4. *Smart v. Com.*, 11 *S. W.* 431, 10 *Ky. L. Rep.* 1035 (1889).

or about the same time.¹ If so, the court will receive evidence of them. In like manner, proof of one burglary may involve the establishment of another.² The crimes of obtaining property by false pretences,³ of embezzlement,⁴ receiving stolen goods⁵ or robbery⁶ stand in the same position. So of forgery,⁷ and uttering forged documents.⁸ As Lord Ellenborough says:

“If crimes do so intermix, the court must go through the detail. I remember a case where a man committed three burglaries in one night; he took a shirt at one place and left it at another; and they were all so connected that the court went through the history of the three different burglaries.”⁹

§ 2592. (*Independent Relevancy of Unsworn Statements; Meaning of Res Gestae; Distinct Criminal Offences*); Dissimilar Offences.—Naturally, the collateral offence, incidentally established, may be dissimilar in nature to that for which liability is claimed in the action.¹ The carrying out of a particular criminal object may well involve, without added stimulus and almost of necessity, perpetration of other offences. A familiar incident of

§ 2591-1. *Indiana*.—Starr v. State, 160 Ind. 661, 67 N. E. 527 (1903).

Massachusetts.—Com. v. Hayes, 140 Mass. 366, 5 N. E. 264 (1886).

Montana.—State v. Willette, 127 Pac. 1013 (1912) (larceny).

New York.—Haskins v. People, 16 N. Y. 344 (1857).

North Carolina.—State v. White, 89 N. C. 462 (1883).

Oklahoma.—Starr v. State, (Cr. App. 1912) 124 Pac. 1109 (larceny).

South Carolina.—State v. Robinson, 35 S. C. 340, 14 S. E. 766 (1891).

Tennessee.—Links v. State, 13 Lea. 701 (1884); Sartin v. State, 7 Lea. 679 (1881).

Texas.—Thompson v. State, 42 Tex. Cr. 140, 57 S. W. 805 (1900); Bonners v. State, (Cr. App. 1896) 35 S. W. 650; Davis v. State, 32 Tex. Cr. 377, 23 S. W. 794 (1893); Kelley v. State, 31 Tex. Cr. 211, 20 S. W. 365 (1892); Mayfield v. State, 23 Tex. App. 645, 5 S. W. 161 (1887).

2. State v. Robinson, 35 S. C. 340, 14 S. E. 766 (1892); Kelley v. State,

31 Tex. Cr. 211, 20 S. W. 365 (1892).

3. Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596 (1848); Com. v. Daniels, 2 Pars. Eq. Cas. (Pa.) 332 (1847).

4. People v. Van Ewan, 111 Cal. 144, 43 Pac. 520 (1896).

5. Copperman v. People, 56 N. Y. 591 (1874).

6. People v. Nelson, 85 Cal. 421, 24 Pac. 1006 (1890); Britt v. State, 9 Humph. (Tenn.) 31 (1848).

7. Cross v. People, 47 Ill. 152, 95 Am. Dec. 474 (1868); Harding v. State, 54 Ind. 359 (1876); People v. Kemp, 76 Mich. 410, 43 N. W. 439 (1889).

8. Steele v. People, 45 Ill. 152 (1867); People v. Kemp, 76 Mich. 410, 43 N. W. 439 (1889).

9. R. v. Wylie, 1 B. & P. N. R. 92, 94 (1804).

§ 2592-1. *Gambling*.—One engaged in playing a gambling game may employ the occasion for passing counterfeit money. Powers v. State, 4 Humphr. (Tenn.), 274 (1843).

the trial of criminal causes is that the proof of the *res gestae* of the offence frequently results in the establishment of statements or other acts which would, in whole or in part, constitute the *res gestae* of a dissimilar crime. Arson, for example, is often found in combination with robbery² or burglary.³ Burglary, if successful, naturally leads to larceny;⁴ if discovered or opposed to assault⁵ and even to homicide.⁶ Homicide is frequently accompanied by larceny⁷ and frequently grows out of an attempt to accomplish unlawful ends.⁸ In much the same way, any meeting between those whose interests are opposed, though the original object with which the interview was sought may have been a comparatively innocent one,⁹ may well culminate in murder or other serious crime. Robbery itself involves an assault and is frequently accompanied by a battery,¹⁰ or by aggravated circumstances, as an attempt to kill,¹¹ rape,¹² or obstruction of an officer in the execution of his duty.¹³ The last would occur as naturally as the gathering of a mob leads to rioting or the doing of malicious mischief.¹⁴

§ 2593. (*Independent Relevancy of Unsworn Statements*); Extrajudicial Statements Part of the *Res Gestae*.—Using the phrase *res gestae* in its restricted or English sense,¹ the rule with regard to unsworn statements, so far as these are not considered as proof of the facts asserted, is a very simple one. Such extrajudicial declarations are admissible, when relevant, like any other

2. *Mixon v. State*, (Tex. Cr. App. 1895) 31 S. W. 408; *Blackwell v. State*, 29 Tex. App. 194, 15 S. W. 597 (1890).

3. *Mixon v. State*, (Tex. Cr. App. 1895) 31 S. W. 408.

4. *State v. Robinson*, 35 S. C. 340, 14 S. E. 766 (1891); *Mixon v. State*, (Tex. Cr. App. 1895) 31 S. W. 408.

5. *Adams v. State*, (Tex. Cr. App. 1901) 62 S. W. 1058 (1901); *Williams v. State*, 42 Tex. Cr. 602, 61 S. W. 395, 62 S. W. 1057 (1901).

6. *People v. Rogers*, 71 Cal. 565, 12 Pac. 679 (1887); *State v. Desroches*, 48 La. Ann. 428, 19 So. 250 (1896); *State v. Wagner*, 61 Me. 178 (1873).

7. *Kennedy v. State*, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99 (1886); *Mask v. State*, 32 Miss. 405 (1856).

8. *State v. McCahill*, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599 (1887) (conspiracy).

9. *State v. McCahill*, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599 (1887).

10. *State v. Nathan*, 5 Rich. Law (S. C.) 219 (1851).

11. *Richards v. State*, 34 Tex. Cr. 277, 30 S. W. 229 (1895).

12. *State v. Taylor*, 118 Mo. 153, 22 S. W. 806, 24 S. W. 449 (1893); *Harris v. State*, 32 Tex. Cr. 279, 22 S. W. 1037 (1893); *Davis v. State*, (Tex. Cr. App. 1893) 23 S. W. 684.

13. *State v. Guy*, 46 La. Ann. 1441, 16 So. 404 (1894).

14. *Gallaher v. State*, 101 Ind. 411 (1884).

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fact.² In other words, a verbal act, in this connection, differs in no essential particular from other acts.³ No special conditions are imposed upon the statement simply because it is a statement.⁴

2. *Georgia*.—Reese v. State, 7 Ga. 373 (1849).

Iowa.—State v. Richards, 126 Iowa 497, 102 N. W. 439 (1905) (telegram).

Kentucky.—Morris v. Com., 11 S. W. 295, 10 Ky. L. Rep. 1004 (1889).

Louisiana.—State v. Horton, 33 La. Ann. 289, 290 (1881).

Massachusetts.—Com. v. Bond, 188 Mass. 91, 74 N. E. 293 (1905).

Oregon.—State v. Henderson, 24 Oreg. 100, 32 Pac. 1030 (1893).

Texas.—Smith v. State, 46 Tex. Cr. App. 267, 81 S. W. 936 (1904).

Washington.—Riggs v. Northern Pac. Ry. Co., 60 Wash. 292, 111 Pac. 162 (1910).

England.—Wright v. Tatham, 5 Cl. & F. 670 (1838).

"Whenever evidence of an act is in itself competent and admissible as a material fact in the case, and is so admitted, the declarations accompanying and characterizing such act become and form a part of the *res gestae* of the act, and as such, are competent and admissible in evidence as being explanatory of the act." Campbell v. State, 133 Ala. 81, 87, 31 So. 804, 91 Am. St. Rep. 17 (1901), per Dowdell, J. See also Harris v. State (Ala. 1912), 59 So. 205.

3. *Alabama*.—Viberg v. State, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22 (1903).

California.—People v. Murphy, 45 Cal. 137 (1872).

Kentucky.—Combs v. Com., 25 S. W. 592, 15 Ky. L. Rep. 659 (1894).

Maine.—State v. Walker, 77 Me. 488, 1 Atl. 357 (1885).

Missouri.—Matthews v. Coalter, 9 Mo. 705 (1846).

New Hampshire.—Morrill v. Foster, 32 N. H. 358 (1855).

Oregon.—State v. Brown, 28 Oreg.

147, 41 Pac. 1042 (1895).

Pennsylvania.—Potts v. Everhart, 26 Pa. St. 493 (1856).

South Carolina.—State v. Belcher, 13 S. C. 459 (1880).

Texas.—Martin v. State, 44 Tex. Cr. 538, 72 S. W. 386 (1903).

Washington.—Seattle v. L. H. Griffith Realty, etc., Co., 28 Wash. 605, 68 Pac. 1036 (1902).

United States.—New Jersey Steam-Boat Co. v. Brockett, 121 U. S. 637, 7 S. Ct. 1039, 30 L. ed. 1049 (1886).

Canada.—Clowser v. Samuel, 15 N. Bruns. 58 (1873).

Declarations of trustees at the time of making a division of land and their instructions to the surveyor at that time have been admitted as part of the *res gestae*, being explanatory of their acts. But subsequent declarations are not competent to affect rights vested at time of such division. Benbow v. Harvin, (S. C. 1912) 75 S. E. 414.

4. *Alabama*.—Hudson v. Crow, 26 Ala. 515 (1855); Jones v. Nirdlinger, 20 Ala. 488 (1852); Spence v. McMillan, 10 Ala. 583 (1846). See also Birmingham R. Light, etc., Co. v. Mullen, 138 Ala. 614, 35 So. 701 (1903); Louisville & N. R. Co. v. Landers, 135 Ala. 504, 33 So. 482 (1902).

California.—Cross v. Zellerbach, 68 Cal. 19, 8 Pac. 714 (1885); Gilman v. Sigman, 29 Cal. 637 (1866). See also Rogers v. Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348 (1903).

Colorado.—Farrer v. Caster, 17 Colo. App. 41, 67 Pac. 171 (1902); Davis v. Hopkins, 18 Colo. 153, 32 Pac. 70 (1893).

Connecticut.—Russell v. Frisbie, 19 Conn. 205 (1848).

That a given declaration was made is simply a fact which should be allowed to give rise to any relevant inference which may prop-

Delaware.—Redden v. Spruance, 4 Harr. 217 (1846).

Georgia.—Batton v. Watson, 13 Ga. 63, 58 Ann. Dec. 504 (1853).

Illinois.—Harding v. Harding, 79 Ill. App. 590 (1898); *modified* 180 Ill. 481, 54 N. E. 587; Pope v. Western Union Tel. Co., 14 Ill. App. 531 (1884); Bushnell v. Wood, 85 Ill. 88 (1877). See also Hoffman v. Chicago Title, etc., Co., 198 Ill. 452, 64 N. E. 1027 (1902); Tri-City R. Co. v. Brennan, 108 Ill. App. 471 (1902).

Indiana.—Mitchell v. Colglazier, 106 Ind. 464, 7 N. E. 199 (1886); Keesling v. Watson, 91 Ind. 578 (1883); Maxwell v. Ratliff's Adm'r. 26 Ind. 157 (1866); Orth v. Sharky, 4 Ind. 642 (1853). See also Piacé v. Baugher, 159 Ind. 232, 64 N. E. 852 (1902).

Kentucky.—Sherley v. Billings, 8 Bush 147, 8 Am. Rep. 451 (1871). See also Petrie v. Cartwright, 114 Ky. 103, 70 S. W. 297, 24 Ky. L. Rep. 903, 954, 59 L. R. A. 720, 102 Am. St. Rep. 274 (1902).

Louisiana.—Butler v. Murison, 18 La. Ann. 363 (1866); Pope v. Hall, 14 La. Ann. 324 (1859); Lockhart v. Jones, 9 Rob. 381 (1844).

Maryland.—Miller v. Williamson, 5 Md. 219 (1853).

Massachusetts.—Deveney v. Baxter, 157 Mass. 9, 31 N. E. 690 (1892); Blake v. Damon, 103 Mass. 199 (1869); Moody v. Sabin, 9 Cush. 505 (1852).

Michigan.—Wilcox v. Ney, 47 Mich. 421, 11 N. W. 225 (1882). And see People v. Sharp, 133 Mich. 378, 94 N. W. 1074 (1903).

Mississippi.—Hall v. Clopton, 56 Miss. 555 (1879).

Missouri.—Brooks v. Jameson, 55 Mo. 505 (1874); Griffith v. Judge, 49 Mo. 536 (1872); Metropolis Nat. Bank v. Williams, 46 Mo. 17 (1870);

Crowther v. Gibson, 19 Mo. 365 (1854). And see Thomas v. Macon County, 175 Mo. 68, 74 S. W. 999 (1903); Strode v. Conkey, 105 Mo. App. 12, 78 S. W. 678 (1903).

Montana.—Burns v. Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653 (1898).

New Jersey.—Castner v. Sliker, 33 N. J. L. 95 (1869); *affirmed* 33 N. J. L. 507.

New York.—Cremare v. Huber, 18 N. Y. App. Div. 231, 45 N. Y. Suppl. 947 (1897); Thorp v. Carvalho, 14 Misc. 554, 36 N. Y. Suppl. 1, 70 N. Y. St. Rep. 760 (1895); Holmes v. Roper, 141 N. Y. 64, 36 N. E. 180 (1894); Brumfield v. Pottier, etc., Mfg. Co., 4 Misc. 194, 23 N. Y. Suppl. 1025, 53 N. Y. St. Rep. 489 (1893), *reversing* 1 Misc. 92, 20 N. Y. Suppl. 615, 48 N. Y. St. Rep. 516 (1892); Koetter v. Manhattan R. Co., 59 Hun 623, 13 N. Y. Suppl. 458, 36 N. Y. St. Rep. 611 (1891), *affirmed* 129 N. Y. 668, 30 N. E. 65; Piper v. New York Cent., etc., R. Co., 1 Thomps. & C. 290 (1873), *affirmed* 56 N. Y. 630; Fox v. Parker, 44 Barb. 541 (1865); Higgins v. Solomon, 2 N. Y. Super. Ct. 482 (1829). See also Hoffman v. Edison Electric Illuminating Co., 87 N. Y. App. Div. 371, 84 N. Y. Suppl. 437 (1903).

North Carolina.—Means v. Carolina Cent. R. Co., 124 N. C. 574, 32 S. E. 960, 45 L. R. A. 164 (1899); Roberts v. Preston, 100 N. C. 243, 6 S. E. 574 (1888); McLurd v. Clark, 92 N. C. 312 (1885); Grandy v. McPherson, 52 N. C. 347 (1860).

North Dakota.—Balding v. Andrews, 12 N. D. 267, 96 N. W. 305 (1903).

Ohio.—Kilbourn v. Fury, 26 Ohio St. 153 (1875).

Pennsylvania.—Lewars v. Weaver, 121 Pa. St. 268, 15 Atl. 514 (1888);

erly be drawn from its existence. The rule is the same in criminal

Devling v. Little, 26 Pa. St. 502 (1856); *Kach v. Howell*, 6 Watts & S. 350 (1843); *Postens v. Postens*, 3 Watts & S. 127 (1842); *Reed v. Dick*, 8 Watts 479 (1839); *Arnold v. Gorr*, 1 Rawle 223 (1829). And see *Shannon v. Castner*, 21 Pa. Super. Ct. 294 (1902).

Tennessee.—*Baird v. Vaughn*, (Sup. 1890) 15 S. W. 734. See also *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467, 75 S. W. 713 (1903).

Texas.—*Smith v. Boatman Sav. Bank*, 1 Tex. Civ. App. 115, 20 S. W. 1119 (1892); *Ft. Worth Pub. Co. v. Hitson*, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551 (1891); *George v. Thomas*, 16 Tex. 74, 67 Am. Dec. 612 (1856). And see *St. Louis Southwestern R. Co. v. Patterson*, (Civ. App. 1903) 73 S. W. 987; *Western Union Tel. Co. v. Uralde Nat. Bank*, (Civ. App. 1903) 72 S. W. 232, *affirmed* 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805.

Vermont.—*Tillotson v. Pritchard*, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95 (1887); *Danforth v. Streeter*, 28 Vt. 490 (1856); *Marsh v. Davis*, 24 Vt. 363 (1852); *White v. Morton*, 22 Vt. 15, 52 Am. Dec. 75 (1849). See also *Terrill v. Tillison*, 75 Vt. 193, 54 Atl. 187 (1903).

Washington.—*Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138 (1900).

Wisconsin.—*McCord v. McSpaden*, 34 Wis. 541 (1874); *Eastman v. Bennett*, 6 Wis. 232 (1857); *McGoon v. Irvin*, 1 Pin. 526, 44 Am. Dec. 409 (1845).

United States.—*Pittsburgh Plate Glass Co. v. Kerlin Bros. Co.*, 122 Fed. 414, 58 C. C. A. 648 (1903); *Chicago Terminal Transfer R. Co. v. Stone*, 118 Fed. 19, 55 C. C. A. 187 (1902).

Canada.—*Commercial Bank v. Great Western R. Co.*, 22 U. C. Q. B. 233, 2 Grant. Err. & App. (U. C.) 285 (1862).

Each case must be decided upon its own circumstances and the question whether a particular statement or declaration is admissible as a part of the *res gestae* is a matter largely within the discretion of the trial judge. *Beal-Doyle Dry Goods Co. v. Carr*, 85 Ark. 479, 108 S. W. 1053 (1908); *Washington Ry. & E. Co. v. Wright*, 38 App. D. C. 268 (1912); *Shelton v. Southern R. Co.*, 86 S. C. 98, 67 S. E. 899 (1910); *Walters v. Spokane I. R. Co.*, 58 Wash. 293, 108 Pac. 593 (1910); *Grant v. Oregon R. & N. Co.*, 54 Wash. 678, 103 Pac. 1126 (1909).

Assault.—Statements made during an assault may be, in effect, part of the assault itself. *Alabama City G. & A. R. Co. v. Sampley*, 169 Ala. 372, 53 So. 142 (1910). *Sherley v. Billings*, 8 Bush (Ky.) 147, 8 Am. Rep. 451 (1871). See *Kinner v. Boyd*, 139 Iowa 14, 116 N. W. 1044 (1908).

In construing an oral contract, acts and declarations of the parties showing in what sense they understood it may be received. *Murray v. Bethune*, 1 Wend. (N. Y.) 191 (1828).

In a proceeding to secure the admission to probate of certain deeds as the will of the grantor evidence of what he said at the time of the execution of the instruments is admissible as part of the *res gestae*. In *re Dowell's Estate*, 152 Mich. 194, 115 N. W. 972, 15 Detroit Leg. N. 141 (1908).

Evidence of complaints by plaintiff to the railroad conductor while cattle were in transit as to the manner in which they were being handled is admissible in an action against the company for injuries to the cattle caused by improper handling of them. *Mis-souri, K. & T. Ry. Co. of Texas v. Ross & Phelan*, (Tex. Civ. App. 1909) 123 S. W. 231.

Though an infant may by statute be incompetent as a witness yet evidence will be received of a declaration

cases.⁵ In fine, within the range of the *res gestae*, what was said

by him which is a part of the *res gestae*. *Beal-Doyle Dry Goods Co. v. Carr*, 85 Ark. 479, 108 S. W. 1053 (1908).

5. *Alabama*.—*Hall v. State*, 130 Ala. 45, 30 So. 422 (1900); *Wood v. State*, 128 Ala. 27, 29 So. 557, 86 Am. St. Rep. 71 (1900); *Bankhead v. State*, 124 Ala. 14, 26 So. 979 (1899); *Evans v. State*, 62 Ala. 6 (1878).

Arkansas.—*Appleton v. State*, 61 Ark. 590, 33 S. W. 1066 (1896).

California.—*People v. Daily*, 135 Cal. 104, 67 Pac. 16 (1901); *People v. Amaya*, 134 Cal. 531, 66 Pac. 794 (1901); *People v. Rodley*, 131 Cal. 240, 63 Pac. 351 (1900); *People v. Piggott*, 126 Cal. 509, 59 Pac. 31 (1899); *People v. Roach*, 17 Cal. 297 (1861).

District of Columbia.—*U. S. v. Nardello*, 4 Mackey 503 (1886).

Florida.—*Anthony v. State*, 44 Fla. 1, 32 So. 818 (1902).

Georgia.—*Barrow v. State*, 80 Ga. 191, 5 S. E. 64 (1887); *Mitchell v. State*, 71 Ga. 128 (1883); *Monroe v. State*, 5 Ga. 85 (1848).

Idaho.—*State v. Alcorn*, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252 (1901).

Illinois.—*Wilson v. People*, 94 Ill. 299 (1880); *Comfort v. People*, 54 Ill. 404 (1870).

Indiana.—*Wood v. State*, 92 Ind. 269 (1883); *Baker v. Gausin*, 76 Ind. 317 (1881).

Iowa.—*State v. Bone*, 114 Iowa 537, 87 N. W. 507 (1901); *State v. Peffers*, 80 Iowa 580, 46 N. W. 662 (1890); *State v. Porter*, 34 Iowa 131 (1871).

Kentucky.—*Ross v. Com.*, 55 S. W. 4, 21 Ky. L. Rep. 1344 (1900); *Renfro v. Com.*, 11 S. W. 815, 11 Ky. L. Rep. 246 (1889).

Louisiana.—*State v. Horton*, 33 La. Ann. 289 (1881).

Maine.—*State v. Walker*, 77 Me. 488, 1 Atl. 357 (1885); *State v. Wagner*, 61 Me. 178 (1873).

Michigan.—*People v. Palmer*, 105 Mich. 568, 63 N. W. 656 (1895).

Mississippi.—*Newcomb v. State*, 37 Miss. 383 (1859); *Mask v. State*, 32 Miss. 405 (1856).

Missouri.—*State v. Moore*, 117 Mo. 395, 22 S. W. 1086 (1893); *State v. Duncan*, 116 Mo. 288, 22 S. W. 699 (1893).

Montana.—*State v. Biggerstaff*, 17 Mont. 510, 43 Pac. 709 (1896); *State v. King*, 9 Mont. 445, 24 Pac. 265 (1890).

Nebraska.—*Lamb v. State*, 95 N. W. 1050 (1903).

New York.—*McKee v. People*, 36 N. Y. 113, 1 Transcr. App. 1, 3 Abb. Pr. (N. S.) 216, 34 How. Pr. 230 (1867).

North Carolina.—*State v. Rollins*, 113 N. C. 722, 18 S. E. 394 (1893).

Oregon.—*State v. Brown*, 28 Ore. 147, 41 Pac. 1042 (1895); *State v. Henderson*, 24 Ore. 100, 32 Pac. 1030 (1893).

South Carolina.—*State v. Belcher*, 13 S. C. 459 (1880).

South Dakota.—*State v. Mulch*, 17 S. D. 321, 96 N. W. 101 (1903).

Texas.—*Shumate v. State*, 38 Tex. Cr. R. 266, 42 S. W. 600 (1897); *Jeffries v. State*, 9 Tex. App. 598 (1880); *Colquitt v. State*, 34 Tex. 550 (1870).

Virginia.—*Nicholas v. Com.*, 91 Va. 741, 21 S. E. 364 (1895).

Washington.—*State v. Webster*, 21 Wash. 63, 57 Pac. 361 (1899).

West Virginia.—*State v. Abbott*, 8 W. Va. 741 (1875).

United States.—*Turner v. U. S.*, 24 Fed. Cas. No. 14,262a, 2 Hayw. & H. 343 (1860).

England.—*Reg. v. Bedingfield*, 14 Cox C. C. 341 (1879); *Atty.-Gen. v. Good, McClel. & Y.* 286 (1825).

by any person including a bystander⁶ may be admitted in evidence. Like others of the *res gestae*, extrajudicial statements may constitute the ultimate objectives of evidence. They may be among the principal facts to be established by the proof, are said to be relevant *per se*, i. e., unconditioned by evidence of any other fact, and are covered by the paramount right of every litigant to establish the *res gestae* of his case⁷ by the best evidence which it is practically in his power to produce. It will not be forgotten, however, that the relevancy of such statements when thus employed is, like that of other *res gestae* facts, constituent⁸ rather than probative. Where the attempt, therefore, is made to use the independently relevant statement in a probative capacity, e. g., as showing some relevant mental condition⁹ or state,¹⁰ it cannot properly be classified as part of the *res gestae*. The existence of mental condition or state itself may, it is true, be a *res gestae* fact and may, as such, be properly deduced from the existence of the other *res gestae*. Being, however, psychological facts, and not subject to direct observation, the extrajudicial declarations or other facts used in establishing them cannot well be part of the *res gestae*, properly so-called.

§ 2594. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Constituent Facts.—Extrajudicial statements may, *a fortiori*, be proved when they are constituent¹ facts. As to their admissibility, little question can well be raised. In fact, they are frequently said to be relevant *per se*.² The relation which such facts sustain to the

Canada.—Reg. v. Troop, 30 Nova Scotia 339 (1898).

Outcries of deceased and of another person killed as part of the same robbery have been treated as part of the *res gestae*. State v. Wagner, 61 Me. 178 (1873). See also State v. Henderson, 24 Oreg. 100, 32 Pac 1030 (1893).

6. § 2597.

7. § 358.

8. § 2581.

9. §§ 2638 *et seq.*

10. §§ 2643 *et seq.*

§ 2594-1. §§ 47, 49.

2. *Alabama*.—Burt v. Henry, 10 Ala. 874 (1846).

Arkansas.—Wallace v. Bernheim, 63 Ark. 108, 37 S. W. 712 (1896).

Massachusetts.—Blanchard v. Child, 7 Gray 155 (1856).

Michigan.—Passmore v. Passmore, 60 Mich. 463, 27 N. W. 601 (1886).

New Jersey.—Cowen v. Bloomberg, 69 N. J. L. 462, 55 Atl. 36 (1903).

North Carolina.—Molyneux v. Huey, 81 N. C. 106 (1879).

Pennsylvania.—Depew v. Depew, 4 Atl. 728 (1886).

South Carolina.—Peeples v. Smith, 8 Rich. 90 (1854).

Texas.—Aetna Ins. Co. v. Fitze, 34 Tex. Civ. App. 214, 78 S. W. 370 (1904).

existence of the right or liability asserted in the action has been, in another connection,³ denominated as constituent. The effect of unsworn statements when thus used on an issue of right or liability present to the tribunal a question of substantive law.⁴ Thus, on an indictment for perjury the fact that the defendant spoke the words now said to be false has no proper connection with the rule against hearsay. It is simply a verbal act which assists, with other facts, to constitute the liability with which the accused is charged.⁵ As such, evidence of this character is admissible as a matter of course, a *res gestae* or constituent fact.⁶ So, in a trial of a civil action on an oral contract any material extrajudicial statement made by either of the parties during the period of negotiation in which an agreement is said to have been reached is merely a *res gestae* or constituent fact

3. § 2581.

4. **A Question of Logic.**—Should the issue raised be one of fact, the establishment of a constituent relevancy, as of a probative one, involves a question of *logic*, i. e., of experience.

Agency, public authority, etc.—These rules of substantive law prescribe also the circumstances under which the extrajudicial statements of those acting in a representative or official capacity are admissible. They may, for example, clothe the declarant with the authority of an agent, *Hoffman v. Chicago Title, etc.*, 198 Ill. 452, 64 N. E. 1027 (1902); *Haggart v. California Borough*, 21 Pa. Super. Ct. 210 (1902); *Terrill v. Tillson*, 75 Vt. 193, 54 Atl. 187 (1903), or qualify him to act as a public officer. *Martin v. State*, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91 (1889).

5. *People v. Lem You*, 97 Cal. 224, 32 Pac. 11 (1893).

6. *Alabama*.—*Viberg v. State*, 138 Ala. 100, 35 So. 53 (1902).

California.—*People v. Murphy*, 45 Cal. 137 (1872). See *Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (1903).

Kentucky.—*Combs v. Com.*, 25 S. W. 592, 15 Ky. L. Rep. 659 (1894).

Maine.—*State v. Walker*, 77 Me. 488, 1 Atl. 357 (1885).

Missouri.—*Matthews v. Coalter*, 9 Mo. 705 (1846).

New Hampshire.—*Morrill v. Foster*, 32 N. H. 358 (1855); *Wiggin v. Plumer*, 31 N. H. 251 (1855); *Tenney v. Evans*, 14 N. H. 343, 350, 40 Am. Dec. 194 (1843); *Mahurin v. Bellows*, 14 N. H. 209 (1843).

Oregon.—*State v. Brown*, 28 Oreg. 147, 41 Pac. 1042 (1895).

Pennsylvania.—*Potts v. Everhart*, 26 Pa. St. 493 (1856).

South Carolina.—*State v. Belcher*, 13 S. C. 459 (1880).

Texas.—*Martin v. State*, 44 Tex. Cr. Rep. 538, 72 S. W. 386 (1903); *Western Union Tel. Co. v. Uvalde Nat. Bank*, (Civ. App. 1903) 72 S. W. 232; *Brin v. McGregor*, (Civ. App. 1901) 64 S. W. 78.

Washington.—*Seattle v. L. H. Griffith Realty, etc., Co.*, 28 Wash. 605, 68 Pac. 1036 (1902).

United States.—*New Jersey Steam-Boat Co. v. Brockett*, 121 U. S. 637, 7 Ct. 1039, 30 L. ed. 1049 (1887).

Canada.—*Clowser v. Samuel*, 15 N. Brunsw. 58 (1873).

and is admissible to show the exact contract, if any, between the parties. The essential point is that, if any agreement is reached at all, it must have been upon the basis of the statements made and the extrajudicial declarations are admissible to show what that basis was.⁷ The unsworn statements are part of the *res gestae* out of which the right or liability arises, if at all.⁸

§ 2595. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Existence of Statement Itself.—The existence of an unsworn statement may be a constituent fact. Under such circumstances, the rule against hearsay has no application—it being of little immediate consequence whether the statement as made be true or false. It is simply received as a fact.¹ “It does not follow that, because the

7. *Murray v. Bethune*, 1 Wend. (N. Y.) 191 (1828).

Conversations.—In like manner, and for the same reasons, where the transaction of the parties was constituted in whole or in part by a conversation, the several statements made during its progress while the matter in question was under consideration will be received in evidence.

California.—*Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791 (1899).

Colorado.—*Denver, etc., R. Co. v. Spencer*, 25 Colo. 9, 52 Pac. 211 (1898).

Massachusetts.—*Green v. Crapo*, 181 Mass. 55, 62 N. E. 956 (1902).

Michigan.—*Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862 (1882).

New Hampshire.—*Wason v. Burnham*, 68 N. H. 553, 44 Atl. 693 (1896).

On the contrary, an irrelevant conversation is excluded upon ordinary principles. *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500 (1887). If what was said at a particular interview be relevant, it will be received although there were other conversations which the witness had not heard. *People v. Daily*, 135 Cal. 104, 67 Pac. 16 (1901). The truth of as-

sertions made is not involved in the evidence. The declarations are facts and are proved as such. *State v. Horton*, 33 La. Ann. 289 (1881).

8. The distinction between what constitutes a legal result and that which merely presents evidence of it, i. e., the difference between a *res gestae* and a probative fact is often a fine one;—raising close-questions of degree. Fortunately, the demarcation is not of practical consequence, except for purposes of clearness. The fact to be proved may in any case be established equally well circumstantially or directly. It is, for example, in the case assumed of an oral contract, by no means essential to admissibility that the unsworn statements of the parties should embody or constitute in and of themselves by a formal offer and acceptance, the precise and entire agreement. Much may be left to the interpretation of circumstances surrounding the transaction. Statements of the parties, however, still perform the appropriate function of assisting to constitute the contract of the parties.

§ 2595-1. *People v. Lem You*, 97 Cal. 224, 32 Pac. 11 (1893); *Stainbrook v. Drawyer*, 25 Kan. 333

words in question are those of a third person, they are necessarily hearsay. On the contrary, it happens, in many cases, that the very fact in controversy is, whether such things were spoken, and not whether they are true.”² This proposition has been reiterated by eminent judges,³ and the law may be regarded as settled that wherever for any reason an extrajudicial statement is constitutently relevant by reason of its bare existence, proof of it will be received.⁴ The court will in a criminal as well as in a civil cause

(1881); *Shaw v. People*, 3 Hun (N. Y.) 272, 5 Thomps. & C. (N. Y.) 439 (1874). See also *Jennings v. Rooney*, 183 Mass. 577, 67 N. E. 665 (1903).

2. *State v. Wentworth*, 37 N. H. 196, 217 (1858) per Eastman, J.

3. “It is sometimes said, that there is an exception when *words* are the *res gestae*, or part of the *res gestae*—but this seems not to be accurate. The words are then received, not as evidence of the *truth* of what was declared, but because the speaking of the words is the *fact*, or part of the fact, to be investigated. There may be a controversy whether A. B. at a certain time spoke certain words, and those who heard him, are of course received to prove the fact. The words spoken concurrently with an act done, are often a part of the act, and give it a precise and peculiar character, and therefore must be testified, *not to show* that the words spoken are *true*, but to show that they were in *fact* spoken. For example—Did A commit an assault on B? What he said when he laid his hands on B, will shew whether it was an angry or friendly act. Did the agent of Defendant make a certain representation in the course of the bargain? If so, that representation was an ingredient in the bargain.” *Cherry v. Slade*, 2 Hawks (N. C.) 400, 404 (1823) per Mr. Gaston.

“If a man, on leaving his counting-house, said to his servant, ‘I have just sold so and so,’ that would not

be evidence of the sale. Here, however, the reference was part of the transaction and the letter had a strong tendency to confirm the other evidence.”⁵ “If the evidence were admissible on that ground, everything a man said on the day when he made a bargain, and still more everything he did, would be admissible. It seems to me that would be very dangerous ground. * * * The real ground is, that this was an inquiry made by the direction of the plaintiffs in pursuance of an authority from Atkin, and therefore was part of the *res gestae*.” *Milne v. Leisler*, 7 H. & N. 786, 796, 802 (1862), per Pollock, C. B. and Wilde, B.

“Everything, therefore, is admissible which was *done* by Thomas; and *words* are often *acts*. The question is not open to the objection against hearsay. It is not hearsay. It is a question as to an act done. One asks another to attest a document, or to advance a sum of money; those are not merely words, but acts.” *Shilling v. Ins. Co.*, 1 F. & F. 116, 120 (1858), per Erle, J.

4. *Alabama*.—*Hudson v. Crow*, 26 Ala. 515 (1855).

California.—*Cross v. Zellerbach*, 8 Pac. 714 (1885).

Colorado.—*Davis v. Hopkins*, 18 Colo. 153, 32 Pac. 70 (1893).

Connecticut.—*Russell v. Frisbie*, 19 Conn. 205 (1848).

Delaware.—*Redden v. Spruance*, 4 Harr. 217 (1845).

receive evidence of what was said, equally with evidence as to what was done.⁵ As has been stated, the truth or falsity of the

Georgia.—Batton v. Watson, 13 Ga. 63, 58 Am. Dec. 504 (1853).

Illinois.—Bushnell v. Wood, 85 Ill. 88 (1877).

Indiana.—Mitchell v. Colglazier, 106 Ind. 464, 7 N. E. 199 (1886).

Kentucky.—Sherley v. Billings, 8 Bush 147, 8 Am. Rep. 451 (1871).

Louisiana.—Butler v. Murison, 18 La. Ann. 363 (1866).

Maryland.—Miller v. Williamson, 5 Md. 219 (1853).

Massachusetts.—Deveney v. Baxter, 157 Mass. 9, 31 N. E. 690 (1892).

Michigan.—Wilcox v. Ney, 47 Mich. 421, 11 N. W. 225 (1882).

Mississippi.—Hall v. Clopton, 56 Miss. 555 (1879).

Missouri.—Brooks v. Jameson, 55 Mo. 505 (1874).

Montana.—Burns v. Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653 (1898).

New Jersey.—Castner v. Sliker, 33 N. J. L. 95 (1868).

New York.—Holmes v. Roper, 141 N. Y. 64, 36 N. E. 180 (1894).

North Carolina.—Means v. Carolina Cent. R. Co., 124 N. C. 574, 32 S. E. 960, 45 L. R. A. 164 (1899).

North Dakota.—Balding v. Andrews, 12 N. D. 267, 96 N. W. 305 (1903).

Ohio.—Kilbourn v. Fury, 26 Ohio St. 153 (1875).

Pennsylvania.—Lewars v. Weaver, 121 Pa. St. 268, 15 Atl. 514 (1888).

Tennessee.—Baird v. Vaughn, (Sup. 1890) 15 S. W. 734.

Texas.—Ft. Worth Pub. Co. v. Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551 (1891).

Vermont.—Tillotson v. Pritchard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95 (1887).

Washington.—Piper v. Spokane, 22 Wash. 147, 60 Pac. 138 (1900).

Wisconsin.—McCord v. McSpaden, 34 Wis. 541 (1874).

United States.—Pittsburgh Plate Glass Co. v. Kerlin Bros. Co., 122 Fed. 414, 58 C. C. A. 648 (1903); Chicago Terminal Transfer R. Co. v. Stone, 118 Fed. 19, 55 C. C. A. 187 (1902).

Canada.—Bank v. Great Western R. Co., 22 U. C. Q. B. 233, 2 Grant Err. & App. (U. C.) 285 (1862).

5. *Alabama*.—Hall v. State, 130 Ala. 45, 30 So. 422 (1900).

Arkansas.—Appleton v. State, 61 Ark. 590, 33 S. W. 1066 (1896).

California.—People v. Daily, 135 Cal. 104, 67 Pac. 16 (1901).

District of Columbia.—U. S. v. Nardello, 4 Mackey 503 (1886).

Florida.—Anthony v. State, 44 Fla. 1, 32 So. 818 (1902).

Georgia.—Barrow v. State, 80 Ga. 191, 5 S. E. 64 (1887).

Idaho.—State v. Alcorn, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252 (1901).

Illinois.—Wilson v. People, 94 Ill. 299 (1880).

Indiana.—Wood v. State, 92 Ind. 269 (1883).

Iowa.—State v. Bone, 114 Iowa 537, 87 N. W. 507 (1901).

Kentucky.—Ross v. Com., 55 S. W. 4, 21 Ky. L. Rep. 1344 (1900).

Louisiana.—State v. Horton, 33 La. Ann. 289 (1881).

Maine.—State v. Walker, 77 Me. 488, 1 Atl. 357 (1885).

Michigan.—People v. Palmer, 105 Mich. 568, 63 N. W. 656 (1895).

Mississippi.—Newcomb v. State, 37 Miss. 383 (1859).

Missouri.—State v. Moore, 117 Mo. 395, 22 S. W. 1086 (1893).

Montana.—State v. Biggerstaff, 17 Mont. 510, 43 Pac. 709 (1896).

Nebraska.—Lamb v. State, 69 Nebr. 212, 95 N. W. 1050 (1903).

declaration itself is not in question. The testimony is only admissible as to the existence of the statement as a constituent fact forming part of the *res gestae*. As such it is admissible, just as any other constitutently relevant physical occurrence would be.⁶ The statements may take the connected form of a conversation. In such a case the reporting witness is debarred from stating that portion of it which he says he heard and remembers because there may have been other additional conversations which he did not hear or does not recollect.⁷

§ 2596. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Evidence Is Primary.—The evidence furnished by the independently relevant *res gestae* declaration is primary.¹ Where the extrajudicial unsworn statement is used as evidence of the facts asserted, a superior grade of evidence is possible, i. e., the testimony of the original declarant on the subject. No better or more convincing evidence of the existence of a statement can be given than the testimony of the reporting witness who says that he heard it made. In other words, while the reporting witness, in

New York.—McKee v. People, 36 N. Y. 113, 1 Trancr. App. 1, 3 Abb. Pr. N. S. 216, 34 How. Pr. 230 (1867).

North Carolina.—State v. Rollins, 113 N. C. 722, 18 S. E. 394 (1893).

Oregon.—State v. Brown, 28 Oreg. 147, 41 Pac. 1042 (1895).

South Carolina.—State v. Belcher, 13 S. C. 459 (1880).

South Dakota.—State v. Mulch, 17 S. D. 321, 96 N. W. 101 (1903).

Texas.—Colquit v. State, 34 Tex. 550 (1871).

Virginia.—Nicholas v. Com., 91 Va. 741, 21 S. E. 364 (1895).

Washington.—State v. Webster, 21 Wash. 63, 57 Pac. 361 (1899).

West Virginia.—State v. Abbott, 8 W. Va. 741 (1875).

United States.—Turner v. U. S., 24 Fed. Cas. No. 14,262a, 2 Hayw. & H. 343 (1860).

England.—Reg. v. Bedingfield, 14 Cox C. C. 341 (1879); Atty.-Gen. v. Good, McClel. & Y. 286 (1825).

Canada.—Reg. v. Troop, 30 Nova Scotia 339 (1898).

6. State v. Horton, 33 La. Ann. 289, 290 (1881).

7. People v. Daily, 135 Cal. 104, 67 Pac. 16 (1901).

§ 2596-1. *Connecticut*.—Wilcox v. Green, 28 Conn. 572 (1859).

Indiana.—Pulaski County v. Shields, 130 Ind. 6, 29 N. E. 385 (1891).

Maine.—Baring v. Calais, 11 Me. 463 (1834).

Maryland.—Wolfe v. Hauver, 1 Gill 84 (1843).

Massachusetts.—Fitzgerald v. Williams, 148 Mass. 462, 20 N. E. 100 (1889).

New Hampshire.—Badger v. Story, 16 N. H. 168 (1844).

New York.—Dodge v. Weill, 158 N. Y. 346, 53 N. E. 33 (1899).

Pennsylvania.—Brolaskey v. McClain, 61 Pa. St. 146 (1869).

both cases, testifies directly to the declaration itself, he states a fact when the unsworn statement is to be used as hearsay which tends to establish the truth of the facts asserted only in a circumstantial way. Superior to this, is the direct testimony of the original observer whose statement is reported to the tribunal. The fact, however, that the statement was made is provable by the primary evidence of any person who heard it.²

A statement which is irrelevant is to be excluded,³ not because it is a statement, but for the reason that under the fundamental rule⁴ it is not evidence, because not relevant. Should such relevancy appear, on the other hand, it is not objectionable that the declaration is self-serving.⁵ Nor need the relevancy, provided it exists, rest upon any particular ground, such as contemporaneous incorporation with a principal fact. On an inquiry as to what was actually said, however, the subjective mental condition of the declarant, the extent of his knowledge or his motive to misrepresent, are naturally immaterial. So long, therefore, as relevancy

2. In Georgia the rule prevails that the declarations of an injured person as to his bodily condition made to third persons are secondary evidence. They are not to be received so long as the declarant himself is able to testify as a witness and no necessity for admitting them appears. *Atlanta St. R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48 (1893).

3. Alabama.—*Powell v. Henry*, 96 Ala. 412, 11 So. 311 (1892).

Iowa.—*Van Sandt v. Cramer*, 60 Iowa 424, 15 N. W. 259 (1883); *Wadsworth v. Harrison*, 14 Iowa 272 (1862).

Maryland.—*Baptiste v. De Volunbrun*, 5 Harr. & J. 86 (1820).

Massachusetts.—*Nourse v. Nourse*, 116 Mass. 101 (1874).

Mississippi.—*Baker v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274 (1868); *Young v. Power*, 41 Miss. 197 (1866).

New York.—*Howard v. Upton*, 9 Hun 434 (1876); *Crounse v. Fitch*, 1 Abb. Dec. 475, 6 Abb. Pr. N. S. 185 (1868).

4. § 1711.

5. Alabama.—*Rogers v. Wilson*, Minor 407, 12 Am. Dec. 61 (1826).

California.—*Fette v. Lane*, 104 Cal. 17, 37 Pac. 914 (1894).

Indiana.—*Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22 (1871).

Kentucky.—*Thompson v. Stewart*, 5 Litt. 5 (1824).

Louisiana.—*State v. Thomas*, 30 La. Ann. 600 (1878).

Maryland.—*Cross v. Black*, 9 Gill. & J. 198 (1837).

Massachusetts.—*Walker v. Worcester*, 6 Gray 548 (1856).

New York.—*People v. De Graffe*, 44 Hun 622, 5 N. Y. Cr. R. 561, 6 N. Y. St. Rep. 412 (1887); *Robetaille's Case*, 5 City Hall Rec. 171 (1821).

Pennsylvania.—*Ellis v. Guggenheim*, 20 Pa. St. 287 (1853).

South Carolina.—*Martin v. Simpson*, 4 McCord 262 (1821).

Texas.—*Phillips v. State*, 19 Tex. App. 158 (1885); *Brunet v. State*, 12 Tex. App. 521 (1882); *McPhail v. State*, 9 Tex. App. 164 (1880).

United States.—*Emma Silver Min. Co. v. Park*, 8 Fed. Cas. No. 4,467, 14 Blatchf. 411 (1878).

is preserved the unsworn declaration may precede⁶ or follow,⁷ even by a considerable interval, a principal fact with which it is logically connected.

6. *Reel v. Reel*, 8 N. C. 248, 268, 9 Am. Dec. 632 (1821); *Gould v. Lakes*, 6 P. D. 1, 44 J. P. 698, 49 L. J. P. 59, 43 L. T. Rep. (N. S.) 382, 29 Wkly. Rep. 155 (1880). But see *Brookfield v. Warren*, 128 Mass. 287 (1880) (intention as to domicile); *Mitchell v. State*, 38 Tex. Cr. 170, 41 S. W. 816 (1897).

Ante litem motam.—The probative force of an extrajudicial statement, viewed as evidence of the facts asserted, is naturally increased when made *ante litem motam*. *Baker v. Kelly*, 41 Mass. 696, 93 Am. Dec. 274 (1868); *Hovey v. Stevens*, 12 Fed. Cas. No. 6745, 1 Woodb. & M. 290 (1846).

7. *Connecticut*.—*In re Johnson*, 40 Conn. 587 (1874).

Georgia.—*Thomas v. State*, 67 Ga. 460 (1881).

Iowa.—*Hannabalsen v. Sessions*, 116 Iowa 457, 90 N. W. 93, 93 Am. St. Rep. 250 (1902).

Maine.—*Baring v. Calais*, 11 Me. 463 (1834).

Massachusetts.—*Wilson v. Terry*, 9 Allen 214 (1864).

New York.—*Compare Betts v. Jackson*, 6 Wend. 173 (1830); *Jackson v. Kniffen*, 2 Johns. 31, 3 Am. Dec. 390 (1806).

North Carolina.—*Reel v. Reel*, 8 N. C. 248, 268, 9 Am. Dec. 632 (1821).

Pennsylvania.—*London v. Blythe*, 16 Pa. St. 532, 55 Am. Dec. 527 (1851) (willingness).

United States.—*Tobin v. Walkinshaw*, 23 Fed. Cas. No. 14,070, McAll. 186 (1856). But see *Smith v. Fenner*, 22 Fed. Cas. No. 13,046, 1 Gall. 170 (1812).

England.—*Gould v. Lakes*, 6 P. D. 1, 44 J. P. 698, 49 L. J. P. 59, 43 L. T. Rep. (N. S.) 382, 29 Wkly. Rep. 155 (1880); *Doe v. Allen*, 12 A. & E. 451,

9 L. J. Q. B. 395, 4 P. & D. 320, 40 E. C. L. 227 (1840); *Nelson v. Oldfield*, 2 Vern. Ch. 76, Eng. Reprint 659, (1688). But see *Provis v. Reed*, 5 Bing. 435, 15 E. C. L. 658 (1829).

Narration.—As an independently relevant statement cannot properly be used, *ex vi termini*, as proof of the facts asserted, the rule under consideration does not admit detailed narratives of distinctly past transactions.

Alabama.—*Morris v. McClellan*, 154 Ala. 639, 45 So. 641 (1908); *Bradford v. Haggerthy*, 11 Ala. 698 (1847) (declarations as to the domicile).

Arkansas.—*Beal-Doyle Dry Goods Co. v. Carr*, 85 Ark. 479, 108 S. W. 1053 (1908).

Connecticut.—*Ladd v. Abel*, 18 Conn. 513 (1847) (reasons assigned).

Illinois.—*Belskis v. Dering Coal Co.*, 246 Ill. 62, 92 N. E. 575 (1910), *revq.* judgment 151 Ill. App. 85 (1909); *Lamb v. Kerrens Donnewald Coal Co.*, 140 Ill. App. 195 (1908); *Chicago Union Tr. Co. v. Daly*, 129 Ill. App. 519 (1906) (statement of motorman subsequent to accident); *Legriss v. Marcotte*, 129 Ill. App. 67 (1906).

Kentucky.—*Louisville R. Co. v. Johnson's Admr.*, 131 Ky. 277, 115 S. W. 207, 20 L. R. A. (N. S.) 133 (1909).

Louisiana.—*Duperrier v. Dautrive*, 12 La. Ann. 664 (1856).

Maine.—*Atkinson v. Orneville*, 96 Me. 311, 52 Atl. 796 (1902) (intention as to domicile); *Bangor v. Brewer*, 47 Me. 97 (1860) (intention as to domicile); *Corinth v. Lincoln*, 34 Me. 310 (1850) (declarations as to domicile).

Evidence must be competent.—The making of the independently unsworn statements must be proved by proper evidence. Hearsay, for example extrajudicial statements used in their assertive capacity, will be rejected when offered for the purpose.⁸

Instances of the independently relevant use of unsworn statements as constitutively relevant are very numerous. On close parallel lines with this employment are found examples of the probative use of such declarations. A particular statement may be regarded as employed in either capacity, according as the specific words themselves effect the legal result which they contemplate, in which case the relevancy is constituent, or, on the other hand, tend to prove the existence of a relevant mental state, in which event their relevancy is probative.

§ 2597. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Declarations of By-standers.—The independently relevant statement may be that of a by-stander.¹ Wherever it can be fairly inferred

Maryland.—Leffler v. Allard, 18 Md. 545 (1862).

Massachusetts.—Salem v. Lynn, 13 Metc. 544 (1847).

Missouri.—Barker v. Lewis Pub. Co., 152 Mo. App. 706, 131 S. W. 924 (1910). See Alten v. Metropolitan St. R. Co., 133 Mo. App. 425, 113 S. W. 691 (1908).

New York.—Osborn v. Robbins, 37 Barb. 481 (1861).

Oklahoma.—Coalgate v. Hurst, 25 Okla. 588, 107 Pac. 657 (1910).

Tennessee.—Thomas v. State, 121 Tenn. 83, 113 S. W. 1041 (1908).

Utah.—Moyle v. Salt Lake City Cong. Soc., 16 Utah 69, 50 Pac. 806 (1897).

Washington.—Henry v. Seattle Electric Co., 55 Wash. 444, 104 Pac. 776 (1909) (declaration of street car conductor that motorman was "green at the business").

United States.—Brannen v. U. S., 20 Ct. Cl. 219 (1885).

See, also, §§ 2601, 2629, 2660.

⁸. State v. Leavitt, 87 Me. 72, 32 Atl. 787 (1894); State v. Hallenbeck,

67 Vt. 34, 30 Atl. 696 (1894) ("fresh complaint").

§ 2597-1. Alabama.—Weller & Co. v. Camp, 169 Ala. 275, 52 So. 929 (1910); Caddell v. State, 136 Ala. 9, 34 So. 191 (1903); Hall v. State, 130 Ala. 45, 30 So. 422 (1900).

California.—People v. Murphy, 45 Cal. 137 (1872).

District of Columbia.—U. S. v. Schneider, 21 D. C. 381 (1893).

Georgia.—Flanagan v. State, 64 Ga. 52 (1879). But see Harris v. State, 53 Ga. 640 (1875).

Kentucky.—Rains v. Commonwealth, 92 S. W. 276, 29 Ky. Law Rep. 66 (1906); Combs v. Com., 25 S. W. 592, 15 Ky. L. Rep. 620 (1894). See Collins v. Com., 70 S. W. 187, 24 Ky. L. Rep. 884 (1902).

Louisiana.—State v. Corcoran, 38 La. Ann. 949 (1886); State v. Moore, 38 La. Ann. 66 (1886). But see State v. Bellard, 50 La. Ann. 594, 23 So. 504, 69 Am. St. Rep. 461 (1898).

Massachusetts.—Hartnett v. Mc-

that the declarations of such a person affected the action of the participants themselves,² in some essential particular, or promoted the doing of some important act, the evidence will be received.³

Mahan, 168 Mass. 3, 46 N. E. 392 (1897).

Michigan.—People v. McArron, 121 Mich. 1, 79 N. W. 944 (1899).

Missouri.—State v. Kaiser, 124 Mo. 651, 28 S. W. 182 (1894); State v. Walker, 78 Mo. 380 (1883).

New Hampshire.—Clough v. Rockingham County Light & P. Co., 75 N. H. 84, 71 Atl. 223 (1908).

New Jersey.—State v. Johnson, 73 N. J. L. 199, 63 Atl. 12 (1906); Castner v. Sliker, 33 N. J. L. 95 (1869).

South Carolina.—Oliver v. Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307 (1902).

Tennessee.—Morton v. State, 91 Tenn. 437, 19 S. W. 225 (1892).

Texas.—Johnson v. State, 47 Tex. Cr. Rep. 523, 84 S. W. 824 (1905).

Utah.—Cromeenes v. San Pedro L. A. & S. L. R. Co., 37 Utah 475, 109 Pac. 10 (1910).

Washington.—Britton v. Washington Water Power Co., 59 Wash. 440, 110 Pac. 20 (1910); Sullivan v. Seattle Electric Co., 51 Wash. 71, 97 Pac. 1109 (1908).

"Courts, so far as they can, are disposed to receive in evidence whatever can throw any light on the matter in issue, and advance the search after truth. No doubt, for that reason, in the case of an exclamation by any one in a crowd, when an accident occurs, and the conduct of a particular person is in question, it may be asked whether some one did not call out 'shame!'; for it is part of the *res gestae*." Milne v. Leisler, 7 H. & N. 786 (1862), per Pollock, C. B.

2. Mere contemporaneousness.—The facts that the declaration offered was made while the *res gestae* was going on, is not sufficient ground for admit-

ting the statement. Some relation of causation is deemed essential. State v. Wagner, 61 Me. 178 (1873); State v. Henderson, 24 Oreg. 100, 32 Pac. 1030 (1893). Should no such connection appear, the statement will be rejected. Bradshaw v. Com., 10 Bush (Ky.) 576 (1874).

The exclamations of those who examined the body of the deceased immediately after the killing have, nevertheless, been held to be part of the *res gestae*. State v. Robinson, 12 Wash. 491, 41 Pac. 884 (1895).

3. Irrelevant statements.—According to judicial custom, evidence of the extrajudicial statement of a bystander which is not relevant for any legitimate purpose connected with the case is said to be rejected because "not part of the *res gestae*."

Kentucky.—Louisville & N. R. Co. v. Moore (C. A. 1912), 150 S. W. 849; Louisville & N. R. Co. v. Cox, 145 Ky. 716, 141 S. W. 59 (1911); Louisville & N. R. Co. v. Johnson's Admr., 131 Ky. 277, 115 S. W. 207, 20 L. R. A. (N. S.) 133 (1909).

Louisiana.—State v. Riley, 42 La. Ann. 995, 8 So. 469 (1890).

Missouri.—State v. Walker, 78 Mo. 380 (1883); State v. Swain, 68 Mo. 605 (1878).

Pennsylvania.—Shadowski v. Pittsburgh Ry. Co., 226 Pa. 537, 75 Atl. 730 (1910).

Texas.—Texas & N. O. R. Co. v. Bellar, 51 Tex. Civ. App. 154, 112 S. W. 323 (1908); Cortez v. State, 44 Tex. Cr. 169, 69 S. W. 536 (1902); Cook v. State, 22 Tex. App. 511, 3 S. W. 749 (1886); Halt v. State, 9 Tex. App. 571 (1880).

Exclamations of bystanders which do not affect the conduct of the participants may properly be rejected as

The same administrative course is adopted where the exclamation of one standing near is felt to be necessary or expedient for connecting other facts into the narrative of significant events.⁴

Statements are not objectionable as Hearsay.—These declarations of by-standers are not offered in their assertive capacity, i. e., as evidence of the facts stated.⁵

§ 2598. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Agency.—

Though the declarations of a person that he is acting as agent for another are of themselves inadmissible to establish the fact of agency,¹ yet extrajudicial statements may frequently create the relation of principal and agent,² in which case evidence thereof is properly received. Many questions raised in this connection, e. g., the relevancy of undisclosed instructions in limiting the apparent

irrelevant. *Bradshaw v. Com.*, 10 Bush (Ky.) 576 (1874). For example the declarations of spectators affirming that certain acts had been done by the accused, *State v. McCoy*, 111 Mo. 517, 20 S. W. 240 (1892), or that he is guilty of a particular offence, cannot be received. *Campbell v. State*, 30 Tex. App. 645, 18 S. W. 409 (1892). The same ruling is made in case of irrelevant statements sought to be introduced as part of a conversation. *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500 (1887).

4. *State v. Walker*, 78 Mo. 380 (1883).

5. It is essential to bear in mind that such statements are not offered as evidence that the fact is as stated. *Woolfalk v. State*, 81 Ga. 551, 8 S. E. 724 (1889); *Kaelin v. Com.*, 84 Ky. 354, 1 S. W. 594, 8 Ky. L. R. 293 (1886); *Bradshaw v. Com.*, 10 Bush (Ky.) 576 (1874); *State v. Brown*, 64 Mo. 367 (1877); *Felder v. State*, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777 (1887). See also *State v. Sneed*, 88 Mo. 138 (1885). And see *State v. McCoy*, 111 Mo. 517, 20 S. W. 240 (1892).

§ 2598-1. § 2729.

2. *Alabama.*—*Martin v. State*, 89

Ala. 115, 8 So. 23, 18 Am. St. Rep. 91 (1889); *Powers v. Harris*, 68 *Ala.* 409 (1880); *Steele v. McTyer's Admr.*, 31 *Ala.* 667, 70 Am. Dec. 516 (1858).

Florida.—*Porter v. Ferguson*, 4 *Fla.* 102 (1851).

Georgia.—*Dunlap v. Hooper*, 66 *Ga.* 211 (1880).

Kansas.—*Stainbrook v. Drawyer*, 25 *Kan.* 383 (1881).

Louisiana.—*State v. Duncan*, 8 *Rob.* 562 (1844).

Massachusetts.—*Porter v. Merrill*, 124 *Mass.* 534 (1878); *Brown v. Leach*, 107 *Mass.* 364 (1871).

Michigan.—*Moore v. Machen*, 124 *Mich.* 216, 82 N. W. 892 (1900).

Mississippi.—*McCleary v. Anthony*, 54 *Miss.* 708 (1877).

New York.—*Lennon v. Stiles*, 2 *Silv. Supreme* 145, 4 N. Y. Suppl. 487, *affirmed* 53 *Hun.* 630, 5 N. Y. Suppl. 870, 24 N. Y. St. Rep. 390 (1889).

North Carolina.—*Harper v. Dail & Bro.*, 92 N. C. 394 (1885).

Pennsylvania.—*Featherman's Administrator v. Miller*, 45 *Pa. St.* 96 (1863).

United States.—*Law v. Cross*, 1 *Black* 533, 17 *Led.* 185 (1861).

authority of the agent,³ have no proper relation to the law of evidence, but are simply matters of substantive law.

§ 2599. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Bailment.

— The existence and conditions of a bailment may be constituted by extrajudicial statements.¹ When made under such circumstances as to exclude the suspicion of fabrication, the statements of a bailor, upon delivering a sealed package to the bailee, as to what it contained, have been regarded as admissible in proof of the facts asserted.² The statement of the owner is said to be part of the *res gestae*.

§ 2600. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Claim.—

The true *res gestae* of an adverse or other claim to real or personal property may consist, in whole or in part, of extrajudicial statements.¹ The relevancy of such declarations may often be regarded as constituent of the right alleged to exist and they

3. Jackson v. Emmons, 119 Pa. St. 356, 13 Atl. 210 (1888).

§ 2599-1. *Alabama*.—Leffler v. Lehman, Durr & Co., 57 Ala. 433 (1876); Hooper v. Edwards, 25 Ala. 523 (1854); Donnell v. Thompson, 13 Ala. 440 (1848); Yarbrough v. Moss, 9 Ala. 382 (1846).

Georgia.—Myers v. Bernstein, 102 Ga. 579, 27 S. E. 681 (1897).

Illinois.—Comfort v. People, 54 Ill. 404 (1870).

Iowa.—Golden v. Vyse, 115 Iowa 726, 87 N. W. 691 (1901).

Kansas.—Greer v. Davis Mercantile Co., 86 Kan. 686, 121 Pac. 1121 (1912).

Kentucky.—Weil v. Silverstone, 6 Bush 698 (1869).

Massachusetts.—Davis v. Spooner, 3 Pick. 284 (1825).

Missouri.—Polston v. See, 54 Mo. 291 (1873).

North Carolina.—Evans v. Howell, 84 N. C. 460 (1881).

Pennsylvania.—Grim v. Bonnell,

78 Pa. St. 152 (1875); Knaues v. Shiffert, 58 Pa. St. 152 (1868).

Wisconsin.—Allen v. Seyfried, 43 Wis. 414 (1877); Resch v. Senn, 28 Wis. 286 (1871).

2. Ross v. Burlington Bank, 1 Aik. (Vt.) 43, 15 Am. Dec. 664 (1825) (banknotes).

§ 2600-1. *Alabama*.—Owen v. Moxon, 167 Ala. 615, 52 So. 527 (1910); Nelson v. Howison, 122 Ala. 573, 25 So. 211 (1898); Larkin v. Baty, 111 Ala. 303, 18 So. 666 (1895); Wisdom v. Reeves, 110 Ala. 418, 18 So. 13 (1895); Smith v. State, 103 Ala. 40, 16 So. 12 (1894); Nashville, etc., R. Co. v. Hammond, 104 Ala. 191, 15 So. 935 (1893).

Arkansas.—Butler v. Hines, 142 S. W. 509 (1912); King v. Slater, 96 Ark. 589, 133 S. W. 173 (1910); Sharp v. Johnson, 22 Ark. 79 (1860).

California.—Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. 1027 (1910) (right to the use of water); Hayne v. Hermann,

may be received in evidence in behalf of the party asserting

97 Cal. 259, 32 Pac. 171 (1893); Phelps v. McGloan, 42 Cal. 298 (1871); Cannon v. Stockmon, 36 Cal. 535, 95 Am. Dec. 205 (1869).

Colorado.—Stone v. O'Brien, 7 Colo. 458, 4 Pac. 792 (1884).

Florida.—Waterous v. Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139 (1894).

Georgia.—Godley v. Barnes, 132 Ga. 513, 64 S. E. 546 (1909); Ogden v. Dodge County, 97 Ga. 461, 25 S. E. 321 (1895); Knorr v. Raymond, 73 Ga. 749 (1884).

Illinois.—Rich v. Naffziger, 248 Ill. 455, 94 N. E. 1 (1911); Fyffe v. Fyffe, 106 Ill. 646 (1883); Amick v. Young, 69 Ill. 542 (1873).

Indiana.—Vannice v. Dungan, 41 Ind. App. 27, 83 N. E. 250 (1908); McDanel v. McDanel, 136 Ind. 603, 36 N. E. 286 (1893); Mans v. Bome, 123 Ind. 522, 24 N. E. 345 (1889); Remy v. Lilly, 22 Ind. App. 109, 53 N. E. 387 (1889).

Iowa.—Ohde v. Hoffman, 90 N. W. 750 (1902); Allbright v. Hannah, 103 Iowa 98, 72 N. W. 421 (1897); Wilson v. Irish, 62 Iowa 260, 17 N. W. 511 (1883); Blake v. Graves, 18 Iowa 312 (1865).

Kansas.—Liebheit v. Enright, 77 Kan. 321, 94 Pac. 203 (1908); Hubbard v. Cheney, 76 Kan. 222, 91 Pac. 793, 123 Am. St. Rep. 129 (1907); Reiley v. Haynes, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 737 (1888); State v. Gurnee, 14 Kan. 111 (1874).

Kentucky.—Young v. Adams, 14 B. Mon. 127, 58 Am. Dec. 654 (1853); West v. Price's Heirs, 2 J. J. Marsh 380 (1829); Smith v. Morrow, 7 T. B. Mon. 234 (1828).

Louisiana.—Davidson v. Matthews, 3 La. Ann. 316 (1848).

Maine.—Harriman v. Hill, 14 Me. 127 (1836).

Maryland.—Gantt v. Trott, 107 Md. 325, 68 Atl. 612 (1908).

Massachusetts.—Marcy v. Stone, 8 Cush. 4, 54 Am. Dec. 736 (1858).

Minnesota.—Brown v. Kohont, 61 Minn. 113, 63 N. W. 248 (1895).

Missouri.—Dunlap v. Griffith, 146 Mo. 283, 47 S. W. 917 (1898); Bagnell v. Sweet Springs Chemical Bank, 76 Mo. App. 121 (1898); Harper v. Morse, 114 Mo. 317, 21 S. W. 517 (1893); Sutton v. Casselleggi, 5 Mo. App. 111 (1878); Thomas v. Wheeler, 47 Mo. 363 (1871); State v. Schneider, 35 Mo. 533 (1865).

Nevada.—Hanson v. Chiatovich, 13 Nev. 395 (1878); Rollins v. Strout, 6 Nev. 150 (1870).

New Hampshire.—Hunt v. Haven, 56 N. H. 87 (1875); Bell v. Woodward, 46 N. H. 315 (1865); Hodgdon v. Shannon, 44 N. H. 572 (1863).

New Jersey.—Lindsley v. McGrath, 62 N. J. Eq. 478, 50 Atl. 236 (1901).

New York.—Gilmartin v. Buchanan, 119 N. Y. Suppl. 489, 134 App. Div. 587 (1909); Swettenham v. Leary, 18 Hun 284 (1879); Howell v. Huyck, 2 Abb. Dec. 423, 4 Transcr. App. 202 (1867); Sheldon v. Van Slyke, 16 Barb. 26 (1852).

North Carolina.—Steadman v. Steadman, 143 N. C. 474, 55 S. E. 784 (1906); Halliday v. McMillan, 83 N. C. 270 (1880); Roberts v. Roberts, 82 N. C. 29 (1880); Yates v. Yates, 76 N. C. 142 (1877); Kirby v. Masten, 70 N. C. 540 (1874).

Pennsylvania.—Crawford v. Ritter, 1 Penny. 29 (1881); Duffey v. Bellefonte Presb. Congregation, 48 Pa. St. 46 (1864); Sample v. Robb, 16 Pa. St. 305 (1851).

South Carolina.—Holden v. Cantrell, 88 S. C. 281, 70 S. E. 815 (1911); Boozer v. Teague, 27 S. C. 348, 3 S. E. 551 (1887).

Tennessee.—Phoenix F. & M. Ins. Co. v. Shoemaker, 95 Tenn. 72, 31 S. W. 270 (1895); Carnahan v. Wood, 2 Swan 500 (1852); Marley v. Rodgers, 5 Yerg. 217 (1833).

Texas.—Baldwin v. McCullough, (Civ. App. 1912) 146 S. W. 203;

it.² As evidence of the facts asserted these extrajudicial statements of adverse claim are objectionable as hearsay and are to be excluded.³ It follows that the assertions of a declarant, as that he

Conroy v. Sharman, 134 S. W. 244 (1911); *Gunn v. Wynne*, (Civ. App. 1897) 43 S. W. 290; *Trinity County Lumber Co. v. Pinckard*, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015 (1893); *Fowler v. Simpson*, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370 (1891); *Hickman v. Gillum*, 66 Tex. 314, 1 S. W. 339 (1886).

Vermont.—*Bennett v. Camp*, 54 Vt. 36 (1882).

West Virginia.—*High v. Pancake*, 42 W. Va. 602, 26 S. E. 536 (1896).

Wisconsin.—*Lamareux v. Huntley*, 68 Wis. 24, 31 N. W. 331 (1887); *Roebke v. Andrews*, 26 Wis. 311 (1870).

United States.—*Ward v. Cochran*, 71 Fed. 127, 18 C. C. A. 1 (1895); *Dodge v. Freedman's Sav., etc., Co.*, 93 U. S. 379, 23 L. ed. 920 (1876); *Holmead v. Chesapeake, etc., Canal Co.*, 12 Fed. Cas. No. 6,626, 1 Hayw. & H. 77 (1842).

See also *Butts v. Purdy* (Oreg. 1912), 125 Pac. 313.

The claim may properly be made in writing. *Benbow v. Harvin* (S. C. 1912), 75 S. E. 414 (letter).

After an extended lapse of time evidence of this class is received by judicial administration, it being reasonably assumed that the original declarants have deceased. *Conroy v. Sharman* (Tex. Civ. App. 1911), 134 S. W. 244.

Under a code provision that the declarations of a person in possession of property, in favor of his own title, are admissible to prove his adverse possession such declarations are admissible for no other purpose and will not be received for the purpose of proving a gift. *Rucker v. Rucker*, 136 Ga. 830, 72 S. E. 241 (1911).

2. Should the declarations as to claim not be specifically used but em-

ployed rather as tending to prove a relevant mental state, their relevancy may well be regarded as probative.

3. *Alabama*.—*McBride v. Lowe*, 57 So. 832 (1912); *Central R., etc., Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 339 (1884); *Humes v. O'Bryan & Washington*, 74 Ala. 64 (1883); *McLemore v. Pinkston*, 31 Ala. 266, 68 Am. Dec. 167 (1857).

Colorado.—*Stone v. O'Brien*, 7 Colo. 458, 4 Pac. 792 (1884).

Connecticut.—*Sears v. Hayt*, 37 Conn. 406 (1870); *Avery v. Clemons*, 18 Conn. 306, 46 Am. Dec. 323 (1847).

Georgia.—*Hendricks v. McDaniel*, 80 Ga. 102, 5 S. E. 194 (1887).

Indiana.—*Shirts v. Irons*, 37 Ind. 98 (1871).

Iowa.—*Pond v. Okey*, 70 Iowa 244, 30 N. W. 500 (1886).

Massachusetts.—*Morrill v. Titcomb*, 8 Allen 100 (1864); *McGough v. Wellington*, 4 Allen 502 (1862).

Missouri.—*Kansas City, etc., R. Co. v. Smith*, 156 Mo. 608, 57 S. W. 555 (1900); *Bagnell v. Sweet Springs Chemical Bank*, 76 Mo. App. 121 (1898); *Sutton v. Casselleggi*, 5 Mo. App. 111 (1878); *Turner v. Belden*, 9 Mo. 797 (1846).

New Hampshire.—*Smith v. Powers*, 15 N. H. 546 (1844).

New York.—*Skinner v. Odenbach*, 85 Hun 595, 33 N. Y. Suppl. 282, 67 N. Y. St. Rep. 102 (1895).

North Carolina.—*Roberts v. Roberts*, 82 N. C. 29 (1880); *Swindell v. Warden*, 52 N. C. 575 (1860).

Ohio.—*Cheeseman v. Kyle*, 15 Ohio St. 15 (1864).

Oregon.—*Besser v. Joyce*, 9 Oreg. 310 (1881).

Texas.—*Duren v. Bottoms*, (Tex. Civ. App. 1910) 129 S. W. 376; *Hickman v. Gillum*, 66 Tex. 314, 1

had not made a gift of certain property to anyone and was joking if he said so,⁴ which do not tend by reason of their own existence to establish the nature and incidents of a claim to land or chattels, will be excluded as hearsay, probably as narrative.⁵ For analogous reasons declarations as to *future* conduct⁶ are as irrelevant for the present purpose as those relating to past transactions. That the declarant should be competent to testify as a witness is not required,⁷ no credit being reposed in him.⁸

§ 2601. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Claim*); Narrative Incompetent.—In and of itself a detail of past transactions does not assist to constitute a right or liability. Verbal acts contained in it cannot, therefore, be part of the *res gestae*, properly so-called. In the present connection what the tenant or holder of property says by way of narrative as to the history of his

S. W. 339 (1886); *Mooring v. McBride*, 62 Tex. 309 (1884).

United States.—*Dodge v. Freedman's Sav., etc., Co.*, 93 U. S. 379, 23 L. ed. 920 (1876).

Canada.—*Doe v. Murray*, 5 N. Brunsw. 335 (1844).

Adjoining owner.—Some additional element of probative force is essential under such circumstances if the declaration is to be received. Frequently this is found in the circumstance that the statement is against the proprietary or pecuniary interest of the declarant. Thus, the declarations of a deceased adjoining owner regarding the position of his corner are admissible if against his interest; otherwise not. *Chrisco v. Yow*, 153 N. C. 434, 69 S. E. 422 (1910).

4. *Nelson v. Iverson*, 17 Ala. 216 (1850).

5. § 2601.

6. *Comins v. Comins*, 21 Conn. 413 (1851).

7. *State v. Emory*, 51 N. C. 133 (1858).

8. **Reputation** cannot be used to establish the fact of title by prescription. *Howland v. Crocker*, 7 Allen

(Mass.) 153 (1863). But see also *Davis v. Butterbach*, 2 Yeates (Pa.) 211 (1797). The question as to whether a possession or user was open and notorious may well be affected by the existence of a reputation on the subject.

Alabama.—*Louisville, etc., R. Co. v. Hall*, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710 (1888); *Hodges v. Coleman*, 76 Ala. 103 (1884).

Connecticut.—*Russell v. Stocking*, 8 Conn. 236 (1830).

Florida.—*Watrous v. Morrison*, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139 (1894).

Georgia.—*Kuglar v. Garner*, 74 Ga. 765 (1885).

Texas.—*Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325 (1888).

Privity.—Under the substantive law the declarations of one in possession of land do not affect a prior or subsequent holder unless some relation of privity be established. *Smith v. Stanley* (Va. 1912), 75 S. E. 742.

possession¹ or the nature of his title² is not a relevant fact, though

§ 2601-1. *Alabama*.—Wilkinson v. Bottoms, 56 South. 948 (1911); Ray v. Jackson, 90 Ala. 513, 7 So. 747 (1890); Central R., etc., Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353 (1884); Dothard v. Denson, 72 Ala. 541 (1882); Thompson v. Mawhinney & Smith, 17 Ala. 362, 52 Am. Dec. 176 (1850).

Connecticut.—Comins v. Comins, 21 Conn. 413 (1851).

Georgia.—Rucker v. Rucker, 136 Ga. 830, 72 S. E. 241 (1911) (gift).

Kansas.—Broughan v. Broughan, 10 Kan. App. 575, 61 Pac. 874, *affirmed*, 62 Kan. 724, 64 Pac. 608 (1900).

Kentucky.—Brubaker v. Poage, 1 T. B. Mon. 123 (1824).

Maine.—Crane v. Marshall, 16 Me. 27, 33 Am. Dec. 631 (1839).

Missouri.—Hannibal, etc., R. Co. v. Clark, 68 Mo. 371 (1878).

North Carolina.—Bynum v. Thompson, 25 N. C. 578 (1843).

Pennsylvania.—Collins v. Lynch, 167 Pa. St. 635, 31 Atl. 921 (1895); Feig v. Meyers, 102 Pa. St. 10 (1882).

Texas.—Campbell v. San Antonio Machine & Supply Co., 133 S. W. 750 (1911); McDow v. Rabb, 56 Tex. 154 (1882).

Vermont.—Swerdferger v. Hopkins, 67 Vt. 136, 31 Atl. 153 (1894).

Declarations asserting the existence of a possession now over are not competent. Campbell v. San Antonio Machine & Supply Co., 133 S. W. 750 (1911).

2. Baker v. Drake, 148 Ala. 513, 41 So. 845 (1906); Doe v. Clayton, 81 Ala. 391, 2 So. 24 (1886); Vincent v. State, 74 Ala. 274 (1883); Dothard v. Denson, 72 Ala. 541 (1882).

District of Columbia.—Samaha v. Mason, 27 App. D. C. 470 (1906) (personalty).

Missouri.—Carter v. Feland, 17 Mo. 383 (1853).

Pennsylvania.—Feig v. Meyers, 102 Pa. St. 10 (1882); Hood v. Hood, 2 Grant. Cas. 229 (1858).

Wisconsin.—Roebke v. Andrews, 26 Wis. 311 (1870).

See, however, Gantt v. Trott, 107 Md. 325, 68 Atl. 612 (1908).

A record title cannot be proved by extrajudicial statements claiming one Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 S. E. 255 (1897); High v. Pancake, 42 W. Va. 602, 26 S. E. 536 (1896).

Opinion.—The inference or conclusion of one in possession of property as to the validity of the title under which he claims is not admissible.

Connecticut.—Smith v. Martin, 17 Conn. 399 (1845).

Maine.—Crane v. Marshall, 16 Me. 27, 33 Am. Dec. 631 (1839).

Massachusetts.—Morgan v. Larned, 10 Mete. 50 (1845).

Missouri.—State v. Groeschke, 16 Mo. App. 557 (1885); Watson v. Bisell, 27 Mo. 220 (1858); Carter v. Feland, 17 Mo. 383 (1853).

North Carolina.—Roberts v. Roberts, 82 N. C. 29 (1880).

Oregon.—Low v. Schaffer, 24 Oreg. 239, 33 Pac. 678 (1893).

Pennsylvania.—Colt v. Selden, 5 Watts 525 (1836).

Texas.—McDow v. Rabb, 56 Tex. 154 (1882).

His view as to the general nature of his title is equally incompetent. Wardlaw v. Hammond, 9 Rich. Law (S. C.) 454 (1856). He is not entitled to surmise how much land his claim covers. Bynum v. Thompson, 25 N. C. 578 (1843). Nor is his inference as to the legal consequences of certain changes in the possession of those under whom he holds regarded as competent. Bell v. Adams, 81 N. C. 118 (1879). In like manner, his opinion as to the value of a claim in opposition to his own is excluded. Sharp v. Johnson, 22 Ark. 79 (1860);

made while he is still in possession.³ The same rule applies to declarations regarding the details of the speaker's title,⁴ to his claim that it is "good,"⁵ and to like assertions made by him, as that the declarant actually owns a given quantity of land.⁶ Such declarations not being received in favor of the person who makes⁷

Colt v. Selden, 5 Watts (Pa.) 525 (1836). Even his confident conclusion that his own possession is adverse has no legitimate influence in establishing that fact. *Crane v. Marshall*, 16 Me. 27, 33 Am. Dec. 631 (1839); *Alden v. Gilmore*, 13 Me. 178 (1836); *Bynum v. Thompson*, 25 N. C. 578 (1843); *McDow v. Rabb*, 56 Tex. 154 (1882).

3. *Allen v. Prater*, 30 Ala. 458 (1857); *Martin v. Hardesty*, 27 Ala. 458, 62 Am. Dec. 773 (1855); *Collins v. Lynch*, 167 Pa. St. 635, 31 Atl. 921 (1895); *Hood v. Hood*, 2 Grant Cas. (Pa.) 229 (1858); *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. ed. 113 (1880).

Intent.—On an action of forcible entry and detainer, a narrative account of the mental state with which an entry was made is inadmissible. *Brubaker v. Poage*, 1 T. B. Mon. (Ky.) 123 (1824).

Payment.—The assertions of one in possession of land that he has paid for it cannot be received. *Feig v. Meyers*, 102 Pa. St. 10 (1882).

4. *Alabama*.—*Doe v. Clayton*, 81 Ala. 391, 2 So. 24 (1886).

Illinois.—*Rigg v. Cook*, 9 Ill. 336, 42 Am. Dec. 462 (1847).

Missouri.—*Carter v. Feland*, 17 Mo. 383 (1853).

North Carolina.—*Bell v. Adams*, 81 N. C. 118 (1879).

Pennsylvania.—*Feig v. Meyers*, 102 Pa. St. 10 (1882).

South Carolina.—*Wardlaw v. Hammond*, 9 Rich. Law 454 (1856).

Wisconsin.—*Roebke v. Andrews*, 26 Wis. 311 (1870).

The nature of an opposing claim stands in the same position. *Sharp*

v. Johnson, 22 Ark. 79 (1860); *Colt v. Selden*, 5 Watts (Pa.) 525 (1836).

5. *Connecticut*.—*Smith v. Martin*, 17 Conn. 399 (1845).

Maine.—*Crane v. Marshall*, 16 Me. 27, 33 Am. Dec. 631 (1839).

Massachusetts.—*Morgan v. Larned*, 10 Mete. 50 (1845).

Missouri.—*Watson v. Bissell*, 27 Mo. 220 (1858).

North Carolina.—*Roberts v. Roberts*, 82 N. C. 29 (1880).

Oregon.—*Low v. Schaffer*, 24 Oreg. 239, 33 Pac. 678 (1893).

Pennsylvania.—*Colt v. Selden*, 5 Watts 525 (1836).

Texas.—*McDow v. Rabb*, 56 Tex. 154 (1882).

The declarant cannot, for example, effectively state, in proof of the truth of what he asserts, that he holds a record title to the property in question. *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255 (1897); *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536 (1896).

6. *Bynum v. Thompson*, 25 N. C. 578 (1843).

The fact that the owner or tenant holds under color of title may be a highly material one, as bearing upon the nature of his claim and extrajudicial statements furnish an unexceptionable method of constituting or proving the nature of the holding. The narrative accounts, however, which the speaker gives have little probative tendency to show that his statements are true.

7. *McLeod v. Bishop*, 110 Ala. 640, 20 So. 130 (1895); *Smith v. Martin*, 17 Conn. 399 (1845).

What A paid for property cannot be proved by his assertions while

them, a *fortiori*, they will not be admissible in favor of⁸ those standing in privity with him.⁹ The solemnity of the circumstances attendant upon the making of these narratives as where the declarant is at the point of death,¹⁰ is a matter of no consequence in this connection. Not being relevant as secondary evidence, the urgent necessity for employing these declarations, e. g., that the speaker has deceased,¹¹ does not render the evidence admissible.

Such accounts of past events cannot well be regarded as constitutently relevant, and only as tending to prove the truth of the facts asserted can they be considered as being probatively so. When thus regarded, they are, so far as not already intrinsically irrelevant, excluded by the express terms of the rule against hearsay.¹²

A *question of administration* is presented to the court where the statements come to the tribunal in a blended form, partly narrative hearsay and partly extrajudicial statements independently relevant as fairly tending to establish or constitute the claim, under which property is being held. Under such conditions, the judge may properly be guided in large measure by the state of the case, especially considering how necessary the evidence may be to proof of the proponent's case and the extent, if any, to which the declarations are calculated to mislead the jury. It follows that the evidence may, at times, be properly rejected.¹³

in possession. Feig v. Meyers, 102 Pa. St. 10 (1882).

8. Holmes v. Sawtelle, 53 Me. 179 (1865); Cheeseman v. Kyle, 15 Ohio St. 15 (1864); Curtis v. Wilson, 2 Tex. Civ. App. 646, 21 S. W. 787 (1893).

9. Connecticut.—Smith v. Martin, 17 Conn. 399 (1845).

Massachusetts.—Osgood v. Coates, 1 Allen 77 (1861).

Missouri.—State v. Groschke, 16 Mo. App. 557 (1885).

New Hampshire.—Smith v. Powers, 15 N. H. 546 (1844).

New York.—Jackson v. Vredenburg, 1 Johns. 159 (1806).

Pennsylvania.—Hood v. Hood, 2 Grant 229 (1858).

Texas.—Gilbert v. Odum, 69 Tex. 670, 7 S. W. 510 (1888).

10. Jackson v. Vredenburg, 1 Johns. (N. Y.) 159 (1806).

11. Watson v. Bissell, 27 Mo. 220 (1858); Smith v. Powers, 15 N. H. 546 (1844); McSween v. McCown, 23 S. C. 342 (1885).

12. Connecticut.—Saugatuck Cong. Soc. v. East Saugatuck School Dist., 53 Conn. 478, 2 Atl. 751 (1885).

Delaware.—Pleasanton v. Simmons, 2 Pennewill 477, 47 Atl. 697 (1900).

Georgia.—Jaffray v. Brown, 91 Ga. 57, 16 S. E. 223 (1892).

Texas.—Hays v. Hays, 66 Tex. 606, 1 S. W. 895 (1886).

Vermont.—Wood v. Willard, 36 Vt. 82, 84 Am. Dec. 659 (1863).

13. Sharp v. Johnson, 22 Ark. 79 (1860); Wickliffe v. Ensor, 9 B. Mon. (Ky.) 253 (1848).

§ 2602. *Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Claim*); Real Estate.—Claim to the ownership of real estate may well be established by the extrajudicial statements of one in possession.¹ In this manner the relevant mental state of exclusive and adverse claim may properly be constituted.² As a matter of substantive law, this psychological fact is equally competent whether the inquiry relate to a question of user³ or of possession.⁴ The extra-

§ 2602-1. *Hampe v. Sage* (Kan. 1912), 125 Pac. 53; *Allen v. Morris* (Mo. 1912), 148 S. W. 905; *Faulkner v. Rocket*, 33 R. I. 152, 80 Atl. 380 (1911).

2. "It is the intention with which the acts are done that gives them their character. If done with no intention of acquiring possession they did not give the plaintiff possession.' It is conceded that proof of the making of the survey is proper. But the effect to be given to that act depends, as above stated, upon the intention with which it was done. The question rejected seeks to elicit the declarations made by the plaintiffs, at the time of making the survey, respecting the object for which the survey was being made. An answer responsive to this question would have been admissible as part of the *res gestae*. Such declarations are those made at the time of the act done, and which are calculated to unfold its nature and quality." *Stephens v. McCloy*, 36 Iowa 659, 661 (1873) per Day, J.

3. *Sears v. Hayt*, 37 Conn. 406 (1870); *Bennison v. Cartwright*, 5 B. & S. 1, 117 E. C. L. 1 (1864).

"The act of plowing and cultivating the ground over which the alleged way passed was an important fact in the case. Unexplained it constituted an interruption of the use, and was evidence tending to prevent the acquisition of a right. It was in itself an assertion of a right to cultivate the ground, and, impliedly, a denial of the right of the defendant, or those

under whom he claimed, to pass over the same. The declaration as received only tended to give that effect to the act, and to that extent only did it characterize or qualify it." *Sears v. Hayt*, 37 Conn. 406 (1870), per Carpenter, J.

4. *Alabama*.—*Chambers v. Morris*, 156 Ala. 626, 48 So. 687 (1909); *Henry v. Brown*, 143 Ala. 446, 39 So. 325 (1905); *Nashville, etc., R. Co. v. Hammond*, 104 Ala. 191, 15 So. 935 (1894); *Doe v. Clayton*, 81 Ala. 391, 2 So. 24 (1887); *Hancock v. Kelly*, 81 Ala. 368, 2 So. 281 (1887); *Dot hard v. Denson*, 72 Ala. 541 (1882).

Arkansas.—*Seawell v. Young*, 77 Ark. 309, 91 S. W. 544 (1905).

California.—*Stockton Sav. Bank v. Staples*, 98 Cal. 189, 32 Pac. 936 (1893).

Connecticut.—*Comins v. Comins*, 21 Conn. 413 (1851).

Florida.—*Watrous v. Morrison*, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139 (1894).

Georgia.—*Ogden v. Dodge County*, 97 Ga. 461, 25 S. E. 321 (1895); *Walker v. Hughes*, 90 Ga. 52, 15 S. E. 912 (1892); *Wood v. Crawford*, 75 Ga. 733 (1885); *Huggins v. Huggins*, 71 Ga. 66 (1883); *Clements v. Wheeler*, 62 Ga. 53 (1878).

Illinois.—*Kotz v. Belz*, 178 Ill. 434, 53 N. E. 367 (1899); *Fyffe v. Fyffe*, 106 Ill. 646 (1883); *Abend v. Mueller*, 11 Ill. App. 257 (1882); *Amick v. Young*, 69 Ill. 542 (1873).

Iowa.—*Dougherty v. McManus*, 36 Iowa 657 (1873).

Kentucky.—*Mann v. Cavanaugh*,

judicial statements may extend so far as to cover the fact that the party entitled to the land actually knew⁵ of the nature of the claim under which it was being held. Such declarations may relate not only to the *character* of the holding, but to its *extent*, in point of territory,⁶ or as to the source of title upon which reliance

110 Ky. 776, 62 S. W. 854, 23 Ky. L. R. 238 (1901).

Maine.—*Emmet v. Perry*, 100 Me. 139, 60 Atl. 872 (1905).

Maryland.—*New Windsor v. Stockdale*, 95 Md. 196, 52 Atl. 596 (1902).

Massachusetts.—*Luce v. Parsons*, 77 N. E. 1032 (1906); *O'Connell v. Cox*, 179 Mass. 250, 60 N. E. 580 (1901); *Kingsford v. Hood*, 105 Mass. 495 (1870).

Michigan.—*Youngs v. Cunningham*, 57 Mich. 153, 23 N. W. 626 (1885).

Minnesota.—*Brown v. Kohout*, 61 Minn. 113, 63 N. W. 248 (1895).

Missouri.—*Harper v. Morse*, 114 Mo. 317, 21 S. W. 517 (1892); *Mississippi County v. Vowels*, 101 Mo. 225, 14 S. W. 282 (1890). See also *Whitaker v. Whitaker*, 175 Mo. 1, 74 S. W. 1029 (1903).

Montana.—*Farmers' Bank of Polo v. Barbee*, 198 Mo. 465, 95 S. W. 225 (1906); *Swope v. Ward*, 185 Mo. 316, 84 S. W. 895 (1904).

New Hampshire.—*Smith v. Putnam*, 62 N. H. 369 (1882); *Hunt v. Haven*, 56 N. H. 87 (1875).

New Jersey.—*Lindsley v. McGrath*, 62 N. J. Eq. 478, 50 Atl. 236 (1901).

New York.—*Edmonston v. Edmonston*, 13 Hun 133 (1878); *Morss v. Salisbury*, 48 N. Y. 636 (1872); *Jackson v. Vredenburgh*, 1 Johns. 159 (1806). See also *Kellum v. Mission of Immaculate Virgin*, etc., 82 N. Y. App. Div. 523, 81 N. Y. Suppl. 603 (1903).

North Carolina.—*Bunch v. Bridgers*, 101 N. C. 58, 7 S. E. 534 (1888); *Phipps v. Pierce*, 94 N. C. 514 (1886); *Yates v. Yates*, 76 N. C. 142 (1877). See *Ratliff v. Rat-*

liff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963 (1902).

Pennsylvania.—*Kennedy v. Wible*, 11 Atl. 98 (1887); *Crawford v. Ritter*, 1 Pennp. 29 (1881); *Sheaffer v. Eakman*, 56 Pa. St. 144 (1867); *Potts v. Everhart*, 26 Pa. St. 493 (1856); *Sample v. Robb*, 16 Pa. St. 305 (1851).

Tennessee.—*Carnahan v. Wood*, 2 Swan 500 (1852).

Texas.—*Baldwin v. McCullough* (Tex. Civ. App. 1912), 146 S. W. 203; *Lochhausen v. Laughter*, 4 Tex. Civ. App. 291, 23 S. W. 513 (1893); *Curtis v. Wilson*, 2 Tex. Civ. App. 646, 21 S. W. 787 (1893); *Fowler v. Simpson*, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370 (1891). See also *Matador Land & Cattle Co. v. Cooper*, 39 Tex. Civ. App. 99, 87 S. W. 235 (1905).

Vermont.—*Bennett v. Camp*, 54 Vt. 36 (1882).

West Virginia.—*High v. Pancake*, 42 W. Va. 602, 26 S. E. 536 (1896).

Wisconsin.—*Lamareux v. Meyers*, 68 Wis. 24, 31 N. W. 331 (1887); *Roebke v. Andrews*, 26 Wis. 311 (1870).

United States.—*Ward v. Cochran*, 71 Fed. 127, 18 C. C. A. 1 (1895); *Dodge v. Freedman's Sav., etc., Co.*, 93 U. S. 379, 23 L. ed. 20 (1876).

Abandonment.—The extrajudicial declaration may properly be employed to negative the fact and intention to abandon the possession. *Holliday v. McMillan*, 83 N. C. 270 (1880).

5. *Dodge v. Stacy*, 39 Vt. 558 (1867).

6. *Connecticut*.—*Reading v. Weston*, 7 Conn. 143, 18 Am. Dec. 89 (1823).

is being placed,⁷ so far as this circumstance is deemed relevant to the inquiry.⁸ In the same way, the claim under which an entry is made may be proved by the extrajudicial declaration of the entrant.⁹ As often happens in this connection, the incidents of the rule relating to unsworn statements used as proof of the facts asserted and said to be admissible as part of the *res gestae* are applied to these independently relevant statements. It is, for example, said that declarations concerning a relevant mental state with which an entry was made must have been contemporaneous with the entry itself.¹⁰ Undoubtedly the fact of a contemporaneous announcement adds to the probative force of the evidence and is a useful incident of proof. The ground of admissibility, however,

Kentucky.—Smith v. Morrow, 7 T. B. Mon. 234 (1828).

Michigan.—Bower v. Earl, 18 Mich. 367 (1869).

New York.—Skinner v. Odenbach, 85 Hun 595, 33 N. Y. Suppl. 282, 67 N. Y. St. Rep. 102 (1895); Donahue v. Case, 61 N. Y. 631 (1874).

South Carolina.—Forrest v. Trammell, 1 Bailey 77 (1828).

Nature of title.—Much may be determined as to the territory covered by a claim by considering the color of title, if any, upon which it is being based. Barrett v. Kelly, 131 Ala. 378, 30 So. 824 (1901); Smith v. Keyser, 115 Ala. 455, 22 So. 149 (1896).

7. *Alabama*.—Hancock v. Kelly, 81 Ala. 368, 2 So. 281 (1886) (parol grant).

Connecticut.—Foote v. Brown, 81 Conn. 218, 70 Atl. 699 (1908); Comins v. Comins, 21 Conn. 413 (1851) (parol gift).

Kentucky.—Com. v. Fletcher, 6 Bush 171 (1869).

Maryland.—Gantt v. Trott, 107 Md. 325, 68 Atl. 612 (1908).

Missouri.—Mississippi County v. Vowles, 101 Mo. 225, 14 S. W. 282 (1890) (purchase).

New Hampshire.—Blake v. White, 13 N. H. 267 (1842).

New York.—Edmonston v. Edmonston, 13 Hun 133 (1878) (parol

gift); Corbin v. Jackson, 14 Wend. 619, 28 Am. Dec. 550 (1835) (power of attorney); Jackson v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330 (1809) (ancient will).

North Carolina.—Steadman v. Steadman, 143 N. C. 345, 55 S. E. 784 (1906); Foust v. Trice, 53 N. C. 290 (1860).

Pennsylvania.—Sheaffer v. Eakman, 56 Pa. 144 (1867).

South Carolina.—Smythe v. Tolbert, 22 S. C. 133 (1884) (common source).

Texas.—Wells v. Burts, 3 Tex. Civ. App. 430, 22 S. W. 419 (1893) (lost deed); Fowler v. Simpson, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370 (1891) (descent).

West Virginia.—Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 S. E. 255 (1897).

8. Pomeroy v. Bailey, 43 N. H. 118 (1861).

9. Rowley v. Hughes, 40 Ill. 316 (1866); Hardisty v. Glenn, 32 Ill. 62 (1863); Stephens v. McCloy, 36 Iowa 659 (1873); Davis v. Campbell, 23 N. C. 482 (1841); Hood v. Hood, 2 Grant (Pa.) 229 (1858); Miles v. Miles, 8 Watts & S. (Pa.) 135 (1844); Bennett v. Hethington, 16 Serg. & R. (Pa.) 193 (1827).

10. Hood v. Hood, 2 Grant (Pa.) 229 (1858).

is that the mental state is a relevant fact and that an unsworn statement is a proper method of proving it.¹¹

Self-serving statements.— Whatever may be true of the unsworn statement when used as proof of the facts asserted, it is not objectionable, in the present connection, that the declaration should be self-serving,¹² provided that it is made in good faith. The fact of making such statements may be availed of not only by the declarant himself, but by his creditors,¹³ privies¹⁴ and other representatives.¹⁵

§ 2603. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Claim; Real Estate*); Boundaries.— The territorial extent of the estate, as determined by its boundaries, which is claimed by one in actual possession¹ of the premises may be shown by independently rele-

11. *Inference excluded.*— The language, i. e., the words, of the unsworn statement are usually required by administration rather than the understanding or inference of a witness regarding them. *Hale v. Silloway*, 1 Allen (Mass.) 21 (1861).

12. *Alabama.*— *Clealand v. Huey*, 18 Ala. 343 (1850); *Gary v. Terrill*, 9 Ala. 206 (1846).

Georgia.— *Bowman v. Owens*, 133 Ga. 49, 65 S. E. 156 (1909).

Kansas.— *Stone v. Bird*, 16 Kan. 488 (1876).

South Carolina.— *Holden v. Cantrell*, 88 S. C. 281, 70 S. E. 815 (1911).

Texas.— *Wallace v. Wilcox*, 27 Tex. 60 (1863).

Vermont.— *Bennett v. Camp*, 54 Vt. 36 (1882). But see *Turgeon v. Woodward*, 83 Conn. 537, 78 Atl. 577 (1910).

Declarations of a person in possession of land in favor of his own title are admissible to prove that such possession was adverse. *Bowman v. Owens*, 133 Ga. 49, 65 S. E. 156 (1909).

13. *Merrill v. Gould*, 16 N. H. 347 (1844).

14. *Indiana.*— *Maus v. Bome*, 123 Ind. 522, 24 N. E. 345 (1889).

Minnesota.— *Brown v. Kphout*, 61 Minn. 113, 63 N. W. 248 (1895).

Missouri.— *Mississippi County v. Vowles*, 101 Mo. 225, 14 S. W. 282 (1890).

New York.— *Edmonston v. Edmonston*, 13 Hun 133 (1878); *Morse v. Salisbury*, 48 N. Y. 636 (1872) *affirming* 35 How. Pr. 90 (1867).

Rhode Island.— *Faulkner v. Rocket*, 33 R. I. 152, 80 Atl. 380 (1911).

Tennessee.— *Wheaton v. Weld*, 9 Humphr. 773 (1849).

Texas.— *Wells v. Burts*, 3 Tex. Civ. App. 430, 22 S. W. 419 (1893).

15. *Wells v. Burts*, 3 Tex. Civ. App. 430, 22 S. W. 419 (1893); *Fyffe v. Fyffe*, 106 Ill. 646 (1883); *Abend v. Mueller*, 11 Ill. App. 257 (1882).

§ 2603-1. *Alabama.*— *Driver v. King*, 145 Ala. 585, 40 So. 315 (1906). *Arkansas.*— *Butler v. Hines*, 142 S. W. 509 (1912).

Illinois.— *Illinois C. R. Co. v. Houghton*, 126 Ill. 233, 18 N. E. 301 (1888); *Grim v. Murphy*, 110 Ill. 271 (1884).

Kentucky.— *Gurley v. Starr*, 30 Ky. L. R. 974, 99 S. W. 972 (1907).

Maryland.— *Cadwalader v. Price*, 111 Md. 310, 73 Atl. 273, 134 Am. St. Rep. 603 n. (1909).

vant statements on the subject, made by the owner, his tenant or

Massachusetts.—Gray v. Kelley, 190 Mass. 184, 76 N. E. 724 (1906).

Michigan.—Bower v. Earl, 18 Mich. 367 (1869).

New Hampshire.—Keefe v. Sullivan County R. R., 75 N. H. 116, 71 Atl. 379 (1908); Claremont v. Carlton, 2 N. H. 369, 372 (1821).

New York.—Dibble v. Cole, 92 N. Y. Suppl. 938, 102 App. Div. 229 (1905).

North Carolina.—Lamb v. Cope-land, 73 S. E. 797 (1912); Fincannon v. Sudderth, 144 N. C. 587, 57 S. E. 337 (1907); Bynum v. Thompson, 25 N. C. 578 (1843). See also Hedrick v. Gobble, 63 N. C. 48 (1868).

Rhode Island.—Faulkner v. Rocket, 33 R. I. 152, 80 Atl. 380 (1911).

South Carolina.—Beaufort L. & I. Co. v. New River L. Co., 86 S. C. 358, 68 S. E. 637, 30 L. R. A. (N. S.) 243 n. (1910). Marion County Lumber Co. v. Tilghman Lumber Co., 79 S. C. 54, 60 S. E. 33 (1908).

Texas.—Caruthers v. Hadley, (Civ. App. 1911) 134 S. W. 757; Simpson v. De Ramires, 50 Tex. Civ. App. 25, 110 S. W. 149 (1908); Ballinger v. McMinn, 47 Tex. Civ. App. 89, 104 S. W. 1079 (1907).

Vermont.—Wood v. Willard, 36 Vt. 82, 84 Am. Dec. 659 (1863). See, however, Western Union Oil Co. v. Newlove, 145 Cal. 772, 79 Pac. 542 (1905).

Declarations made by an owner of land as to the lines thereof are admissible only if made while he owned the land. Beaufort Land & Investment Co. v. New River Lumber Co., 86 S. C. 358, 68 S. E. 637, 30 L. R. A. (N. S.) 243n. (1910); Bismark Mountain Gold Min. Co., 14 Idaho 516, 95 Pac. 14 (1908). See Cadwalader v. Price, 111 Md. 310, 73 Atl. 273, 134 Am. St. Rep. 603, n. (1909).

As proof of facts asserted the statement might be merely self-serving hearsay. Hemphill v. Hemphill, 138 N. C. 504, 51 S. E. 42 (1905). See

Williamson v. Gooch, 103 Me. 402, 69 Atl. 691 (1908).

Declarations of deceased surveyor.—The rule that declarations of a deceased owner with respect to boundary are competent evidence only when made on the ground, applies also to declarations of a deceased surveyor. Such declarations are admissible on the principle of *res gestae*, and not to establish reputation. Collins v. Clough, 222 Pa. 472, 71 Atl. 1077 (1909). See Simpson v. De Ramires, 50 Tex. Civ. App. 25, 110 S. W. 149 (1908).

In an action between strangers to the title it has been held proper to refuse to permit a witness to state what another had said in respect to such boundaries where it did not appear that the person whose statement was sought to be proved was either a surveyor or a chain carrier at the making of the original survey, or that he was the owner of the tract or of any adjoining tract calling for the same boundaries or that he had been engaged as a processioner of the land or that his situation was such in reference to the land as to render it his duty or his interest to make diligent inquiry and obtain accurate information as to the facts. Smith v. Stanley (Va. 1912), 75 S. E. 742.

The form of such extra-judicial declarations may be either oral or written. Hardisty v. Glenn, 32 Ill. 62 (1863); Burr v. Smith, 152 Ind. 469, 53 N. E. 468 (1899) (boundaries); Sulphur Mines Co. v. Thompson's Heirs, 93 Va. 293, 25 S. E. 232 (1897). Prominent among written forms of statement are the recitals in deeds: ancient or of recent origin. Postal Tel. Cable Co. v. Brantley, 107 Ala. 683, 18 So. 321 (1895); Garwood v. Dennis, 4 Binn. (Pa.) 314 (1811); Dunn v. Eaton, 92 Tenn. 743, 23 S. W. 163 (1893). Tax lists may serve the same purpose. Pasley v. Richardson, 119 N. C. 449, 26 S. E. 32 (1896). Indeed, any form of written

an equitable owner² or his agent within the scope of the latter's authority.³ In fact, the claim of the person in possession as to the position of his boundaries may constitute, and, in fact, in a very large proportion of the cases is, a very essential part of his entire demand. As cannot too often be made the subject of insistence, the statements on the point are not offered for the purpose of establishing, nor do they frequently tend to establish, the true position of the boundaries themselves. So regarded, they are merely hearsay and, as such, will be considered in another connection.⁴ The independently relevant statement on the subject is, however, at all times cogent evidence as to the nature and extent of the declarant's claim, for or against⁵ his interest, and is received for this purpose.⁶ So treated, it is primary evidence deter-

assertion may be the vehicle of an extra-judicial statement of claim. The point of the evidence being the existence of the statement, it is not essential that the execution of the instrument containing it should itself be duly proved. See, however, *Gittings v. Hall*, 1 H. & J. (Md. 1800) 14. Nor is it important that the document is invalid for the purpose for which it was drawn. *Waldron v. Tuttle*, 4 N. H. 371 (1828) (deed); *Bounds v. Bounds*, 11 Heisk. (Tenn.) 318, 324 (1872) (unrecorded deed).

Damage and benefit maps will not be received to control the question of boundary, in a dispute between grantees of a city of different tracts, being in a certain sense regarded as self-serving evidence in favor of the city. *Webber v. Gillies*, 112 N. Y. Suppl. 397 (1908).

Field notes of a deceased surveyor.—The field notes of a deceased surveyor are admissible as declarations contemporaneous with the work done on the ground, provided they are authenticated in some other way than by the mere declarations of the surveyor himself. *Collins v. Clough*, 222 Pa. 472, 71 Atl. 1077 (1909).

2. *State v. King*, 64 W. Va. 545, 546, 63 S. E. 468, 495 (1908).

3. *Keefe v. Sullivan County R. R.*, 75 N. H. 116, 71 Atl. 379 (1908);

Marion County Lumber Co. v. Tilghman Lumber Co., 79 S. C. 54, 60 S. E. 33 (1908).

4. §§ 2804 *et seq.*

5. *Davis v. Mills*, 133 S. W. 1064 (1911).

6. That a rule of substantive law, elsewhere in part considered (§ 2608), turns, after an established interval, a claim of ownership into the fact of ownership by no means serves to obliterate this distinction. *Davis v. Jones*, 3 Head (Tenn.) 603 (1859); *Shutte v. Thompson*, 15 Wall. (U. S.) 151, 21 L. ed. 123 (1872).

Recognition.—On an issue as to whether the holding by A. up to a certain boundary line is adverse, A's statements in recognition of the claims of the adjoining owner are competent. *Butler v. Hines* (Ark. 1912), 142 S. W. 509.

Where in an action involving the location of a boundary corner, the object of a question on cross examination was to get a quasi admission against the interest of a deceased owner showing that he was present when the survey was being made and interposed no objection and the witness by his answer completely negatived such an admission, it was held that the court properly refused to permit the witness to further state on the redirect examination the re-

mining the claim as to the position of land-marks.⁷ In many instances, declarations of this kind are receivable as *admissions*,⁸ being the declarations of a party to the record, or of one standing in privity with him.⁹

§ 2604. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Claim; Real Estate*); Form of Claim.—No requirement as to form has been placed on the admissibility of extrajudicial statements constituting or proving a claim to real estate. With equal competency, they may be oral¹ or written.²

§ 2605. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Claim; Real Estate*); Objective Relevancy.—Where, as here, an extrajudicial statement is circumstantially employed, i.e., where the declaration is relevant by reason of its bare existence, irrespective of the

mainder of the conversation to the effect that such owner disclosed that the true corner was located elsewhere. *Brooks v. Shook*, 147 N. C. 630, 61 S. E. 601 (1908).

7. *California*.—*Sneed v. Osborn*, 25 Cal. 619 (1864).

Illinois.—*Yates v. Shaw*, 24 Ill. 367 (1860).

Kentucky.—*Crutchlow v. Beatty*, 23 S. W. 960, 15 Ky. L. R. 464 (1893).

Maryland.—*Redding v. McCubbin*, 1 Harr. & M. 368 (1770).

Massachusetts.—*Niles v. Patch*, 13 Gray 254 (1859).

Michigan.—*Bower v. Earl*, 18 Mich. 367 (1869).

New York.—*Donahue v. Case*, 61 N. Y. 631 (1874); *Smith v. McNamara*, 4 Lans. 169 (1870).

North Carolina.—See *Westfelt v. Adams*, 131 N. C. 379, 42 S. E. 823 (1902).

Pennsylvania.—*Dawson v. Mills*, 32 Pa. St. 302 (1858).

Tennessee.—*Davis v. Jones*, 3 Head 603 (1859).

Vermont.—*Swerdferger v. Hop-*

kins, 67 Vt. 136, 31 Atl. 153 (1894); *Kimball v. Ladd*, 42 Vt. 747 (1870); *Perkins v. Blood*, 36 Vt. 273 (1863).

United States.—*Shutte v. Thompson*, 15 Wall. 151, 21 L. ed. 123 (1872).

8. *Manuel v. Flynn*, 5 Cal. App. 319, 90 Pac. 463 (1907); *Chrisco v. Yow*, 153 N. C. 434, 69 S. C. 422 (1910). See § 2778.

9. *Caruthers v. Hadley* (Tex. Civ. App. 1911), 134 S. W. 757 (1911).

§ 2604-1. *Walker v. Hughes*, 90 Ga. 52, 15 S. E. 912 (1892); *Nodle v. Hawthorne*, 107 Iowa 380, 77 N. W. 1062 (1899).

2. *Harral v. Wright*, 57 Ga. 484 (1876); *Nodle v. Hawthorne*, 107 Iowa 380, 77 N. W. 1062 (1899).

A letter from a party to a magistrate in which he claimed title to land from the same common source as the opposite party is admissible. *Benbow v. Harvin* (S. C. 1912), 75 S. E. 414.

Tax return.—A satisfactory declaration may be contained in a tax return. *Smith v. Haire*, 58 Ga. 446 (1877).

truth or real existence of the facts asserted it will at once become obvious that only objective relevancy¹ is necessarily involved. Should the unsworn statement, in and of itself, logically tend to establish the actuality of the fact in support of which it is adduced, judicial administration is satisfied. Nothing further need be shown. We are not asked to believe that the declaration states the truth. We are merely made to know that it exists. How much the maker of the unsworn statement knew about the matter or what was his motive, if any, to misstate the truth need not be inquired. It is not surprising to find that self serving declarations are perfectly admissible,² although statements in derogation of title are equally competent under proper circumstances.³

On the other hand, as is more fully seen at another place,⁴ where the unsworn statement is offered in its assertive capacity, i.e., as hearsay, subjective relevancy is imperatively required. We are now asked to place reliance on the speaker, to trust him, to believe what he says. To judge as to the propriety of doing this, it is essential that we ascertain whether the declarant knows the truth and is under any controlling motive to misrepresent it.

§ 2606. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Claim; Real Estate*); Possession Necessary.—Actual¹ or constructive² pos-

§ 2605-1. § 55.

2. § 2602.

3. *Knight v. Hunter*, 155 Ala. 238, 46 So. 235 (1908); *Bowman v. Owens*, 133 Ga. 49, 65 S. E. 156 (1909); *Kirby v. Kirby*, 236 Ill. 255, 86 N. E. 259 (1908). Such declarations may be evidence in favor of the person holding the record title even where the statute of limitations has conferred a title by adverse possession upon the declarant. *Carroll v. Rabberman*, 240 Ill. 450, 88 N. E. 995 (1909).

Declarations in disparagement of the title of the adverse party are inadmissible if made in the absence of the latter. *Preston v. Newcomb*, 149 Mich. 512, 14 Detroit Leg. N. 501, 113 N. W. 29, 119 Am. St. Rep. 691 (1907).

4. § 2698.

§ 2606-1. *Alabama*.—*Gillespie v. Burleson*, 28 Ala. 551 (1856); *Rowan v. Hutchisson*, 27 Ala. 328 (1855).

Arkansas.—*Strickland v. Strickland*, 146 S. W. 501 (1912); *King v. Slater*, 96 Ark. 589, 133 S. W. 173 (1910).

California.—*Sneed v. Osborn*, 25 Cal. 619 (1864); *Ellis v. Janes*, 10 Cal. 456 (1858).

Connecticut.—*Comins v. Comins*, 21 Conn. 413 (1851).

Florida.—*Long v. State*, 44 Fla. 134, 32 So. 870 (1902).

Georgia.—*Luke v. Cannon*, 4 Ga. App. 538, 62 S. E. 110 (1908); *Parrott v. Baker*, 82 Ga. 364, 9 S. E. 1068 (1889).

Idaho.—*Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, 14 Idaho 516, 95 Pac. 14 (1908).

session of the property in question³ on the part of the declarant must be affirmatively shown or reasonably inferred. These declarations are thereupon received whether in favor of the declarant⁴ or against his interest,⁵ the difference in probative force being obvious. Statements of a person claiming by adverse possession that he was "in possession" of the land are not admissible to prove that fact,⁶ although statements explanatory of a proved possession are competent. Notwithstanding the requirement prevailing in several jurisdictions,⁷ it is not, as a general rule, essential that the speaker should actually be on the land⁸ at the time of making the statement with regard to a claim to real estate.

Expiration of prescriptive period.—Whether, at the time the declaration is made, the statutory period of prescription has expired is not a matter of consequence.⁹

Part of the res gestae.—This requirement of possession as a necessary condition of the admissibility of an independently relevant statement of claim has had a very natural consequence. Using the term in its broad American significance, the declarations

Illinois.—Towle v. Quante, 246 Ill. 568, 92 N. E. 967 (1910); Abend v. Mueller, 11 Ill. App. 257 (1882).

Kentucky.—Wickliffe v. Ensor, 9 B. Mon. 253 (1848).

New Hampshire.—Spence v. Smith, 18 N. H. 587 (1847).

New York.—McDuffie v. Clark, 39 Hun 166 (1886); Jackson v. Anderson, 4 Wend. 474 (1830).

North Carolina.—Ray v. Pearce, 84 N. C. 485 (1881).

South Carolina.—Gilchrist v. Martin, 1 Bailey Eq. 492 (1831).

Tennessee.—Alexander & Mentlo v. Jennings, 10 Lea 419 (1882).

Texas.—Lochausen v. Laughter, 4 Tex. Civ. App. 291, 23 S. W. 513 (1893).

Virginia.—Garnett v. Sam, 5 Munf. 542 (1817).

West Virginia.—High v. Pancake, 42 W. Va. 602, 26 S. E. 536 (1896).

Wisconsin.—Roebke v. Andrews, 26 Wis. 311 (1870).

2. Abeel v. Van Gelder, 36 N. Y. 513 (1867).

Possession authorized by declarant.

—The objection that declarations as to the character of possession are admissible only from one exercising it is removed where it appears that though the property was in possession of another, such possession was authorized by the declarant. *Illinois Steel Co. v. Paczocha*, 139 Wis. 23, 119 N. W. 550 (1909).

3. *Remy v. Lilly*, 22 Ind. App. 109, 53 N. E. 387 (1899); *Doe v. Jauncy*, 8 C. & P. 99, 34 E. C. L. 631 (1837).

4. *Holden v. Cantrell*, 88 S. C. 281, 70 S. E. 815 (1911).

5. *Stacy v. Alexander*, 143 Ky. 152, 136 S. W. 150 (1911).

6. *McBride v. Lowe*, (Ala. 1912) 57 So. 832.

7. See § 2806.

8. *Owen v. Moxom*, 167 Ala. 615, 52 So. 527 (1910); *Keefe v. Sullivan County R. R.*, 75 N. H. 116, 71 Atl. 379 (1908); *Swettenham v. Leary*, 18 Hun (N. Y.) 284 (1879); *Abeel v. Van Gelder*, 36 N. Y. 513 (1867).

9. *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205 (1869).

have been spoken of as part of the *res gestae*,¹⁰ the principal fact being that of possession which the statements themselves serve to characterize or explain.¹¹ It will be borne in mind, however, that

10. *Alabama*.—Larkin v. Baty, 111 Ala. 303, 18 So. 666 (1895); Turnley v. Hanna, 82 Ala. 139, 2 So. 483 (1886); Daffron v. Crump, 69 Ala. 77 (1881).

Arkansas.—Yarbrough v. Arnold, 20 Ark. 592 (1859).

California.—Ellis v. Janes, 10 Cal. 456 (1858).

Colorado.—Doane v. Glenn, 1 Colo. 495 *rev'd* 21 Wall. 33 (U. S.) 22 L. ed. 476 (1872).

Connecticut.—Saugatuck Cong. Soc. v. East Saugatuck School Dist., 53 Conn. 478, 2 Atl. 751 (1885); Comins v. Comins, 21 Conn. 413 (1851).

Georgia.—Fraser v. State, 112 Ga. 13, 37 S. E. 114 (1900); Brown v. Cantrell, 62 Ga. 257 (1879); Dawson v. Callaway, 18 Ga. 573 (1855).

Illinois.—Amick v. Young, 69 Ill. 542 (1873).

Indiana.—Gaar, etc., Co. v. Shaffer, 139 Ind. 191, 38 N. E. 811 (1894); Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784 (1890).

Iowa.—Hardy v. Moore, 62 Iowa 65, 17 N. W. 200 (1883); Stephens v. Williams, 46 Iowa 540 (1877).

Kansas.—Reiley v. Haynes, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 737 (1888); Stone v. Bird, 16 Kan. 488 (1876); State v. Gurnee, 14 Kan. 111 (1874).

Minnesota.—Elwood v. Saterlie, 68 Minn. 173, 71 N. W. 13 (1897).

Mississippi.—McMullen v. Mayo, 8 Sm. & M. 298 (1847).

Nevada.—Rollins v. Stront, 6 Nev. 150 (1870).

New York.—Waring v. Warren, 1 Johns. 340 (1806).

Oregon.—Low v. Schaffer, 24 Oreg. 239, 33 Pac. 678 (1893).

Pennsylvania.—Brolaskey v. McClain, 61 Pa. St. 146 (1869).

Tennessee.—Alexander & Mentlo v. Jennings, 10 Lea 419 (1882).

Wisconsin.—Roebke v. Andrews, 26 Wis. 311 (1870).

Such declarations are verbal parts of the declarant's act of occupation, *Liebheit v. Enright*, 77 Kan. 321, 94 Pac. 203 (1908). "The declaration of an owner in possession, accompanying and explaining acts of ownership, do not fall within the rule of self-serving declarations and hearsay, but within the rule of the *res gestae*." *Holdren v. Cantrell*, 88 S. C. 281, 70 S. E. 815 (1910), per Mr. Chief Justice Jones.

11. *Alabama*.—Owen v. Moxom, 167 Ala. 615, 52 So. 527 (1910); Boozer v. Jones, 169 Ala. 481, 53 So. 1013 (1910); Cohn & Goldberg Lumber Co. v. Robbins, 159 Ala. 289, 48 So. 853 (1909); Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353 n. (1884); Dothard v. Denson, 72 Ala. 541 (1882).

Arkansas.—King v. Slater, 96 Ark. 589, 133 S. W. 173 (1910); Seawell v. Young, 77 Ark. 309, 91 S. W. 544 (1905); Sharp v. Johnson, 22 Ark. 79 (1860).

California.—Phelps v. McGloan, 42 Cal. 298 (1871).

Georgia.—Knorr v. Raymond, 73 Ga. 749 (1884).

Illinois.—Towle v. Quante, 246 Ill. 568, 92 N. E. 967 (1910); Godfrey v. Dixon P. & L. Co., 247 Ill. 124, 93 N. E. 116 (1910); Kotz v. Belz, 178 Ill. 434, 53 N. E. 367 (1899).

Indiana.—Vannice v. Dungan, 41 Ind. App. 27, 83 N. E. 250 (1908); Robbins v. Spencer, 140 Ind. 483, 38 N. E. 522 (1895).

Iowa.—Wilson v. Irish, 62 Iowa 260, 17 N. W. 511 (1883).

Kansas.—Butts v. Butts, 84 Kan.

the more obvious ground of relevancy is the circumstance that the mental state under which the possession is being held is itself a relevant fact and that the extrajudicial statement seems to be an appropriate way of proving it. As is seen elsewhere,¹² such a statement may become relevant as evidence of the facts asserted by its incorporation as part of a fact in the *res gestae*, prop-

475, 114 Pac. 1048 (1911); *State v. Gurnee*, 14 Kan. 111 (1874).

Kentucky.—*Stacy v. Alexander*, 143 Ky. 152, 136 S. W. 150 (1911); *Young v. Adams*, 53 Ky. (14 B. Mon.) 127, 58 Am. Dec. 654 (1853); *West v. Price*, 25 Ky. (2 J. J. Marsh.) 380 (1829).

Louisiana.—*Davidson v. Matthews*, 3 La. Ann. 316 (1848).

Maine.—*Emmet v. Perry*, 100 Me. 139, 60 Atl. 872 (1905); *Little v. Libby*, 2 Me. (2 Greenl.) 242, 11 Am. Dec. 68 (1823).

Michigan.—*Bower v. Earl*, 18 Mich. 367 (1869).

Missouri.—*Allen v. Morris*, 148 S. W. 905 (1912); *Minor v. Burton*, 228 Mo. 558, 128 S. W. 964 (1910); *Harper v. Morse*, 114 Mo. 317, 21 S. W. 517 (1893).

New Hampshire.—*Bell v. Woodward*, 46 N. H. 315 (1865); *Hodgdon v. Shannon*, 44 N. H. 572 (1863).

New York.—*Hamlin v. Hamlin*, 192 N. Y. 164, 84 N. E. 805 (1908), judgment reversed, 102 N. Y. Suppl. 571, 117 App. Div. 493 (1907), which affirmed 100 N. Y. Suppl. 701, 51 Misc. Rep. 111 (1906); *Sheldon v. Van Slyke*, 16 Barb. 26 (1852).

North Carolina.—*Clary v. Hatton*, 152 N. C. 107, 67 S. E. 258 (1910); *Smith v. Moore*, 149 N. C. 185, 62 S. E. 892 (1908); judgment affirmed on rehearing, 63 S. E. 735 (1909); *Yates v. Yates*, 76 N. C. 142 (1877); *Kirby v. Masten*, 70 N. C. 541 (1874).

Pennsylvania.—*Greenwich Coal & Coke Co. v. Learn*, 234 Pa. 180, 83 Atl. 74 (1912); *Brolaskey v. McClain*, 61 Pa. St. 146 (1869); *Duffey*

v. Presbyterian Congregation, 48 Pa. St. (12 Wright) 46 (1864); *Rankin v. Tenbrook*, 6 Watts 388 (1837).

Rhode Island.—*Faulkner v. Rockett*, 33 R. I. 152, 80 Atl. 380 (1911).

South Carolina.—*Holden v. Cantrell*, 88 S. C. 231, 70 S. E. 815 (1911).

Tennessee.—*Marley v. Rodgers*, 13 Tenn. (5 Yerg.) 217 (1833).

Texas.—*Campbell v. San Antonio M. & S. Co.*, (Civ. App. 1911) 133 S. W. 750; *Trinity County Lumber Co. v. Pinckard*, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015 (1893); *Jackson v. Deslonde*, 1 Posey, Unrep. Cas. 674 (1880); *Harnage v. Berry*, 43 Tex. 567 (1875); *Hooper v. Hall*, 30 Tex. 154 (1867).

West Virginia.—*High's Heirs v. Pancake*, 42 W. Va. 602, 26 S. E. 536 (1896).

United States.—*Ward v. Cochran*, 71 Fed. 127, 18 C. C. A. 1, 36 U. S. App. 307 (1895);

The competency of declarations of one in possession of land is limited to showing the character of the possession of the declarant or the title by which he holds. *Godfrey v. Dixon Power & Lighting Co.*, 247 Ill. 124, 93 N. E. 116 (1910).

Where land was deeded to a husband and wife jointly but was intended as a mortgage to the wife, declarations of the husband in possession, explanatory thereof and the rights claimed, were admitted in a controversy between the heirs as to whether the deed was a mortgage. *Hubbard v. Cheney*, 76 Kan. 222, 91 Pac. 793, 123 Am. St. Rep. 129 (1907).

12. § 2984 et seq.

erly so-called. The forensic result of this incorporation is, however, that of contributing a distinct element of relevancy, that of spontaneity. In the case under present consideration the relevancy of the mental state is intrinsic and in no way derived from its connection with the *res gestae*, whether that term is employed in its proper or its inflated meaning.¹³

§ 2607. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Claim; Real Estate*); Possession by Tenants and Other Holders.—Independently relevant declarations as to claim to the ownership of land,¹ as to the territorial extent of such holding² or the existence of some other relevant fact³ may be made by tenants or by landlords for whom possession is being held by a tenant.⁴ The unsworn statements of such a holder may properly cover the name of the landlord under whom he claims.⁵ The tenant's statement may also be in disparagement of his landlord's title.⁶

13. Reputation or popular designation.—The intention with which the possession of property is held being important, reputation as to the general designation applied to it in the community may be received as bearing upon the question as to whether the holding is adverse or permissive. The evidence is received, however, only in case of a popular reputation so wide spread and notorious as presumably to have been brought to the attention of those interested to claim that it is not true. *Carlisle v. Gibbs*, 57 Tex. Civ. 592, 123 S. W. 216 (1909). Proof, therefore, will not be received simply that a witness heard the property spoken of as being that of a particular person, or corporation, in the absence of any showing that the other side ever heard the property so-called. *Shingler v. Bailey*, 135 Ga. 666, 70 S. E. 563 (1911); *Heatley v. Long*, 135 Ga. 153, 68 S. E. 783 (1910).

§ 2607-1. *Illinois Steel Co. v. Paczocha*, 139 Wis. 23, 119 N. W. 550 (1909); *Doe v. Rickarby*, 5 Esp. 4 (1803).

2. *Sheaffer v. Eakman*, 56 Pa. St. 144 (1867); *Davies v. Pierce*, 2 T. R. 53, 1 Rev. Rep. 419 (1787).

3. *Smith v. Donaldson*, (Ga. 1912) 73 S. W. 577; *Davies v. Pierce*, 2 T. R. 53, 1 Rev. Rep. 419 (1787).

4. *Illinois Steel Co. v. Paczocha*, 139 Wis. 23, 119 N. W. 550 (1909).

Evidence that one authorized his mother's possession of land for a consideration, hence that he was in possession at the time, removes the objection to his testimony that declarations as to character of possession are admissible only from one exercising it. *Illinois Steel Co. v. Paczocha*, 139 Wis. 23, 119 N. W. 550 (1909).

5. *Alabama*.—*Beasley v. Howell*, 117 Ala. 499, 22 So. 989 (1897); *Kirkland v. Trott*, 66 Ala. 417 (1880).

Maryland.—*Webster v. Saunders*, 4 Harr. & J. 287 (1817).

Massachusetts.—*Marcy v. Stone*, 8 Cush. 4, 54 Am. Dec. 736 (1851).

Minnesota.—*Elwood v. Saterlie*, 68 Minn. 173, 71 N. W. 13 (1897).

Missouri.—*Bagnell v. Sweet*

§ 2608. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Claim; Real Estate*); Effect of Substantive Law on Question of Possession.—

In this connection, as in others,¹ the positive or substantive law controls the adjective law of evidence by determining the elements of the right or liability to the establishment of which the true *res gestae* are to be proved, either directly or by circumstantial evidence. The confusing statement is sometimes made² that the extrajudicial declarations are admissible because possession is a *res gestae* fact and they are received on account of the circumstance that they tend to characterize it. It would seem clear, however, that the reason of admissibility is stated in a somewhat obscure way. The substantive law of acquirement of title by adverse possession determines, as is the characteristic effect of substantive law, the objectives to which the proof of facts is directed. Among these, are two, possession for a given number of years and a definite mental state. Each of these is apparently complete. Only upon the establishment of both in the *res gestae* does the right asserted come into being. But these two facts, merely because one is physical and the other psychological, seem to be joined together by no connection other than exists in case of any two elements of a single right. The fact of the mental state, the claiming adversely to the true owner may, like that of possession, be proved by any logically relevant means. Among means appropriate to the purpose may be unsworn statements.³ No other rule

Spring Chemical Bank, 76 Mo. App. 121 (1898).

New Hampshire.—South Hampton v. Fowler, 54 N. H. 197 (1874).

Texas.—Wallace v. Wilcox, 27 Tex. 60 (1863).

England.—De Bode's Case, 8 Q. B. 208, 55 E. C. L. 208 (1845); Doe v. Jauncey, 8 C. & P. 99, 34 E. C. L. 631 (1837); Peaceable v. Watson, 4 Taunt. 16, 13 Rev. Rep. 552 (1811); Holloway v. Rakes, cited in Davies v. Pierce, 2 T. R. 53, 55, 1 Rev. Rep. 419 (1787).

One may declare that he is acting as agent for another. Murphy v. Dafoe, 18 S. D. 42, 99 N. W. 86 (1904).

See, however, § 2729 as to declarations showing agency.

6. Kirby v. Kirby, 236 Ill. 255, 86 N. E. 259 (1908).

That the possession of a tenant is actual as required by a statute for gaining title by adverse possession cannot be shown by the mere acknowledgment by the tenant of his landlord's title. As to proof of actual possession the acknowledgments of the tenant are merely hearsay. Dunn v. Taylor, 102 Tex. 80, 113 S. W. 265 (1908), reversing judgment (Tex. Civ. App. 1908), 107 S. W. 952. § 2608-1. § 1718i.

2. See, for example, § 2606.

3. *Alabama*.—Lawrence v. Doe, 144 Ala. 524, 41 So. 612 (1905); Chastang v. Chastang, 141 Ala. 451, 36 So. 799, 109 Am. St. Rep. 45 (1904);

for receiving them seems essential and to speak of the admissibility as requiring such incorporation with other facts as would establish the existence of a spontaneous statement proving the truth of the facts asserted may well be thought to be unnecessarily confusing. In many other respects, the substantive law of prescription determines the admissibility of extrajudicial statements as to claim by determining the objectives to proof of which alone the *res gestae* may properly be directed.

Gillespie v. Burleson, 28 Ala. 551 (1856); *Johnson v. Boyles*, 26 Ala. 576 (1855); *Nelson v. Sverson*, 24 Ala. 9 (1853).

California.—*Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205 (1869).

Connecticut.—*Dawson v. Town of Orange*, 78 Conn. 96, 61 Atl. 101 (1905); *Comins v. Comins*, 21 Conn. 413 (1851); *Reading v. Weston*, 7 Conn. 143, 18 Am. Dec. 89 (1828).

Georgia.—*Godley v. Barnes*, 132 Ga. 513, 64 S. E. 546 (1909); *Ogden v. Dodge Co.*, 97 Ga. 461, 25 S. E. 321 (1896).—See, however, *Perkins v. Brinkley*, (Ga. 1903), 45 S. E. 652 (husband as agent).

Idaho.—*Daly v. Josslyn*, 7 Idaho 657, 65 Pac. 442 (1901).

Illinois.—*Rich v. Naffziger*, 248 Ill. 455, 94 N. E. 1 (1911); *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306 (1899); *Gage v. Eddy*, 179 Ill. 492, 53 N. E. 1008 (1899); *Shaw v. Schoonover*, 130 Ill. 448, 22 N. E. 589 (1889); *James v. R. Co.*, 91 Ill. 554 (1879); *Rowley v. Hughes* 40 Ill. 316 (1866).

Iowa.—*Stephens v. McCloy*, 36 Iowa 659 (1873).

Kansas.—*Liebheit v. Enright*, 77 Kan. 321, 94 Pac. 203 (1908); *Broughan v. Broughan*, 10 Kan. App. 575, 61 Pac. 874 (1900); *affirmed* 62 Kan. 724, 64 Pac. 608 (1901); *Rand v. Huff*, 59 Kan. 777, 53 Pac. 483 (1898); *Smith v. Morrow*, 7 T. B. Mon. 234 (1828).

Maine.—*Emmett v. Perry*, 100 Me. 139, 60 Atl. 872 (1905).

Massachusetts.—*Pickering v. Reynolds*, 119 Mass. 111 (1875); *Osgood v. Coats*, 1 Allen 77 (1861); *Niles v. Patch*, 13 Gray 254 (1859); *Tyler v. Mather*, 9 Gray 177 (1857).

Michigan.—*Youngs v. Cunningham*, 57 Mich. 153, 23 N. W. 626 (1906); *Moran v. Lezotte*, 54 Mich. 83, 19 N. W. 757 (1884).

Missouri.—*Farmers' Bank v. Barbee*, 198 Mo. 465, 95 S. W. 225 (1906); *Swope v. Ward*, 185 Mo. 316, 84 S. W. 895 (1904); *Harper v. Morse*, 114 Mo. 317, 21 S. W. 517 (1893); *Dunlap v. Griffith*, 146 Mo. 283, 47 S. W. 917 (1898); *Meier v. Meier*, 105 Mo. 411, 16 S. W. 223 (1891).

New Hampshire.—*Smith v. Putnam*, 62 N. H. 369 (1882); *Hodgdon v. Shannon*, 44 N. H. 572 (1863); *Cilley v. Bartlett*, 19 N. H. 312 (1849); *Downs v. Lyman*, 3 N. H. 486 (1826).

New Jersey.—*Miller v. Feenane*, 50 N. J. L. 32, 11 Atl. 136 (1887).

New York.—*Cole v. Lester*, 48 Misc. Rep. 13, 96 N. Y. Suppl. 67 (1905); *Donahue v. Case*, 61 N. Y. 631 (1874); *Morss v. Salisbury*, 48 N. Y. 636 (1872); *Abeel v. Van Gelder*, 36 N. Y. 513 (1867).

North Carolina.—*Norcom v. Savage*, 140 N. C. 472, 53 S. E. 289 (1906); *Davis v. Campbell*, 1 Ired. 482 (1841).—See also *State v. Emory*, 6 Jones L. 133 (1858).

Pennsylvania.—*Kennedy v. Wible*, 11 Atl. 98 (1887); *Hood v. Hood*, 2 Grant Cas. 229 (1858); *Sailor v. Hertzogg*, 2 Pa. St. 182 (1845).

Ouster.—A prominent instance is the requirement that the extrajudicial statements, in order to be admissible, must be shown to have come to the knowledge of the true owner. In certain instances where the possession of the tenant is lawful and permissive, as where he is holding under a landlord,⁴ or is a tenant by the curtesy⁵ in dower⁶ is a cotenant,⁷ holding under a mortgage,⁸ or in some similar way, the extrajudicial statements indicative of an adverse claim will not be received in evidence unless something in the nature of an *ouster* be shown. In other words, the owner

South Carolina.—Wingo v. Caldwell, 36 S. C. 598, 15 S. E. 382 (1891); Boozer v. Teague, 27 S. C. 348, 3 S. E. 551 (1887); Ellen v. Ellen, 16 S. C. 132 (1881).

Tennessee.—Carnahan v. Wood, 2 Swan 500, 502 (1852).

Texas.—Lochhausen v. Laughter, 4 Tex. Civ. App. 491, 23 S. W. 720, 1015 (1893).

Vermont.—Kimball v. Ladd, 42 Vt. 747 (1870); Hollister v. Young, 42 Vt. 403 (1869); Perkins v. Blood, 36 Vt. 273 (1863).

Virginia.—Dooley v. Baynes, 86 Va. 644, 10 S. E. 974 (1890).

West Virginia.—Stewart v. Doak Bros., 58 W. Va. 172, 52 S. E. 95 (1905).

United States.—Henderson v. Wanamaker, 79 Fed. 736, 25 C. C. A. 181 (1897); Ricard v. Williams, 7 Wheat. 59, 5 L. ed. 398 (1822).

A claim of right by prescription to use water for irrigation purposes may be so shown. Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. 1027 (1910).

The fact to be proved is the statement itself rather than the understanding of the witness as to it. Hale v. Salloway, 1 Allen (Mass.) 21 (1861). It is scarcely necessary to observe that the existence of a claim must be a relevant fact. McLeod v. Bishop, 110 Ala. 640, 20 So. 130 (1895).

Explanation.—It is said that the declaration must be such as to ex-

plain the fact of possession. Drefahl v. Rabe, 132 Iowa 563, 107 N. W. 179 (1906). See also Morrill v. Titcomb, 8 Allen (Mass.) 100 (1864); Osgood v. Coates, 1 Allen (Mass.) 77 (1861).

4. *Alabama.*—Butler v. Butler, 133 Ala. 377, 32 So. 579 (1901); Jones v. Pelham, 84 Ala. 208, 4 So. 22 (1887).

Georgia.—Ingram v. Little, 14 Ga. 173, 58 Am. Dec. 549 (1853).

Kansas.—Crawford v. Crawford, 60 Kan. 126, 55 Pac. 842 (1899).

Maine.—Mann v. Edson, 39 Me. 25 (1854); Russell v. Clark, 38 Me. 332 (1854).

Michigan.—Hogsett v. Ellis, 17 Mich. 351 (1868). See also Ward v. Ward, 37 Mich. 253 (1877).

Missouri.—Salmons v. Davis, 29 Mo. 176 (1859).

5. Morgan v. Larned, 10 Metc. (Mass.) 50 (1845).

6. Salmons v. Davis, 29 Mo. 176 (1859).

7. Harral v. Wright, 57 Ga. 484 (1876); Rand v. Huff, 59 Kan. 777, 53 Pac. 483 (1898); Sewall v. Sewall, 8 Me. 194 (1831). See, however, Casey v. Casey, 107 Iowa 192, 77 N. W. 844, 70 Am. St. Rep. 190 (1899). Declarations of a deceased co-tenant in possession asserting title in himself are admissible to prove a possession under adverse claim of title, though not to prove title. Rand v. Huff, 59 Kan. 777, 53 Pac. 483 (1898).

8. Hays v. Hays, 66 Tex. 606, 1 S. W. 895 (1886).

to be affected by the unsworn statement must be shown to have been made aware,⁹ actually or constructively, that the person in possession was not holding under his *prima facie* rights but under some more extended claim adverse to the former's interest. The fact of possession must be established by evidence extrinsic to the declarations themselves.¹⁰ It is, on the contrary, quite within the rights of the opponent to show that no adverse claim was in fact made by unsworn statements or otherwise but that the user of an easement¹¹ or the possession of property was at all times by permission of the true owner.

§ 2609. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Claim*); Personal Property.—The independently relevant extrajudicial statement may constitute a claim to the ownership of chattels¹

9. Alabama.—Butler v. Butler, 133 Ala. 377, 32 So. 579 (1901); Jones v. Pelham, 84 Ala. 208, 4 So. 22 (1888).

Georgia.—Harral v. Wright, 57 Ga. 484 (1876); Ingram v. Little, 14 Ga. 173, 58 Am. Dec. 549 (1853). See also Whelchel v. Gainesville, etc., Electric R. Co., 116 Ga. 431, 42 S. E. 776 (1902).

Massachusetts.—Morgan v. Larned, 10 Metc. 50 (1845).

Michigan.—Hogsett v. Ellis, 17 Mich. 351 (1868).

Canada.—Earnshaw v. Tomlinson, 26 U. C. Q. B. 610 (1867).

10. Alabama.—Thomas v. Degraffenreid, 17 Ala. 602 (1850).

Arkansas.—Sharp v. Johnson, 22 Ark. 79 (1860).

Georgia.—Jaffray v. Brown, 91 Ga. 57, 16 S. E. 223 (1892); Walker v. Hughes, 90 Ga. 52, 15 S. E. 912 (1892).

Massachusetts.—Niles v. Patch, 13 Gray 254 (1859).

Minnesota.—Whitney v. Wagener, 84 Minn. 211, 87 N. W. 602, 87 Am. St. Rep. 351 (1901); Rollofson v. Nash, 75 Minn. 237, 77 N. W. 954 (1899).

Missouri.—McCune v. McCune, 29 Mo. 117 (1859).

Tennessee.—Stranahan v. Terry, 9 Lea 560 (1882).

The admissions of the true owner may be effective for the purpose. McDuffie v. Clark, 39 Hun (N. Y.) 166 (1886); Jackson v. Anderson, 4 Wend. (N. Y.) 474 (1830); Ray v. Pearce, 84 N. C. 485 (1881). But see Shrader v. Bonker, 65 Barb. (N. Y.) 608 (1873).

11. Wisdom v. Reeves, 110 Ala. 418, 18 So. 13 (1895).

§ 2609-1. Alabama.—Nelson v. Howison, 122 Ala. 573, 25 So. 211 (1898); Larkin v. Baty, 111 Ala. 303, 18 So. 666 (1895); Smith v. State, 103 Ala. 40, 16 So. 12 (1893) (necklace).

Arkansas.—Yarbrough v. Arnold, 20 Ark. 592 (1859).

Colorado.—Doane v. Glenn, 1 Colo. 495 (1872).

Connecticut.—Avery v. Clemons, 18 Conn. 306, 46 Am. Dec. 323 (1847).

Florida.—Long v. State, 44 Fla. 134, 32 So. 870 (1902); McDougall v. Van Brunt, 6 Fla. 570 (1856).

Georgia.—Belcher v. Black, 68 Ga. 93 (1881) (money).

when made by one in possession of them.² Frequently, this is by way of explanation,³ as where one found in possession of stolen goods seeks to account for having them,⁴ the statements being re-

Indiana.—Traylor v. Hollis, 45 Ind. App. 680, 91 N. E. 567 (1910); Remy v. Lilly, 22 Ind. App. 109, 53 N. E. 387 (1898); Gaar, etc., Co. v. Shaffer, 139 Ind. 191, 38 N. E. 811 (1894); Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784 (1890); Maus v. Bome, 123 Ind. 522, 24 N. E. 345 (1889).

Iowa.—Hardy v. Moore, 62 Iowa 65, 17 N. W. 200 (1883); Stephens v. Williams, 46 Iowa 540 (1877); Blake v. Graves, 18 Iowa 312 (1865).

Kansas.—Wiggins v. Foster, 8 Kan. App. 579, 55 Pac. 350 (1898); Reiley v. Haynes, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 737 (1888); Stone v. Bird, 16 Kan. 488 (1876).

Kentucky.—Lundy v. Moritz, 33 Ky. L. R. 223, 109 S. W. 897 (1908).

Massachusetts.—Boyden v. Moore, 11 Pick. 362 (1831).

Michigan.—Davis v. Zimmerman, 40 Mich. 24 (1879).

New Hampshire.—Bradley v. Spoford, 23 N. H. 444, 55 Am. Dec. 203 (1851).

New York.—Moore v. Fingar, 115 N. Y. Suppl. 1035, 131 App. Div. 399 (1909).

North Dakota.—Wipperman Mercantile Co. v. Robbins, 135 N. W. 785 (1912).

South Carolina.—Adams v. Lathan, 14 Rich. Eq. 304 (1868).

Tennessee.—Brooks v. Lowenstein, 95 Tenn. 262, 35 S. W. 89 (1895); Carnahan v. Wood, 2 Swan 500 (1852); Wheaton v. Weld, 9 Humphr. 773 (1849).

Texas.—San Antonio Brewing Ass'n v. Magoffin, 99 S. W. 187 (1907).

Vermont.—Eddy v. Davis, 34 Vt. 209 (1861).

Wisconsin.—Roebke v. Andrews, 26 Wis. 311 (1870).

United States.—Evans v. Hettich, 7 Wheat. 453, 5 L. ed. 496 (1822) (patent).

2. Alabama.—Pilcher v. Smith, (App. 1912) 58 So. 672; Larkin v. Baty, 111 Ala. 303, 18 So. 666 (1895); Wright v. Smith, 66 Ala. 514 (1880).

Colorado.—Doane v. Glenn, 1 Colo. 495 (1872).

Connecticut.—Sears v. Hayt, 37 Conn. 406 (1870).

District of Columbia.—Samaha v. Mason, 27 App. D. C. 470 (1906).

Georgia.—Morgan v. Sims & Nance, 26 Ga. 283 (1858); Hansell v. Bryan, 19 Ga. 167 (1855).

New Hampshire.—Smith v. Putnam, 62 N. H. 369 (1882).

New York.—Howe v. Brundage, 1 Thomps. & C. 429 (1873).

Pennsylvania.—Woodwell v. Brown, 44 Pa. St. 121 (1862).

Choses in action may stand in the same position. Harriman v. Hill, 14 Me. 127 (1836). See also New York L. Ins. Co. v. Johnson's Adm'r, 72 S. W. 762, 24 Ky. L. R. 1867 (1903). But see Enneking v. Woebkenberg, 88 Minn. 259, 92 N. W. 932 (1903).

3. Pilcher v. Smith (Ala. App. 1912), 58 So. 672; Samaha v. Mason, 27 App. D. C. 470 (1906).

"The rule is familiar that the declarations of a party in possession of either real or personal property tending to explain the character or extent of such possession are ordinarily admissible as part of the *res gestae* of his possession." Shaw v. Cleveland (Ala. 1912), 59 So. 534, per De Grafenried, J.

4. Williams v. State, 105 Ala. 96, 17 So. 86 (1894); Allen v. State, 73 Ala. 23 (1882); Moore v. State (Tex. Cr. App. 1894), 24 S. W. 95; Childress v. State, 10 Tex. App. 698 (1881).

ceived as part of the *res gestae*.⁵ The probative force of this evidence seems largely dependent upon the spontaneousness with which the explanation is given, how immediately it follows upon notice that the holder's right to possession is challenged by one claiming under a superior title.⁶ While circumstances may readily arise in which this spontaneity may make the declaration evidence of the facts asserted in it, the extrajudicial statement is rejected, in the absence of special facts, when tendered for the latter purpose.⁷ Claim to the ownership of personal property may be constituted by the extrajudicial declarations of a tenant⁸ men-

5. *Samaha v. Mason*, 27 App. D. C. 470 (1906).

6. *Alabama*.—*Allen v. State*, 73 Ala. 23 (1882). Compare *Maynard v. State*, 46 Ala. 85 (1871); *Taylor v. State*, 42 Ala. 529 (1868); *Spivey v. State*, 26 Ala. 90 (1855).

Georgia.—*Walker v. State*, 28 Ga. 254 (1859).

Illinois.—*Bennett v. People*, 96 Ill. 602 (1880).

Kansas.—*State v. Gillespie*, 62 Kan. 469, 63 Pac. 742, 84 Am. St. Rep. 411 (1901).

New York.—*Atwood's Case*, 4 City Hall Rec. 91 (1819).

Oklahoma.—*Mitchell v. Territory*, 7 Okla. 527, 54 Pac. 782 (1898).

Texas.—*Eastland v. State*, (Cr. App. 1900) 59 S. W. 267; *Radford v. State*, 33 Tex. Cr. 520, 27 S. W. 143 (1894); *Hampton v. State*, 5 Tex. App. 463 (1879); *Allen v. State*, 4 Tex. App. 581 (1878); *Cameron v. State*, 44 Tex. 652 (1876); *Ward v. State*, 41 Tex. 611 (1874); *Perry v. State*, 41 Tex. 483 (1874).

United States.—*Kansas City Star Co. v. Carlisle*, 108 Fed. 344, 47 C. C. A. 384 (1901).

England.—*Reg. v. Abraham*, 2 C. & K. 550, 61 E. C. L. 550 (1848).

Canada.—*Reg. v. Ferguson*, 16 N. Brunsw. 612 (1876).

See, however, *Parker v. Goldsmith*, 16 Ala. 526 (1849).

Effect of reflection.—Evidently, the

question of spontaneity is part of that of the subjective relevancy of an unsworn statement when used as proof of the facts asserted. This is more fully considered elsewhere (§§ 3051 *et seq.*) In the present connection, it seems difficult, for reasons which have been stated (§ 2580) to separate the independently relevant capacity of the statement from the assertive, as the explanation offered is probative only to the extent that we feel it to be true. Regarded in its assertive capacity, the evidentiary power of the statement, appropriate only to a spontaneous utterance, may well fall below the point of relevancy when an extended opportunity for reflection has been afforded, and followed by self-serving declarations. *Allen v. State*, 73 Ala. 23 (1882); *Cooper v. State*, 63 Ala. 80 (1879); *State v. Pettis*, 63 Me. 124 (1873); *State v. Slack*, 1 Bailey, (S. C.) 330 (1829); *Foster v. State*, 4 Tex. App. 246 (1878); *Williams v. State*, 4 Tex. App. 5 (1878); *Harmon v. State*, 3 Tex. App. 51 (1877); *Powell v. State*, 44 Tex. 63 (1875).

7. *Cohn & Goldberg Lumber Co. v. Robbins*, 159 Ala. 289, 48 South. 853 (1909); *Campbell v. Sech*, 155 Mich. 634, 119 N. W. 922, 15 Detroit Leg. N. 1105 (1909).

8. *King v. Frost*, 28 Minn. 417, 10 N. W. 423 (1881).

tioning the person in question as being the one under whom he claims.⁹ Declarations of this nature, however, when made by one who has already parted with his possession of the property are no longer to be received.¹⁰

Disclaimer.—An extrajudicial declaration may constitute a partial or total disclaimer of title to chattels.¹¹

Privity.—The benefit of the declarations in question may, under the rules of substantive law, enure to those standing in privity with the speaker or be receivable against them,¹² as the case may be presented.

§ 2610. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Claim; Personal Property*); Claimer and Disclaimer in Relation to Creditors.—A frequent, yet somewhat complicated, situation in which the unsworn statements of one in possession of personal property are customarily received is presented where the statements are

9. *Barnes & Barnes v. Mobley*, 21 Ala. 232 (1852); *Rosenberg v. Burnstein*, 60 Minn. 18, 61 N. W. 684 (1895); *Bradley v. Spofford*, 23 N. H. 444, 55 Am. Dec. 205 (1851); *Woods v. Blodgett*, 18 N. H. 249 (1846).

10. *Traylor v. Hollis*, (Ind. App. 1910) 91 N. E. 567 (trustee).

11. *Darling v. Bryant*, 17 Ala. 10 (1849).

12. *Alabama.*—*Guy v. Lee*, 81 Ala. 163, 2 So. 273 (1886); *Jemison v. Smith*, 37 Ala. 185 (1861); *Jennings v. Blocker's Adm'r*, 25 Ala. 415 (1854); *Barnes & Barnes v. Mobley*, 21 Ala. 232 (1852); *Horton v. Smith*, 8 Ala. 73, 42 Am. Dec. 628 (1845).

Georgia.—*Doughty v. McMillan*, 92 Ga. 818, 19 S. E. 59 (1894); *Roberts v. Neal*, 62 Ga. 163 (1878).

Illinois.—*Vennum v. Thompson*, 38 Ill. 143 (1865).

Indiana.—*Tyres v. Kennedy*, 126 Ind. 523, 26 N. E. 394 (1891).

Kentucky.—*Jackson v. Holloway*, 53 Ky. (14 B. Mon.) 133 (1853).

Maine.—*McLanathan v. Patten*, 39 Me. 142 (1855); *Parker v. Marston*,

34 Me. 386 (1852); *Holt v. Walker*, 26 Me. (13 Shep.) 107, 45 Am. Dec. 98 (1846).

Mississippi.—*Walker v. Marseilles*, 70 Miss. 283, 12 So. 211 (1892).

North Carolina.—*Johnson v. Patterson*, 9 N. C. (2 Hawks) 183, 11 Am. Dec. 756 (1822).

Ohio.—*Ritchy v. Martin*, Wright 441 (1833).

South Carolina.—*Crawley v. Tucker*, 4 Rich. Law 560 (1851); *Land v. Lee*, 2 Rich. Law 168 (1845).

Tennessee.—*Drennon v. Smith*, 40 Tenn. (3 Head) 389 (1859).

Texas.—*Harrison v. Hawley*, 7 Tex. Civ. App. 308, 26 S. W. 765 (1894).

Vermont.—*Alger v. Andrews & Baldwin*, 47 Vt. 238 (1875).

"Declarations of a person while in possession of personal property, explanatory of such possession, as that he held it as the agent, or for another, or in his own right, are admissible in evidence, against a party claiming under him." *Taylor v. Lusk*, 9 Iowa 444 (1859), per Wright, C. J.

those of a debtor, e. g., A, whose goods are attached or levied upon by B, one of A's creditors. Ownership of them is, on the other hand, claimed by C, either under a conveyance from A or by reason of some title superior to that of the latter.¹ Under these circumstances, the extrajudicial statements of A regarding his claim to the property, made while in possession of it,² or in connection

§ 2610-1. Where the claimant is proceeding under a title in no way derived from the debtor, the declarations of the latter, though made while in possession and as to the nature of his holding, cannot be received on behalf of his attaching creditor. *Overholtzer v. Hazen*, 101 Iowa 340, 70 N. W. 207 (1897); *Olson v. Swenson*, 53 Minn. 516, 55 N. W. 596 (1893); *King v. Frost*, 28 Minn. 417, 10 N. W. 423 (1881). See, however, *Dailey v. Linnehan*, 42 Minn. 277, 44 N. W. 59 (1890).

2. *Alabama*.—*Montgomery Moore Mfg. Co. v. Leeth*, 162 Ala. 246, 50 So. 210 (1909); *Holman v. Clark*, 148 Ala. 286, 41 So. 765 (1906); *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722 (1851).

Georgia.—*Smiley v. Padgett*, 123 Ga. 39, 50 S. E. 927 (1905).

Illinois.—*Martin v. Martin*, 174 Ill. 371, 51 N. E. 691, 66 Am. St. Rep. 290. *affirming* 74 Ill. App. 215 (1898).

Indiana.—*Kuhns v. Gates*, 92 Ind. 66 (1883).

Iowa.—*Ohde v. Hoffman*, 90 N. W. 750 (1902); *Nodle v. Hawthorne*, 107 Iowa 380, 77 N. W. 1062 (1899).

North Carolina.—*Piedmont Savings Bank v. Levy*, 138 N. C. 274, 50 S. E. 657 (1905).

North Dakota.—*Wifferman v. Mercantile Co. v. Robbins*, 135 N. W. 785 (1912).

Possession must be held in the capacity in which alone the declarations would be relevant. For example, one who has possession, as agent for a corporation, of corporate assets cannot make a declaration with re-

gard to the same which can be utilized by his individual creditors. *Whitney v. Wagener*, 84 Minn. 211, 87 N. W. 602 (1901).

"The rule is familiar, that the declarations of a party in possession of property, are verbal acts, and are admitted as explanatory of the nature of that possession." *Burgert v. Borchert*, 59 Mo. 80 (1875), per *Sherwood, J.*

Should both title and possession have been parted with, the declarations of the vendor are incompetent.

Alabama.—*Pulliam v. Newberry's Adm'r*, 41 Ala. 168 (1867); *Footte v. Cobb*, 18 Ala. 585 (1851); *Strong v. Brewer*, 17 Ala. 706 (1850).

Arkansas.—*Gauss v. Doyle*, 46 Ark. 122 (1885); *Smith v. Hamlet*, 43 Ark. 320 (1884).

Georgia.—*Flanders & Huguenin v. Maynard*, 58 Ga. 56 (1877).

Illinois.—*Bell v. Prewitt*, 62 Ill. 361 (1872); *Hessing v. McCloskey*, 37 Ill. 341 (1865).

Iowa.—*Allen v. Kirk*, 81 Iowa 658, 47 N. W. 906 (1891); *Benson v. Lundy*, 52 Iowa 265, 3 N. W. 149 (1879); *Keystone Mfg. Co. v. Johnson*, 50 Iowa 142 (1878).

Maine.—*Fiske v. Small*, 25 Me. 453 (1845).

Missouri.—*Farrar v. Snyder*, 31 Mo. App. 93 (1888); *Weinrich v. Porter*, 47 Mo. 293 (1871); *Stewart v. Thomas*, 35 Mo. 202 (1864).

Nebraska.—*Farmers' Loan & Trust Co. v. Montgomery*, 30 Neb. 33, 46 N. W. 214 (1890).

Nevada.—*Lewis v. Wilcox*, 6 Nev. 215 (1870).

with a delivery³ even though not made in the presence of the adverse party,⁴ are received, according to their legal and logical bearing, either for⁵ or against⁶ B. In the same way, they are equally

New York.—Peck v. Crouse, 46 Barb. 151 (1864).

Pennsylvania.—Pringle v. Pringle, 59 Pa. St. 281 (1869).

South Carolina.—Kittles v. Kittles, 4 Rich. Law 422 (1851).

Tennessee.—Holmark v. Molin, 45 Tenn. 482 (1868).

Texas.—Q'Arrigo v. Texas Produce Co., (Civ. App. 1895) 31 S. W. 713; Boaz v. Schneider, 69 Tex. 128, 6 S. W. 402 (1887).

Wisconsin.—Selsby v. Redlon, 19 Wis. 17 (1865).

Wyoming.—Toms v. Whitmore, 44 Pac. 56, 6 Wyo. 220 (1896).

3. Myers v. Bernstein, 102 Ga. 579, 27 S. E. 681 (1897).

4. Remy v. Lilly, 22 Ind. App. 109, 53 N. E. 387 (1899); Rollofson v. Nash, 75 Minn. 237, 77 N. W. 954 (1899). Compare, Preston v. Newcomb, 149 Mich. 512, 113 N. W. 29, 14 Det. Leg. N. 501, 119 Am. St. Rep. 691 (1907).

5. *Alabama*.—Larkin v. Baty, 111 Ala. 303, 18 So. 666 (1895); Bell v. Kendall, 93 Ala. 489, 8 So. 492 (1890); Nelson v. Iverson, 19 Ala. 95, 99, 24 Ala. 9, 16 (1851); Thomas v. Degraffenreid, 17 Ala. 602, (1850) 27 Ala. 651 (1855); Gary v. Terrill, 9 Ala. 206 (1846); Oden v. Stubblefield, 4 Ala. 40 (1842).

Connecticut.—Avery v. Clemens, 18 Conn. 306, 46 Am. Dec. 323 (1847).

Georgia.—See Horn v. Ross & Leitch, 20 Ga. 210, 65 Am. Dec. 621 (1856).

Illinois.—Amick v. Young, 69 Ill. 542 (1873).

Indiana.—Remy v. Lilly, 22 Ind. App. 109, 53 N. E. 387 (1899); Mans v. Bome, 123 Ind. 522, 24 N. E. 345 (1889).

Iowa.—Walkley v. Clarke, 107 Ia. 451, 78 N. W. 70 (1899); Nodle v.

Hawthorne, 107 Ia. 380, 77 N. W. 1062 (1899); Hardy v. Moore, 62 Ia. 65, 17 N. W. 200 (1883).

Massachusetts.—Parry v. Libby, 166 Mass. 112, 44 N. E. 124 (1896); Roberts v. Medberry, 130 Mass. 100 (1882). See, however, Fellows v. Smith, 130 Mass. 378 (1881); McGough v. Wellington, 4 Allen 502 (1862); Noblitt v. Durbin, 41 Or. 555, 69 Pac. 685 (1902).

Minnesota.—Rollofson v. Nash, 75 Minn. 237, 77 N. W. 954 (1899).

Montana.—Gallick v. Bordeaux, 22 Mont. 470, 56 Pac. 961 (1899).

New Hampshire.—Putnam v. Osgood, 52 N. H. 148 (1872)

North Carolina.—McCanless v. Reynolds, 67 N. C. 268 (1872).

Tennessee.—Brooks v. Lowenstein, 95 Tenn. 262, 35 S. W. 89 (1895).

Narrative of past occurrences by a vendor in possession may properly be excluded. Hadden v. Powell, 21 Ala. 745 (1850); Nelson v. Iverson, 17 Ala. 216 (1850); Robinson v. Devone, 2 Hayw. 154 (1801). See, however, Babb v. Clemson, 10 S. & R. 419, 12 Penn. 328 (1823).

Narrative accounts of past transactions will not be received in this connection. Perry v. Graham, 18 Ala. 822 (1851); Allen v. Kirk, 81 Iowa 658, 47 N. W. 906 (1891); Sweet v. Spencer, 57 Ia. 510, 10 N. W. 870 (1881); Runquist v. Anderson, 64 Neb. 755, 90 N. W. 760 (1902). "While it is allowable to prove the statements of one in possession, in explanation of the possession, it is not permissible to show everything that may have been said by him in respect to the title, as that it was acquired bona fide, and for a valuable consideration." Webster v. Smith, 10 Ala. 429 (1846), per Goldthwaite, J. Statements subsequent to judg-

competent in derogation of C's alleged rights or in his favor.⁷ In like manner, the extrajudicial declarations of C, the subsequent claimant, made while in possession of the goods and indicating the nature of his claim to them should be received in his own favor.⁸ This, however, has not been conceded by the courts, as an administrative matter, in many cases.⁹

Fraud of creditors.—With especial frequency, the declarations of a debtor will be received to show the claim under which property is being held by him after he has parted with the title to it where it is asserted by creditors that the retention of possession by the vendor is evidence that the conveyance is intended to hinder, defraud and delay them in the enforcement of their rights.¹⁰ Such extrajudicial statements are received as against the claims of the vendee.¹¹ But in a case of a voluntary and gratuitous conveyance

ment are inadmissible.—*James v. Taylor*, 93 Ga. 275, 20 S. E. 309 (1893).

Statements after levy.—"The declarations of a defendant in *fi. fa.* after a levy are never admissible. The defendant in *fi. fa.* cannot be permitted to talk away the rights of either the plaintiff in *fi. fa.* or the claimant." *Walton v. Mitchell* (Ga. App. 1912), 74 S. E. 1006, per Russell, J. See also *Luke v. Cannon*, 4 Ga. App. 538, 62 S. E. 110 (1908).

6. *Cole v. Varner*, 31 Ala. 244 (1857); *Beall v. Ledlow*, 14 Ala. 523 (1848); *Tillman v. Fontaine*, 98 Ga. 672, 27 S. E. 149 (1896).

7. *Alabama.*—*Moses v. Dunham*, 71 Ala. 173 (1881).

Georgia.—*Myers v. Bernstein*, 102 Ga. 579, 27 S. E. 681 (1851).

Indiana.—*Remy v. Lilly*, 22 Ind. App. 109, 53 N. E. 387 (1899).

Minnesota.—*Lehmann v. Chapel*, 70 Minn. 496, 73 N. W. 402 (1897).

Missouri.—*Thomas v. Wheeler*, 47 Mo. 363 (1871); *Foster v. Nowlin*, 4 Mo. 18 (1835).

New Hampshire.—*Bradley v. Spofford*, 23 N. H. 444, 55 Am. Dec. 205 (1851); *Walcott v. Keith*, 22 N. H. 196 (1850).

Vermont.—*Hayward Rubber Co. v.*

Dunklee, 30 Vt. 29 (1856). See, also, *Fletcher v. Wakefield*, 75 Vt. 257, 54 Atl. 1012 (1903).

A contrary view has been expressed in Canada. *Earnshaw v. Tomlinson*, 26 U. C. Q. B. 610 (1867).

8. *Larkin v. Baty*, 111 Ala. 303, 18 So. 666 (1895); *Whitaker v. Wheeler*, 44 Ill. 440, 442 (1867); *Boyden v. Moore*, 11 Pick. 362 (1831).

9. *Thompson v. Mawhinney & Smith*, 17 Ala. 362, 52 Am. Dec. 176 (1850); *Murray v. Cone*, 26 Iowa. 276 (1868); *Swindell v. Warden*, 7 Jones L. (N. C.) 575 (1860).

The difficulty of so controlling the jury that they will use the statements simply to the extent permitted by the present rule, not going further and using them as proof of the facts asserted, is obviously a grave one.

10. *Burgert v. Borchert*, 59 Mo. 80 (1875); *Den v. Pickett*, 3 Dev. (N. C.) 6 (1831); *Willies v. Farley*, 3 C. & P. 395 (1828).

11. *Alabama.*—*Martin v. Hardesty*, 27 Ala. 458, 62 Am. Dec. 773 (1855); *Mobley v. Dilberry*, 17 Ala. 428 (1850); *Abney v. Kingsland & Co.*, 10 Ala. 355 (1846); *Borland v. Mayo*, 8 Ala. 105 (1845).

the declarations of the party will not be received to explain his intentions in favor of himself where there are other circumstances tending to show fraud.¹²

§ 2611. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Claim*); Confusion with Res Gestae as Evidence of Facts Asserted.—In several jurisdictions the normal scope of the rule admitting extrajudicial statements independently relevant for the purpose of constituting or proving any claim to boundaries has been confused in a marked degree with the use of unsworn statements as proof of the facts asserted, utilizing both the principle of the *res gestae*, so called,¹ and the rules relating to the determination of private boundaries.² Yet there is apparently a clear distinction between the two, it being obviously a different matter to show what a declarant *claimed* to be the truth as to the position of the boundary and its real position in point of fact. Disregarding this, it has been insisted that the declaration will not be receivable in one capacity unless it is also available in the other. Thus, the independently relevant statement as to claim has been received only when a declarant, since deceased, not merely was on the land³ but actually engaged at the time in the act of pointing out its boun-

California.—Visher v. Webster, 8 Cal. 109 (1857).

Florida.—Volusia Co. Bank v. Bigelow, 45 Fla. 638, 33 So. 704 (1903).

Maine.—Fisher v. True, 38 Me. 534 (1854).

Missouri.—Wall v. Beedy, 161 Mo. 625, 61 S. W. 864 (1901); Dunlap v. Griffith, 146 Mo. 283, 47 S. W. 917 (1898); Boyd v. Jones, 60 Mo. 454 (1875); State *ex rel.* Heed v. King, 44 Mo. 238 (1869).

Wyoming.—Toms v. Whitmore, 6 Wyo. 220, 44 Pac. 56 (1896).

United States.—Bowie v. Hunter, 4 Cranch C. C. 699, Fed. Cas. No. 1,731 (1836).

In North Carolina a contrary view has been held, excluding the declarations of a grantor made after assignment. City National Bank v.

Bridgers, 128 N. C. 322, 38 S. E. 888 (1901); Blair v. Brown, 116 N. C. 631, 21 S. E. 434 (1895). The earlier law was in accordance with the more general rule. Gidney v. Logan, 79 N. C. 214 (1878); Kirby v. Masten, 70 N. C. 540 (1874); Satterwhite v. Hicks, 44 N. C. (Busb.) 105, 57 Am. Dec. 577 (1852). See, however, Arnold v. Bell, 1 Hayw. 396 (1796).

12. Gruber v. Boyles, 1 Brev. (S. C.) 266, 2 Am. Dec. 665 (1803).

§ 2611-1. § 2808.

2. §§ 2804 *et seq.*

3. Mann v. Cavanaugh, 110 Ky. 776, 23 Ky. Law Rep. 238, 62 S. W. 854 (1901); Long v. Colton, 116 Mass. 414 (1875); Daggett v. Shaw, 5 Mete. (Mass.) 223 (1842); Bender v. Pitzer, 27 Pa. St. 333 (1856); Hunnicut v. Peyton, 102 U. S. 333, 26 L. ed. 113 (1880).

daries.⁴ In other words, the declaration must be a spontaneous one, tending to establish the truth of the facts asserted, including the position of boundaries or landmarks.⁵ Should it be made to ap-

4.—*Connecticut*.—Noyes v. Ward, 19 Conn. 250 (1848).

Maine.—Wilson v. Rowe, 93 Me. 205, 44 Atl. 615 (1899); Royal v. Chandler, 83 Me. 150, 21 Atl. 842 (1891); Chapman v. Twitchell, 37 Me. 59, 58 Am. Dec. 773 (1853).

Massachusetts.—Wood v. Foster, 8 Allen 24, 85 Am. Dec. 681 (1864); Daggett v. Shaw, 5 Metc. (Mass.) 223 (1842).

New Hampshire.—Wood v. Fiske, 62 N. H. 173 (1882); Hobbs v. Cram, 22 N. H. 130 (1850).

New Jersey.—Curtis v. Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584 (1886).

North Carolina.—Price v. Price, 133 N. C. 494, 45 S. E. 855 (1903).

Texas.—Matthews v. Thatcher, 33 Tex. Civ. App. 133, 76 S. W. 61 (1903).

United States.—Hunnicut v. Peyton, 102 U. S. 333, 26 L. ed. 113 (1880).

5. *Kentucky*.—Gurley v. Starr, 30 Ky. L. Rep. 974, 99 S. W. 972 (1907).

Maine.—Wilson v. Rowe, 93 Me. 205, 44 Atl. 615 (1899); Royal v. Chandler, 83 Me. 150, 21 Atl. 842 (1891).

Massachusetts.—Holmes v. Turners Falls Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283 (1890); Long v. Colton, 116 Mass. 414 (1875); Whitney v. Bacon, 9 Gray 206, 69 Am. Dec. 281 (1857); Flag v. Mason, 8 Gray 556 (1857); Bartlett v. Emerson, 7 Gray 174 (1856); Daggett v. Shaw, 5 Metc. 223 (1842).

New Hampshire.—Lawrence v. Tennant, 64 N. H. 532, 15 Atl. 543 (1888).

New Jersey.—Curtis v. Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584 (1886).

Pennsylvania.—Bender v. Pitzer, 27 Pa. St. 333 (1856).

Vermont.—Child v. Kingsbury, 46 Vt. 47 (1873).

United States.—Hunnicut v. Peyton, 102 U. S. 333, 363, 26 L. ed. 113 (1880).

See Westfelt v. Adams, 131 N. C. 379, 42 S. E. 823 (1902).

It is not material that the effect of the declaration is to contradict the unambiguous language of a deed. Hobbs v. Cram, 22 N. H. 130 (1850).

Facts collateral to the position of boundaries cannot be shown in this way. That a given line of trees, for example, was a "known division line" cannot be proved by such a statement. Van Deusen v. Turner, 12 Pick. (Mass.) 532 (1832).

In Wisconsin the declarations of the grantor at the time of the conveyance with regard to the boundaries of the land conveyed is held not to be competent. Lampe v. Kennedy, 60 Wis. 110, 18 N. W. 730 (1884).

Subjective relevancy.—As in other cases where an extrajudicial declaration is to be used as proof of the facts asserted, the subjective mental state of the declarant is the all-important consideration. Adequate knowledge on his part must be shown. Lawrence v. Tennant, 64 N. H. 532, 15 Atl. 543 (1888); Curtis v. Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584 (1886); Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113 (1880). It must further appear that he was under no controlling motive to misrepresent the truth of the matter. Holmes v. Turners Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283 (1890); Daggett v. Shaw, 5 Metc. (Mass.) 223 (1842); Smith v. Forrest, 49 N. H. 230 (1870); Curtis v. Aaronson, 49 N. J.

pear that the declarant has never occupied the premises as owner,⁶ or in any other capacity,⁷ or that at the time of making his declaration he had parted with his ownership, or ceased to be in possession,⁸ or that the declaration is made in any other connection than in that of pointing out the boundaries,⁹ or the declarant is not shown to be dead,¹⁰ his extrajudicial assertion is merely hearsay and is accordingly rejected. These conditions of admissibility are imperative.

§ 2611a. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Conspiracy.—The extrajudicial statements of persons confederating together may constitute a conspiracy.¹

§ 2612. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Contract.—The *res gestae* of a contract, the occurrences out of which the

L. 68, 7 Atl. 886, 60 Am. Rep. 584 (1886); *Child v. Kingsbury*, 46 Vt. 47 (1873). That the declaration is self-serving is not regarded as objectionable. *Daggett v. Shaw*, 5 Metc. (Mass.) 223 (1842); *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584 (1886). See also *Royal v. Chandler*, 83 Me. 150, 21 Atl. 842 (1891); *Hedrick v. Gobble*, 63 N. C. 48 (1868); *Evarts v. Young*, 52 Vt. 329 (1880).

6. *Sullivan Granite Co. v. Gordon*, 57 Me. 520 (1869); *Long v. Colton*, 116 Mass. 414 (1875); *Bartlett v. Emerson*, 7 Gray (Mass.) 174 (1856).

See also *Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61 (1903).

Agency.—The extrajudicial declarations of an agent in possession will not be received to disparage the title of his principal. *Perkins v. Brinkley*, 133 N. C. 348, 45 S. E. 652 (1903).

7. *Bartlett v. Emerson*, 7 Gray (Mass.) 174 (1856).

8. *O'Connell v. Cox*, 179 Mass. 250, 60 N. E. 580 (1901); *Whitney v. Bacon*, 9 Gray (Mass.) 206, 69 Am. Dec. 281 (1857); *Nutter v. Tucker*, 67 N.

H. 185, 30 Atl. 352, 68 Am. St. Rep. 647 (1892); *Martyn v. Curtis*, 68 Vt. 397, 35 Atl. 333 (1896).

9. *Peck v. Clark*, 142 Mass. 436, 8 N. E. 335 (1886); *Long v. Colton*, 116 Mass. 414 (1875).

Vermont holds an even more extended rule on this subject. The extrajudicial declarations of the owner, said to be received upon this principle of the *res gestae*, are required to be made in connection with the exercise of some right of ownership in the property and embody a claim that the speaker is entitled, as a matter of right, to do as he is doing. *Kimball v. Ladd*, 42 Vt. 747 (1870); *Noble v. Sylvester*, 42 Vt. 146 (1869); *Perkins v. Blood*, 36 Vt. 273 (1863).

10. *O'Connell v. Cox*, 179 Mass. 250, 60 N. E. 580 (1901); *Flagg v. Mason*, 8 Gray (Mass.) 556 (1857); *Daggett v. Shaw*, 5 Metc. (Mass.) 223 (1842); *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584 (1886). See also *Barrett v. Kelly*, 131 Ala. 378, 30 So. 824 (1901).

§ 2611a-1. *Banks v. State*, 157 Ind. 190, 60 N. E. 1087 (1901) (conversation).

right or liability is said to arise, may consist largely, if not solely, of extrajudicial statements.¹ The relevancy of such declarations to the existence of the contract is usually constituent, although it may be probative, in proportion as the mental state, the *animus contrahendi*, is relied upon rather than the words themselves, which are the subject of direct observation.

The rescission of a contract may be established in the same way.² In other words, extrajudicial statements may constitute a rescission.

§ 2612-1. *Alabama*.—*Vincent v. State*, 74 Ala. 274 (1883); *Hooper v. Edwards*, 25 Ala. 528 (1854).

District of Columbia.—*Tuohy v. Trail*, 19 App. Cas. 79 (1901) (contract by father to pay daughter for services).

Illinois.—*Benedict v. Dakin*, 243 Ill. 384, 90 N. E. 712 (1910); *Hurd v. Haggerty*, 24 Ill. 171 (1860).

Indiana.—*Bolds v. Woods*, 9 Ind. App. 657, 36 N. E. 933 (1894); *State v. Gregory*, 132 Ind. 387, 31 N. E. 952 (1892); *Porter v. Waltz*, 108 Ind. 40, 8 N. E. 705 (1886).

Indian Territory.—*Long-Bell Lumber Co. v. Thomas*, 1 Indian Terr. 225, 40 S. W. 773 (1897).

Iowa.—*Sheldon v. Bigelow*, 118 Iowa 586, 92 N. W. 701 (1902) (to show that declarant was a partner).

Massachusetts.—*Blanchard v. Child*, 7 Gray, 155 (1856). See *Jennings v. Rooney*, 183 Mass. 577, 67 N. E. 665 (1903).

Michigan.—*Chick v. Sisson*, 95 Mich. 412, 54 N. W. 895 (1893); *Brush Swan Light, etc., Co. v. Gardner*, 59 Mich. 424, 26 N. W. 661 (1886); *Owen v. Union Match Co.*, 48 Mich. 348, 12 N. W. 175 (1882).

Montana.—*Frank v. Murray*, 7 Mont. 4, 14 Pac. 654 (1887).

New Hampshire.—*Delano v. Goodwin*, 48 N. H. 203, 97 Am. Dec. 601 (1868); *Johnson v. Elliott*, 26 N. H. 67 (1852).

New York.—*Lennon v. Stiles*, 2 Silv. Supreme 145, 4 N. Y. Suppl. 487, affirmed 53 Hun 630, 5 N. Y.

Suppl. 870, 24 N. Y. St. Rep. 390 (1889); *Sickles v. Richardson*, 23 Hun, 559 (1878); *Robison v. Lyle*, 10 Barb. 512 (1851); *Murray v. Bethune*, 1 Wend. 191 (1828).

Pennsylvania.—*Ellis v. Guggenheim*, 20 Pa. St. 287 (1853).

South Dakota.—*Jenkins v. Hallstrom*, 138 N. W. 13 (1912).

Texas.—*Itasca First Nat. Bank v. Watson*, 66 S. W. 232 (1902).

Vermont.—*Fifield v. Richardson*, 34 Vt. 410 (1861).

Virginia.—*Steptoe v. Pollard*, 30 Gratt. 689 (1878).

United States.—*Marks v. Fox*, 18 Fed. 713 (1883); *Metropolis Nat. Bank v. Kennedy*, 17 Wall. 19, 21 L. ed. 554 (1872); *Hunter v. Marlboro*, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168 (1846). See, also, *Wilmoth v. Hamilton*, 127 Fed. 48, 61 C. C. A. 584 (1904).

Extrajudicial statements of others forming part of a conversation which results in a contract are not objectionable as hearsay. *Puryear v. Ould*, 81 S. C. 456, 62 S. E. 863 (1908).

Antenuptial contract. In a proceeding for a specific performance of an alleged antenuptial contract evidence is admissible of declarations by the defendant, part of the *res gestae* to show a contemplated marriage. *Kennedy v. Borah*, 157 Ill. App. 90 (1910).

2. *Babcock v. Huntington*, 9 Ala. 869 (1846); *Leas v. Grubbs*, Wils. (Ind.) 301 (1873).

Statements of Interpreter.—Where a conversation claimed to result in a contract takes place between two persons who are each ignorant of the language of the other, the statements of the interpreter employed are competent evidence upon the same principles. Under such circumstances, the statement of a bystander who knows one of the languages used as to what he understood to be the contract reached may be received.³

§ 2613. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Contract*); Letters, Telegrams, etc.—The existence of a contract may be shown by the extrajudicial statements contained in letters¹ or telegrams.² The relevancy of the declarations brought to the tri-

3. *Com. v. Vose*, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813 (1892).

§ 2613-1. *Arkansas*.—*Hamburg Bank v. George & Butler*, 92 Ark. 472, 123 S. W. 654 (1909).

Georgia.—*Kimbell v. Moreland*, 55 Ga. 164 (1875).

Illinois.—*Dana v. Short*, 81 Ill. 468 (1876).

Indiana.—*Thames L. & T. Co. v. Beville*, 100 Ind. 309 (1885).

Kentucky.—*Hutcheson v. Blake-man*, 3 Metc. 80 (1860).

Maryland.—*Cheney v. Eastern Transp. Line*, 59 Md. 557 (1883).

Massachusetts.—*Baylies v. Payson*, 5 Allen 473 (1862).

Missouri.—*Stotesburg v. Messengale*, 13 Mo. App. 221 (1883); *Bourne v. Shapleigh*, 9 Mo. App. 64 (1880). And see *Whaley v. Hinchman*, 22 Mo. App. 483 (1886).

New York.—*Clark v. Dales*, 20 Barb. 42 (1855); *Vassar v. Camp*, 14 Barb. 341, *affd.* 11 N. Y. 441 (1852).

Oklahoma.—*Keel v. New York Life Ins. Co.*, 20 Okla. 195, 94 Pac. 177 (1908).

Pennsylvania.—*Ames v. Pierson*, 174 Pa. St. 597, 34 Atl. 317 (1896); *Wood v. Lovett*, 1 Pennyp. 51 (1881).

Tennessee.—*College Mill Co. v. Fidler*, (Ch. 1899) 53 S. W. 382.

Texas.—*Short v. Threadgill*, 3 White & W. Civ. Cas., Ct. App. § 267

(1887); *Duble v. Batts & Dean*, 38 Tex. 312 (1873).

West Virginia.—*Cobb v. Dunleir*, 63 W. Va. 398, 60 S. E. 384 (1908); *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692 (1895).

United States.—*Patrick v. Bowman*, 149 U. S. 411, 13 S. Ct. 811, 866, 37 L. ed. 790 (1893); *Galgate Ship Co. v. Starr & Co.*, 58 Fed. 894 (1893); *Darlington Iron Co. v. Foote*, 16 Fed. 646 (1883); *Deshon v. Fosdick*, 1 Woods 286, 7 Fed. Cas. No. 3,819 (1872); *The Palo Alto*, 2 Ware 344, 18 Fed. Cas. No. 10,700 (1847).

An employee's report prepared by him at the request of his employer by whom it was reviewed and accepted is admissible as a part of the *res gestae* in an action to recover for his salary and expenses on such trip. *Shepard v. Minneapolis Threshing M. Co.*, 50 Wash. 242, 97 Pac. 57, 18 L. R. A. (N. S.) 239 (1908).

2. *Illinois*.—*Cobb v. Foree*, 38 Ill. App. 255 (1890); *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634 (1884).

Indiana.—*Miller v. Nugent*, 12 Ind. App. 348, 40 N. E. 282 (1895).

Kentucky.—*Calhoun v. Atchison*, 4 Bush 261, 96 Am. Dec. 299 (1868).

Maine.—*True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156 (1872).

bunal by such documents may be regarded as being either constituent or probative according as the specific language employed is used as constituting a formal offer or acceptance, on the one hand; or is, on the other, employed as evidence of a mental state claimed to be an agreement in the minds of the contracting parties as to a certain subject matter.³

§ 2614. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Contract; Letters, Telegrams, etc.*); Entire Correspondence Required.—Under the administrative principle of completeness elsewhere con-

Maryland.—Curtis v. Gibney, 59 Md. 131 (1882).

Missouri.—Whaley v. Hinchman, 22 Mo. App. 483 (1886).

New Jersey.—Hallow v. Commercial Ins. Co., 26 N. J. L. 268, *affd.* 27 N. J. L. 645 (1857).

New York.—Marshall v. Eisen Vineyard Co., 7 Misc. 674, 28 N. Y. Suppl. 62, 58 N. Y. St. 375 (1894); Schonberg v. Cheney, 3 Hun 677, 6 Thomp. & C. 200, 677 (1875); Beach v. Raritan, etc., R. Co., 37 N. Y. 457 (1868); Trevor v. Wood, 41 Barb. 255, *reversed* in 36 N. Y. 307, 1 Transcr. App. 248, 3 App. Pr. (N. S.) 355, 93 Am. Dec. 511 (1864).

Tennessee.—College Mill Co. v. Fidler, 58 S. W. 382 (1899).

United States.—Minnesota Linseed Oil Co. v. Collier White Lead Co., 4 Dill 431, 17 Fed. Cas. No. 9,635 (1876).

England.—Stevenson v. McLean, 5 Q. B. D. 346, 49 L. J. Q. B. 701, 42 L. T. Rep. (N. S.) 897, 28 Wkly. Rep. 916 (1880).

Canada.—Thorne v. Barwick, 16 W. C. C. P. 369 (1866).

3. The existence of such an agreement presents a question of construction.

Massachusetts.—Cox v. Maxwell, 151 Mass. 336, 24 N. E. 50 (1890).

Texas.—Short v. Threadgill, 3 Tex. App. Civ. Cas., § 267 (1887).

Utah.—Societe Anonyme, etc. v.

Old Jordan Min., etc., Co., 9 Utah 483, 35 Pac. 492, *affd.* 164 U. S. 261, 17 S. Ct. 113, 41 L. ed. 427 (1894).

Wisconsin.—Lawrence v. Milwaukee, etc., R. Co., 84 Wis. 427, 54 N. W. 797 (1893).

United States.—Central Trust Co. v. Wabash, etc., R. Co., 38 Fed. 561 (1889); Alford v. Wilson, 20 Fed. 96 (1884); Utley v. Donaldson, 94 W. S. 29, 24 L. ed. 54 (1876).

Responsibility for correct transmission.—In the United States, the sender of an offer or acceptance by telegraph assumes the responsibility for errors by transmission and is bound by the form of the message as it reaches the sender. Dunning v. Roberts, 35 Barb. (N. Y.) 463 (1862); New York, etc., Printing Tel. Co. v. Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338 (1860); Durkee v. Vermont Cent. R. Co., 29 Vt. 127 (1856); Saveland v. Green, 40 Wis. 431 (1876). And see Ayer v. Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353 (1887). The rule is different in England where the sender of a telegraphic communication is bound only by the form of his message as he actually delivers it to the company, who are said to be employed by him for the purpose of correct and not of erroneous transmission. Henkel v. Pope, L. R. 6 Exch. 7, 40 L. J. Exch. 15, 23 L. T. Rep. (N. S.) 419, 19 Wkly. Rep. 106 (1870).

sidered¹ the proponent of a portion of a correspondence said to constitute the *res gestae* of a contract may be required to produce all portions of the correspondence which may reasonably be claimed to be part of the *res gestae*, properly so-called, in order to determine the nature and scope of the agreement of the parties. The opposing party is also at liberty, if so disposed, to add such parts of the correspondence to those already submitted by his antagonist as reasonably serve to explain, modify or supplement the portion already received.² It follows that a condition or limitation set forth in an early letter of the correspondence need not be repeated in subsequent ones.³

§ 2615. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Contract*); Period of the Res Gestae.—So long as the business of forming a contract is “still open and in progress,”¹ the period of the *res gestae*, using the term in its proper sense, is not yet complete.² It is clear, therefore, that until the negotiations between the parties are concluded³ their extrajudicial statements showing an offer,⁴ its acceptance,⁵ or repudiation,⁶ may be independently relevant. The period of the *res gestae*, as properly understood, is not ended so long as something still remains to be done in furtherance of a common object. Consequently, where several interviews are required to reach an agreement relevant statements made at any of

§ 2614-1. § 522.

See Flynn v. Kelly, 12 O. L. R. 440 (1906).

2. Where the evidence to show an antenuptial contract has been destroyed by mutual mistake and declarations in favor of one have been received the other party is entitled to show declarations to the contrary. Gordon v. Munn (Kan. 1912), 125 Pac. 1.

3. Georgia R., etc., Co. v. Smith, 83 Ga. 626, 10 S. E. 235 (1889).

§ 2615-1. Allen v. Duncan, 11 Pick. (Mass.) 308 (1831), per Shaw, C. J.

2. “The transaction could not be considered as ended so long as on the occasion of the payment and before the parties had separated anything according to the usual course of business remained to be done in regard

to it.” Fifield v. Richardson, 34 Vt. 410 (1861), per Aldis, J.

3. Fifield v. Richardson, 34 Vt. 410 (1861).

4. Sayre v. Durwood, 35 Ala. 247 (1859).

5. Peet v. Sherwood, 47 Minn. 347, 50 N. W. 241, 929 (1891). Thus, where a letter states that a given financial institution has accepted the proposition to make a certain loan, this is an acceptance and is not excluded by the rule against hearsay. Peet v. Sherwood, 47 Minn. 347, 50 N. W. 241, 929 (1891).

6. Bee v. San Francisco, etc., R. Co., 46 Cal. 248 (1873); Parry v. Arnold, 33 Ill. App. 622 (1889) (letters); Largent v. Beard, (Tex. Civ. App. 1899) 53 S. W. 90.

them, by whomever made, will be received.⁷ On the other hand, after a contract has been completed unilateral statements made by one party and not assented to by the other are not admissible as part of the *res gestae*.⁸ Narrative statements will, as in all other cases, be excluded.⁹

§ 2616. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Contract*); Statements by Agents, etc.—Under the rules of substantive law enabling one with delegated authority to bind his principal, the extrajudicial statements which are part of the *res gestae* of a contract may be those of an agent.¹ In other words, his unsworn

7. Porter v. Hannibal, etc., R. Co., 60 Mo. 160 (1875); Ahern v. Goodspeed, 72 N. Y. 108 (1878).

8. Woods v. Clark, 24 Pick. (Mass.) 35 (1834); Hudson v. Slate, 53 Tex. Civ. App. 453, 117 S. W. 469 (1909).

9. Northwestern Redwood Co. v. Dicken, 13 Cal. App. 689, 110 Pac. 591 (1910).

§ 2616-1. Fritz v. Chicago Grain & E. Co., 136 Iowa 699, 114 N. W. 193 (1907); American Pure Food Co. v. G. W. Elliott & Co., 151 N. C. 393, 66 S. E. 451, 31 L. R. A. (N. S.) 910 n. (1909); Jungworth v. Chicago, M. & St. P. Ry. Co., 24 S. D. 342, 123 N. W. 695 (1909); Ives v. Atlantic & N. C. R. Co., 142 N. C. 131, 55 S. E. 74 115 Am St. Rep. 732 (1906).

"Declarations of an agent when made in the course of, and accompanying, the transaction which is the subject of inquiry, and acting within the scope and limits of his authority, do not come within the general rule excluding hearsay evidence, for the reason that such declarations, as well as the acts of the agent, under such circumstances, are considered and treated as the declarations of his principal." Henderson v. Coleman, 19 Wyo. 183, 115 Pac. 439, 1136 (1911). per Potter, J. See also Franklin Bank v. Navigation Co., 11 Gill & J. (Md.) 28, 33 Am. Dec. 687 (1839).

"Declarations of a carrier's agent

made while acting within the scope of his authority and during the continuance of his agency, in regard to a transaction pending at the time with reference to the discovery of goods for the loss of which plaintiffs sued, were admissible as *res gestae*." Fein v. Weir, 199 N. Y. 540, 92 N. E. 1084 (1910), *affirming* 114 N. Y. Suppl. 426, 129 App. Div. 299 (1908). See also St. Louis & S. F. R. Co. v. Watkins, 45 Tex. Civ. App. 321, 100 S. W. 162 (1907).

So a statement of an agent of a carrier in an action for non-delivery of goods that he would send out a tracer followed after other inquiries by the statement "no use losing more time the goods are lost" was held to be admissible as part of the *res gestae*, the agent being the proper person to make inquiries of and having authority to arrange for the tracing of goods. Maller v. Long Island R. Co., 106 N. Y. Suppl. 784, 122 App. Div. 463 (1907).

Explanation.—Statements of an agent, made in his principal's absence, explaining the indefinite terms of a contract made by the agent in his behalf, are not objectionable as hearsay in an action on the contract. Arkansas, etc., Men's Ass'n v. Lester, (Ark. 1910) 126 S. W. 712.

Reporting offer.—The knowledge of the principal may be shown by the

declaration in and of itself may constitute and establish rather than prove the result at which it arrives.

Question of admissibility of declarations.—Though the question of agency and the extent of the agent's authority is for the jury to determine, the question whether the declarations were made at the time that would entitle them to consideration is one for the court to determine in the first instance.²

Ratification.—On the part of the principal the ratification of an unauthorized act of his representative may take the form of an extrajudicial statement. Where such a declaration is made upon the representations of the agent, the entire conversation in which they were made will be received. It tends to show the information and knowledge upon which the principal acted.³

§ 2617. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae; Contract*); Post Res Gestae Statements.—Narrative statements of distinctly past transactions cannot well assist to constitute a right or liability. They are not, therefore, independently relevant as part of the *res gestae*. So far as such declarations possess any relevancy, it is probative, i. e., as tending to establish the truth of the facts asserted. So regarded, the evidence is excluded by the rule against hearsay.¹ After a contract has been executed the correspondence

extrajudicial statements of the agent made to him in reporting an offer of a third person. *Frank v. Murray*, 7 Mont. 4, 14 Pac. 654 (1887). See also, *St. Louis Southwestern Ry. Co. of Texas v. Kennedy*, (Tex. Civ. App. 1906) 96 S. W. 653. So of his knowledge as to other facts. *Carpenter v. Gibson*, 82 Vt. 336, 73 Atl. 1030 (1909).

In an action brought by a husband to recover for the value of his wife's services, the plaintiff may testify as to what he understood to be the nature of the contract of employment, although his information on the point consists entirely of the statements of his wife. *Delano v. Goodwin*, 48 N. H. 203, 97 Am. Dec. 601 (1868).

On an action for legal services "defendant objected to certain answers

in plaintiff's deposition in which he testified to a conversation had with his stenographer. It is urged that the conversation was not in the presence of the defendant, and was hearsay. The evidence was properly considered. It was merely evidence of the delivery of a message which the stenographer had testified to as having been received from the defendant with instructions to communicate it to the plaintiff." *Carpenter v. Gibson*, 82 Vt. 336, 73 Atl. 1030 (1909).

2. *Henderson v. Coleman*, 19 Wyo. 183, 115 Pac. 439, 1136 (1911).

3. *Davenport Sav. Fund, etc., Assoc. v. North American F. Ins. Co.*, 16 Iowa 74 (1864).

§ 2617-1. *Woods v. Clark*, 24 Pick. (Mass.) 35 (1834).

of the parties respecting it is entirely irrelevant unless more appear.²

§ 2617a. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Dedication.—Extrajudicial statements may constitute or prove the fact of a dedication.¹

§ 2618. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Demand.—A demand may be constituted by an extrajudicial statement.¹ That the statement is, in part at least, self-serving, is not necessarily fatal to admissibility² especially where the declarant's position has been fully covered by a reply made by the adverse interest.³ In like manner, a refusal may be so constituted.⁴

§ 2619. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Denial.—An unsworn statement may constitute a denial.¹ In any case,

2. *Coxe v. Milbrath*, 110 Wis. 499, 86 N. W. 174 (1901).

§ 2617a-1. *Poole v. Commissioners of Rehoboth*, (Del. Ch. 1911) 80 Atl. 683.

§ 2618-1. *Wallace v. Bernheim*, 63 Ark. 108, 37 S. W. 712 (1896); *Gracie v. Robinson*, 14 Ark. 438 (1854); *SeEVERS v. Cleveland Coal Co.*, (Iowa 1912), 138 N. W. 793; *Glatfelter v. Mendels* (Pa. Super. Ct. 1911), 46 Pa. Super. Ct. 562 (letter); *Martin v. Ince* (Tex. Civ. App. 1912), 148 S. W. 1178. Compare *Walleston v. Fahnestock*, 116 N. Y. Suppl. 743 (1909).

Conversion.—In an action for conversion, conversation which took place between plaintiff's representative and the persons in charge of property at the time a demand for possession was made by the former is admissible as a part of the *res gestae*. *Robertson v. Kennedy*, 152 Mich. 553, 116 N. W. 413, 15 Detroit Leg. N. 406 (1908).

Presentment of notes for collection.—The acts and declarations of one

who presents notes for collection have been held to constitute a part of the *res gestae* and evidence thereof to be admissible in an action on the note. *Bolt v. State Savings Bank* (Tex. Civ. App. 1912), 145 S. W. 707.

2. *Glatfelter v. Mendels*, 46 Pa. Super. Ct. 562 (1911).

3. *Glatfelter v. Mendels*, 46 Pa. Super. Ct. 562 (1911).

4. *Pickel v. Luetgert*, 59 Ill. App. 378 (1895); *Merrill v. Cahill*, 8 Mich. 55 (1860).

§ 2619-1. *Arkansas*.—*Tatum v. Mohr*, 21 Ark. 349 (1860).

Kansas.—*Kaufman v. Springer*, 38 Kan. 730, 17 Pac. 475 (1888).

Michigan.—*Passmore's Estate*, 60 Mich. 463, 27 N. W. 601 (1886).

Mississippi.—*Bonner v. Marx*, 51 Miss. 141 (1875).

New Hampshire.—*Clark v. Wood*, 34 N. H. 447 (1857).

South Carolina.—*Charles v. Jacobs*, 6 S. C. 69 (1874).

therefore, where the fact of denial is relevant, the extrajudicial statement which constitutes it will be received. Frequently, it is part of the true *res gestae*.

§ 2620. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Disclaimer.

— Disclaimer may, in like manner, be constituted by the unsworn statement of a person who does not appear as a witness.¹ The statement may be, therefore, constitutently relevant, independent of its truth.

§ 2621. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Libel and Slander.

— One whose purpose is to prove that certain statements of a defamatory nature were made, is clearly entitled to show as part of the true *res gestae*, the making of such extrajudicial declarations. Citation of authority in support of such every-day practice seems unnecessary. These statements are constitutently relevant, independent of their truth or falsity. Should the statement be one for which the defendant, under the rules of substantive law, is in no way responsible, constituent relevancy is not shown and the declaration is rejected, not being, as is said, any part of the *res gestae*.¹

Mitigation of damages.— Extrajudicial statements of a third person made to defendant that certain facts published were true, when introduced in mitigation of damages, and not as justification, are not hearsay.² A defendant may also show for the same purpose the making of previous libelous statements by the plaintiff.³

§ 2622. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the Res Gestae*); Revocation.

— The practical difficulty of distinguishing between the constituent relevancy of extrajudicial statements as *res gestae* facts and the probative relevancy of such declarations when used as circumstantial evidence of a relevant mental state, to which some ref-

§ 2620-1. *Beasley v. Howell*, 117 Ala. 499, 22 So. 989 (1897); *Vincent v. State*, 74 Ala. 274 (1883); *Place v. Gould*, 123 Mass. 347 (1877); *Davis v. Campbell*, 23 N. C. 482 (1841).

§ 2621-1. *American Pub. Co. v.*

Gamble, 115 Tenn. 663, 90 S. W. 1005 (1906).

2. *Kershaw v. Steurer*, 123 N. Y. Suppl. 77, 138 App. Div. 211 (1910).

3. *Downey v. Stirton*, 1 O. L. R. 186 (1901); *Stirton v. Gummer*, 31 O. R. 227 (1899).

erences has been elsewhere made,¹ is well illustrated in cases where the fact to be constituted or proved is *revocation*. For example, evidence will be received in many cases of statements or declarations² which tend to determine the question of whether or not there has been a revocation of an instrument, as where they are a part of the *res gestae* of an act of mutilation which raises a presumption of revocation.³ Such declarations tend to establish the existence of a psychological fact, i. e., the *animus revocandi*.⁴

§ 2622-1. § 2596.

2. District of Columbia.—Patterson v. Ocean Accident & Guarantee Corp., 25 App. D. C. 46 (1905).

Indiana.—Indianapolis & M. Rapid Transit Co. v. Reeder, 37 Ind. App. 262, 76 N. E. 816 (1906).

New Hampshire.—Managle v. Parker, 75 N. H. 139, 71 Atl. 637, 24 L. R. A. (N. S.) 180n. (1908).

New York.—Kennedy's Will, 53 App. Div. 105, 65 N. Y. Suppl. 879, (1900) *affirmed* 167 N. Y. 163, 60 N. E. 442 (1901).

Texas.—Buchanan v. Rollings, (Civ. App. 1909) 128 S. W. 962; Hardin v. St. Louis Southwestern Ry. Co. of Texas, (Civ. App. 1905) 88 S. W. 440.

United States.—Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. ed. 663 (1901).

England.—Staines v. Stewart, 2 Sw. & Tr. 320, 329 (1861).

Margin of will.—Declarations by a testator written on the margin of his will after the date of its alleged revocation and tending to prove that he did not write or execute such revocation are competent. *In re Shelton's Will*, 143 N. C. 218, 55 S. E. 705 (1906).

Recognition of will.—Declarations of a testator subsequent to the execution of her will showing that it had been deposited with a third person followed by a later declaration a few days before her death showing that there was no change in her affections for her devisees, are, where there was direct evidence showing

that there had been no opportunity thereafter for her to withdraw such will, admissible as tending to show that the will had not been cancelled. *Miller's Will*, 49 Oreg. 452, 90 Pac. 1002, 124 Am. St. Rep. 1051 (1907). Where testator's declarations have been admitted showing a recognition of the will a contestant may introduce evidence of contrary statements made by deceased. *Venable v. Venable*, 165 Ala. 621, 51 So. 833 (1910). **3. Throckmorton v. Holt**, 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. 474 (1901).

Where a presumption arises that a will has been revoked by the testator his declarations that he had destroyed it or intended not to adhere to it are competent to strengthen and fortify such presumption. *McCoy's Will*, 49 Oreg. 579, 90 Pac. 1105 (1907).

The revocation of a former will cannot be established solely by the declaration of the testator that an instrument he is signing is a will, there being no evidence of its contents or that it was ever seen after its supposed execution. *Williams v. Niles*, 87 Neb. 455, 127 N. W. 90a (1910).

"There must be an act and an intention in order to revoke. Neither can be inferred from evidence of declarations of a testator apart from the act and with no proof that the testator ever performed an act of a revocatory nature." *Throckmorton v. Holt*, 180 U. S. 552, 586, 45 L. ed. 663, 21 Sup. Ct. 474 (1901), per Mr.

§ 2623. (Independent Relevancy of Unsworn Statements; Extrajudicial Statements Part of the *Res Gestae*); Sales.—

Extrajudicial statements, being part of the true *res gestae*, may constitute, or assist to constitute, a sale.

A special rule unnecessary.— It is thought that much of the confusion which requires the statement which is evidentiary of a relevant mental state to accompany some act which is itself ambiguous has its origin in the failure to observe this familiar distinction. Wherever a psychological fact is one of the *res gestae*, properly so called, or a probative circumstance tending to establish one or more of the true *res gestae*, an extrajudicial statement, if it would logically tend to establish the existence of the mental state, is competent. No apparent necessity exists for introducing any special rule on the subject, such as that formulated under the so-called "verbal act" doctrine. Where the mental state is competent, the unsworn statement is an appropriate, perhaps the most appropriate, way of proving it. Subject to any requirements of positive law regulating the mode of transfer, it is not material in this connec-

Justice Peckham. See *Smith v. Ryan*, 136 Iowa 335, 112 N. W. 8 (1907).

"To admit such declarations inconsistent with the will would be to establish a doctrine, which would render useless the precautions which the law requires in making a will; for, if such evidence were allowed, witnesses would constantly be produced to set aside the most solemn testamentary instruments. Testator having shown a settled purpose that such writing as is before us should be his will, there must be shown something more than declarations inconsistent with its existence, since the paper, in his own handwriting, and under his control, was permitted to remain undisturbed by him until his death. The law prescribes the requisites for a valid will, and when these are complied with in strict conformity thereto, can it be allowed, upon reason to defeat them, by mere declarations, unaccompanied by any act?" *LaRue v. Lee*, 63 W. Va. 388, 60 S. E. 388, 129 Am. St. Rep. 978, 14 L. R. A. (N. S.) 968 n. (1908),

per *Robinson, J.* See *Barnewell v. Murrell*, 108 Ala. 366, 18 So. 831 (1895).

4. "Such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive, or not to revive, the earlier will. Whether it had the one effect or the other depended upon what was in the mind of the testatrix." *Pickens v. Davis*, 134 Mass. 252 (1883), per *C. Allen, J.* "Mere words alone will in no case amount to a revocation. Under these statutes, therefore, the only possible purpose for which evidence of the declaration of the testator can be given, upon a question of revocation, is to establish the *animo revocandi*, in other words, to show the intent with which the act relied upon as a revocation was done. . . . The fact to be proved in such cases is, the act claimed as a revocation, together with the intent with which it was done; and all declarations of the testator which do not accompnay the

tion whether the sale in question relates to real¹ or personal² property. Such declarations may naturally condition the effect of an otherwise unlimited transfer.³ This occurs only where the qualify-

act, are to be regarded as mere hearsay and should be treated as such." *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71 (1854), per Selden, J. "The act of cancelling is, in itself, equivocal, and will be governed by the intent," *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395 (1825), per Woodworth, J. to show which declarations of the testator at the time of revocation are admissible. *Blackett v. Ziegler*, 153 Iowa 344, 133 N. W. 901, 37 L. R. A. (N. S.) 291 u. (1911). "All acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done *'animo revocandi'* it is no revocation." *Powell v. Powell*, L. R. 1 P. & D. 209, 212 (1866), per Wilde, J.

§ 2623-1. *Alabama*.—*Bethea v. McCall*, 3 Ala. 449 (1842).

Alabama.—*Bethea v. McCall*, 3 Ala. 449 (1842).

California.—*Tevis v. Hicks*, 41 Cal. 123 (1871).

Illinois.—*Brush v. Blanchard*, 19 Ill. 31 (1857).

Indiana.—*Kenney v. Phillipy*, 91 Ind. 511 (1883).

Missouri.—*Fischer Leaf Co. v. Whipple*, 51 Mo. App. 181 (1892); *Gamble v. Johnson*, 9 Mo. 605 (1845).

New Hampshire.—*Badger v. Story*, 16 N. H. 168 (1844).

New York.—*Kent v. Harcourt*, 33 Barb. 491 (1860).

Pennsylvania.—*Layton v. Bright-*

field, 3 Pennyp. 181 (1882); *York County Bank v. Carter*, 38 Pa. St. 446, 80 Am. Dec. 494 (1861).

Texas.—*Lunn v. Scarborough*, (Civ. App. 1896) 35 S. W. 508.

Virginia.—*Laud v. Jeffries*, 5 Rand. 211, 599 (1827).

West Virginia.—*State v. Andrews*, 39 W. Va. 35, 19 S. E. 385, 45 Am. St. Rep. 884 (1894).

Offers to buy or sell real estate.—It has been said that any evidence of offers for the purchase or sale of real estate are hearsay, unless made by one under oath and subject to cross-examination. *Helena Power Transmission Co. v. McLean*, 38 Mont. 388, 99 Pac. 1061 (1909).

2. *Alabama*.—*Heflin v. Slay*, 78 Ala. 180 (1884).

Georgia.—*Cook v. Pinkerton*, 81 Ga. 89, 7 S. E. 171, 12 Am. St. Rep. 297 (1888).

Indiana.—*Fox v. Cox*, 20 Ind. App. 61, 50 N. E. 92 (1897).

Kansas.—*Greer v. Davis Mercantile Co.*, 86 Kan. 686, 121 Pac. 1121 (1912).

Maine.—*Dale v. Gower*, 24 Me. 563 (1845).

Massachusetts.—*Elliott v. Stoddard*, 98 Mass. 145 (1867).

Missouri.—*Patchin v. Biggerstaff*, 25 Mo. App. 534 (1887).

North Carolina.—*Fain v. Edwards*, 44 N. C. 64 (1852).

Ohio.—*Leggett v. State*, 15 Ohio 283 (1846).

Pennsylvania.—*Rees v. Livingston*, 41 Pa. St. 113 (1861).

Texas.—*Fellman v. Smith*, 20 Tex. 99 (1857).

3. *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509 (1898); *Smith v. T. M. Richardson Lumber Co.*, (Tex. Civ. App. 1898) 47 S. W. 386, reversed 92 Tex. 448, 49 S. W. 574.

ing statement is made during the *res gestae*, as properly understood.⁴

Representations.—The statements or representations, fraudulent or in good faith, on the basis of which the sale was made may be given in evidence as part of the *res gestae*,⁵ using the term in its proper signification.

Bona Fides.—Where the *bona fides* of a sale of cotton is in issue, the fact may be established by the original memoranda of the telegrams sent by the plaintiff over a private wire to its agents.⁶

§ 2624. (*Independent Relevancy of Unsworn Statements*); Extrajudicial Statements as Probative Facts.—The relevancy of an extrajudicial statement when used as the basis of some inference other than that it is true is not, however, necessarily constituent. It may equally well be probative. In other words, the existence of an unsworn statement may not only, as one of the *res gestae* properly so called, constitute or assist to constitute the right or liability asserted but it may also tend to prove, in and of itself, by reason of its very existence, some mental or bodily condition or other fact which is in its turn, one of the *res gestae*—or tends to establish the latter. The instances in which this occurs are very numerous and will be set forth in some detail, although only by way of illustration. It would seem that, in this connection, we are dealing with a very simple logical process. An ultimate fact, one of the *res gestae*, is to be proved. At some point in the line of proof the fact that an extrajudicial statement has been made is a *factum probans* which logically tends, with or without intermediate steps, to establish this ultimate *factum probandum*. It is offered and received for the purpose. For example, the mental state with which a given act was done may be a legitimate component of a defendant's liability. At some time not too remote to be relevant, the defendant is known to have made a declaration which gives a glimpse into his mind, disclosing what the mental state in question was. Whether this statement is true or false, is not the point. The hearsay rule, excluding unsworn declarations as proof of the facts which they assert, is in no way involved. The

4. *Miles v. Knott's Lessee*, 12 Gill & J. (Md.) 442 (1842).

5. *John Silvey & Co v. Tift*, 123 Ga. 804, 1 L. R. A. (N. S.) 386, 51

S. E. 748 (1905); *Smith v. Birge*, 126 Ill. App. 596 (1906).

6. *Overbeck, Starr & Cooke Co. v. Roberts*, 49 Or. 37, 87 Pac. 158 (1906).

mental state is a *res gestae* fact and the unsworn statement tends logically to prove it. Or again, on a civil action, the *knowledge* of one of the parties at a given time may be a material fact. The circumstance that the party made a given statement to someone or that someone made a given statement to him may be a very enlightening fact as to what the person in question knew. As before, the rule against hearsay plays no part. Only a question of proving a material fact in the most natural way possible is apparently involved. There seems, however, to be much confusion among the decisions upon this simple matter. The tendency to involve the rule under consideration with the requirement for contemporaneous incorporation with a relevant act, which has been insisted upon where the extrajudicial declaration is used in its assertive capacity, seems particularly noticeable. As will be seen, the latter rule rests upon a separate and distinct principle, that of the relevancy of spontaneity,¹ and would seem to have little, if anything, to do with the present subject. Nor does there appear to be sufficient ground for formulating a distinct rule, like that of the "verbal act" doctrine. The law of evidence is pursuing, in this connection, merely the ordinary method of using logically probative facts to establish those constituent of the right or liability asserted.

Basis of opinion.—Wherever the existence of an opinion whether that of an expert or skilled observer,² is regarded as material, the statements upon which it is based will be received in evidence. Such declarations are not evidence of the facts which they assert but are taken simply in connection with the mental result arrived at and for the purpose of estimating its value. In this way, the opinion of an attending physician upon the condition of his patient may be received, although based, in part at least, upon the statements of the patient himself.³ In such an event, the

§ 2624-1. § 2983.

2. *Alabama.*—Smith v. State, 53 Ala. 486 (1875); Eckles & Brown v. Bates, 26 Ala. 655 (1855).

Illinois.—Salem v. Webster, 95 Ill. App. 120, affirmed 192 Ill. 369, 61 N. E. 323 (1900).

Massachusetts.—Barber v. Merriam, 11 Allen 322 (1865).

New Hampshire.—Plummer v. Osipee, 59 N. H. 55 (1879).

New Jersey.—State v. Gedick, 43 N. J. L. 86 (1881).

New York.—Mattison v. New York Cent. R. Co., 62 Barb. 364 (1862) (physician).

United States.—Kansas City, etc. R. Co. v. Stoner, 51 Fed. 649, 2 C. C. A. 437 (1892).

3. Consolidated Traction Co. v. Lambertson, 59 N. J. L. 297, 36 Atl. 100, affirmed 60 N. J. L. 452,

statements of the latter may be admitted, especially where corroborated by other evidence.⁴ Certain administrative precautions have, however, been employed by the courts to avoid abuse of the rule. The declarant will not, in many cases, be permitted to manufacture evidence for himself by the expedient of going over the story to an attending physician or skilled observer and calling upon the latter to detail the account to the jury by way of stating the basis of his opinion.⁵ Mere objective symptoms, such as shrinking under the pressure of examination or the exclamation of pain when a tender spot is touched stand, like the indications furnished by pulse, temperature and other bodily manifestations beyond the patient's immediate control, in an entirely different position, and are usually received as a matter of course.⁶

Administrative Danger.—There is an obvious danger, partly by reason of the futile nature of the distinction which procedure seems to draw between the inference of truth and other deductions which may logically arise from the existence of an unsworn statement,⁷ lest the jury may treat as evidence of the facts asserted the unsworn statement which they are allowed to consider only in its independently relevant capacity. It may, therefore, seem to a presiding judge to be sound administration to modify the admissibility of the extrajudicial declarations, so far as is consistent with the right of the proponent to prove his case. Should no other course for preventing the jury from being misled appear practicable, it may well be rejected entirely.

§ 2625. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts*); Bodily Sensation.—Wherever the existence of a bodily condition is a *res gestae* or probative fact, the extrajudicial declarations, articulate or inarticulate, which commonly accompany, characterize or tend to establish the existence, of such a bodily condition, will be re-

38 Atl. 683, and 60 N. J. L. 457, 38 Atl. 684 (1896).

4. Consolidated Traction Co. v. Lambertson, 60 N. J. L. 452, 38 Atl. 683 (1897).

5. St. Louis Southwestern R. Co. v. Martin, 26 Tex. Civ. App. 231, 63 S. W. 1089 (1901).

6. Broyles v. Priscock, 97 Ga. 643, 25 S. E. 389 (1895); Missouri, etc., R. Co. v. Johnson, 95 Tex. 409, 67 S. W. 768 (1902); Missouri, etc., R. Co. v. Johnson (Tex. Civ. App. 1901), 67 S. W. 769, affirmed in 95 Tex. 409, 67 S. W. 768.

7. § 2580.

ceived in evidence.¹ The statement must be one of fact, rather than of opinion.²

§ 2625-1. *Alabama*.—*Stowers Fur niture Co. v. Brake*, 158 Ala. 639, 48 So. 89 (1908); *Western Union Telegraph Co. v. Rowell*, 153 Ala. 295, 45 South. 73 (1907); *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 So. 500 (1902); *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 So. 276 (1893); *Stone v. Watson*, 37 Ala. 279 (1861); *Stein v. State*, 37 Ala. 123 (1861); *Barker v. Coleman*, 35 Ala. 221 (1859).

Arkansas.—*St. Louis Southwestern Ry. Co. v. Jackson*, 93 Ark. 119, 124 S. W. 241 (1910); *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405 (1908); *Edmonds v. State*, 34 Ark. 720 (1879).

California.—*Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. 747 (1900).

Colorado.—*Colorado Springs & I. R. Co. v. Allen*, 48 Colo. 4, 108 Pac. 990 (1910); *Denver City T. Co. v. Martin*, 44 Colo. 324, 98 Pac. 836 (1908).

Connecticut.—*Kelsey v. Universal L. Ins. Co.*, 35 Conn. 225 (1868); *Goodwin v. Harrison*, 1 Root 80 (1789).

Georgia.—*Cedartown v. Brooks*, 2 Ga. App. 583, 59 S. E. 836 (1907); *Tilman v. Stringer*, 26 Ga. 171 (1858).

Idaho.—*State v. Gilbert*, 8 Ida. 346, 69 Pac. 62 (1902).

Illinois.—*Springfield Consol. R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884 (1898).

Indiana.—*Guilfoil Contracting Co. v. Clark*, (App. 1912) 99 N. E. 777; *Indianapolis & M. R. T. Co. v. Walsh*, 45 Ind. App. 42, 90 N. E. 138 (1909); *Southern Indiana R. Co. v. Davis*, 32 Ind. App. 569, 69 N. E. 550 (1904); *Indiana R. Co. v. Maurer*, 160 Ind. 25, 66 N. E. 156 (1903); *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961 (1901); *Hunting-*

ton v. Burke, 21 Ind. App. 655, 52 N. E. 415 (1898); *Alexandria v. Young*, 20 Ind. App. 672, 51 N. E. 109 (1898); *Anderson v. Citizens' St. R. Co.*, 12 Ind. App. 194, 38 N. E. 1109 (1894); *Hancock County v. Leggett*, 115 Ind. 544, 18 N. E. 53 (1888); *De Pew v. Robinson*, 95 Ind. 109 (1883).

Iowa.—*Vernon v. Iowa State Tr. M. Assn.*, 138 N. W. 696 (1912); *Duffey v. Consolidated Block Coal Co.*, 124 N. W. 609 (1910); *Etz Korn v. City of Oelwein*, 142 Iowa 107, 120 N. W. 636 (1909); *Johnston v. Cedar Rapids & M. C. R. Co.*, 141 Iowa 114, 119 N. W. 286 (1909); *Yeager v. Spirit Lake*, 115 Iowa 593, 88 N. W. 1095 (1902); *Keyes v. Cedar Falls*, 107 Iowa 509, 78 N. W. 227 (1899); *Crippen v. Des Moines*, 78 N. W. 688 (1899); *McDonald v. Franchere*, 102 Iowa 496, 71 N. W. 427 (1897); *Blair v. Madison County*, 81 Iowa 313, 46 N. W. 1093 (1890).

Kansas.—*St. Louis, etc., R. Co. v. Burrows*, 62 Kan. 89, 61 Pac. 439 (1900); *Atchison, etc., R. Co. v. Johns*, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609 (1887).

Kentucky.—*Shotwell v. Com.*, 68 S. W. 403, 24 Ky. L. R. 255 (1902).

Maine.—*Asbury L. Ins. Co. v. Warren*, 66 Me. 523, 22 Am. Rep. 590 (1876).

Massachusetts.—*Com. v. Fenno*, 134 Mass. 217 (1883); *Hatch v. Fuller*, 131 Mass. 574 (1881).

Michigan.—*Leedy v. Hoover*, 160 Mich. 449, 125 N. W. 394, 17 Det. Leg. N. 90 (1910); *Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622 (1902); *Burleson v. Reading*, 110 Mich. 512, 68 N. W. 294 (1896); *Will v. Mendon*, 108 Mich. 251, 66 N. W. 58 (1896); *Mayo v. Wright*, 63 Mich. 32, 40, 29 N. W. 832 (1886).

Minnesota.—*Williams v. Great*

A matter of necessity.— Apart from the incompetency of parties to testify, which can hardly be regarded at the present day as an

Northern R. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199 (1897).

Mississippi.— Field v. State, 57 Miss. 474, 34 Am. Rep. 476 (1879) (effect of poison.)

Missouri.— State v. Thompson, 132 Mo. 301, 34 S. W. 31 (1896) (sufferings from poison); King v. King, 42 Mo. App. 454 (1890); Marr v. Hill & Haynes, 10 Mo. 320 (1847).

New Hampshire.— Southern Ry. Co. v. Hardin, 76 N. H. 160, 80 Atl. 336 (1911); Plummer v. Ossipee, 59 N. H. 55 (1879); Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229 (1869); Perkins v. R. Co., 44 N. H. 225 (1862); Howe v. Plainfield, 41 N. H. 135 (1860).

New Jersey.— State v. Gedicke, 43 N. J. L. 86 (1881).

New York.— People v. Williams, 3 Park. Cr. R. 84 (1885).

North Carolina.— State v. Whitt, 113 N. C. 716, 18 S. E. 715 (1893); Henderson v. Crouse, 52 N. C. 623 (1860); Bell v. Marrisett, 51 N. C. 178 (1858); Biles v. Holmes, 33 N. C. 16 (1850).

Ohio.— Cleveland City R. Co. v. Roebuck, 22 Ohio Cir. Ct. 99, 12 Ohio Cir. Dec. 262 (1901).

Oregon.— Thomas v. Herrall, 18 Oreg. 546, 23 Pac. 497 (1890); State v. Mackey, 12 Oreg. 154, 6 Pac. 648 (1885).

Pennsylvania.— Howe v. Howe, 16 Pa. Super. Ct. 193 (1901).

South Carolina.— Oliver v. Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307 (1902); Welch v. Brooks, 10 Rich. (Law) 123 (1856); Young v. Grey, Harp. 38 (1823). See, also, Gosa v. Southern R. Co., 67 S. C. 347, 45 S. E. 810 (1903).

Tennessee.— Lewis v. Moses, 6 Coldw. 193 (1869); Denton v. State, 1 Swan 279 (1851).

Texas.— Trinity & B. V. Ry. Co. v. Carpenter, (Civ. App. 1910) 132

S. W. 837; Pecos & N. T. Ry. Co. v. Coffman, 56 Tex. Civ. App. 472, 121 S. W. 218 (1909); Texas Cent. R. Co. v. Wheeler, 52 Tex. Civ. App. 603, 116 S. W. 83 (1909); St. Louis S. W. Ry. Co. v. Nowell, (Civ. App. 1909) 115 S. W. 861; Roth v. Travelers' Protective Ass'n of America, 102 Tex. 241, 132 Am. St. Rep. 871, 115 S. W. 31 (1909) (headache); affirming Travelers' Protective Ass'n of America v. Roth, (Tex. Civ. App. 1908) 108 S. W. 1039; Arrington v. Texas, etc., R. Co., (Civ. App. 1902) 70 S. W. 551 (1902); Gulf, etc., R. Co. v. Bell, 24 Tex. Civ. App. 579, 58 S. W. 614 (1900); St. Louis, etc., R. Co. v. Gill, (Civ. App. 1900) 55 S. W. 386.

Vermont.— Graves v. Town of Waitsfield, 81 Vt. 84, 69 Atl. 137 (1908); State v. Howard, 32 Vt. 380, 78 Ann. Dec. 609 (1859).

Washington.— Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76 (1903); Bothell v. Seattle, 17 Wash. 263, 49 Pac. 491 (1897).

Wisconsin.— McKeigue v. Janesville, 68 Wis. 50, 31 N. W. 298 (1887).

United States.— Armour & Co. v. Skene, 153 Fed. 241, 82 C. C. A. 385 (1907); Travelers' Protective Assoc. v. West, 102 Fed. 226, 42 C. C. A. 284 (1900); Chicago Travelers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437 (1869).

England.— Gilbey v. Great Western R. Co., 102 L. T. R. 202 (1910); Aveson v. Kinnaird, 6 East 188, 2 Smith K. B. 286, 8 Rev. Rep. 455 (1805); Canning's Trial, 19 How. St. Tr. 283, 478, (1754); Earl of Pembroke's Trial, 6 How. St. Tr. 1309, 1325, 1327, 1331, 1336 (1678).

Canada.— Youlden v. London G. & A. Co., D. L. R. 721, 3 O. W. N. 832, 21 O. W. R. 674, 26 O. L. R. 75 (1912).

important consideration, the chief necessity for relying on circumstantial evidence, including extrajudicial statements used as facts, in proof of bodily sensation consists in the difficulty of procuring other evidence.³

Who may testify as to statements.—The extrajudicial statement of one suffering pain or conscious of other bodily sensation may, as well as his coherent or incoherent ejaculation on the same subject, be testified to by any one who heard it.⁴ Accordingly, a wife,⁵ parent,⁶ daughter,⁷ nurse,⁸ other attendant,⁹ or even a mere by-

Ireland.—Wright v. Kerrigan, 2 I. R. 301 (1911).

Failure to complain.—The fact that a person was not heard to complain of a given injury may be shown, as a relevant fact. Warren v. Wright, 103 Ill. 298, 301 (1882).

Such declarations must be "the natural result and expression of suffering." McMurrin v. Rigby, 80 Iowa 322, 45 N. W. 877 (1890).

Where the character and extent of the injuries received by the plaintiff were fully described by him, evidence of his declarations as to his physical suffering was held to be properly excluded. Goodwyn v. Central of Ga. Ry. Co., 2 Ga. App. 470, 58 S. E. 688 (1907).

Delay in delivery of telegram.—Where a husband was delayed for two days in reaching his sick wife by reason of a failure to deliver a telegram, evidence of her declaration to him when he reached her that she had been "mighty" sick and nervous was held to be admissible in proof of the fact that she was sick and nervous when he reached her. Western Union Teleg. Co. v. Rowell, 153 Ala. 295, 45 So. 73 (1907).

2. § 2628.

3. "If other persons could not be permitted to testify to them, when the person injured might be a witness, there might often be a defect of proof. The person injured might be unable to recollect or state them by reason of the agitation and suffering occasioned by it." Kennard v. Burton, 25 Me. 39, 43 Am. Dec. 249 (1845), per Shepley, J.

4. *Alabama.*—Stein v. State, 37 Ala. 123 (1861); Eckles & Brown v. Bates, 26 Ala. 655 (1855).

Illinois.—Chicago & A. Ry. Co. v. Johnson, 128 Ill. App. 20 (1906).

Iowa.—Rupp v. Howard, 114 Iowa 65, 86 N. W. 38 (1901).

Kansas.—St. Louis, etc., R. Co. v. Burrows, 62 Kan. 89, 61 Pac. 439 (1900); Atchison, etc., R. Co. v. Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609 (1887).

Kentucky.—Allen v. Van Cleave, 15 B. Mon. 236, 61 Am. Dec. 184 (1854).

Minnesota.—Williams v. Great Northern R. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199 (1897).

Mississippi.—Mississippi Cent. Ry. Co. v. Turnage, 49 So. 840 (1909).

New York.—Matteson v. New York Cent. R. Co., 35 N. Y. 487, 91 Am. Dec. 67 (1866).

Tennessee.—Jones v. White, 11 Humphr. 268 (1850).

5. Geiselman v. Schmidt, 106 Md. 580, 68 Atl. 202 (1907).

6. Western Steel Car & F. Co. v. Bean, 163 Ala. 255, 50 So. 1012 (1909).

7. Sheldon v. Wright, 80 Vt. 298, 67 Atl. 807 (1907).

8. Green v. Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747 (1900); Brown v. Mt. Holly, 69 Vt. 364, 38 Atl. 69 (1897).

9. Bagley v. Mason, 69 Vt. 175, 37 Atl. 287 (1896); Drew v. Sutton, 55 Vt. 586, 45 Am. Rep. 644 (1882).

stander¹⁰ is permitted to detail statements to the court. Even the declarant himself may testify as to his own statements.¹¹

§ 2626. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Bodily Sensation*); Form of Statement; Articulate.—The forms which may be taken by the indications of present suffering or other bodily sensation are various. Speaking in the most general way, they may be divided into two classes, articulate and inarticulate, although any administrative attempt to determine the admissibility of such extrajudicial statements by any such test, or by the degree of spontaneity found to exist, seems impracticable.¹ Articulate utterances may be specifically presented to the tribunal² or summarized by the witness under the general term “complaints.”³

10. *Fondren v. Durfee*, 39 Miss. 324 (1860); *Perkins v. Concord R. Co.*, 44 N. H. 223 (1862); *Northern Pac. R. Co. v. Umlin*, 158 U. S. 271, 15 S. Ct. 840, 39 L. ed. 977 (1894).

11. *Alexandria v. Young*, 20 Ind. App. 672, 51 N. E. 109 (1898).

§ 2626-1. “So narrow and strict a rule is not practicable. The expression of suffering may be one-half groans and exclamations and one-half words, or nine-tenths of the former and one-tenth of the latter, or vice versa. How can the law say how much of the utterance shall consist of words, and how much of groans, sighs, and exclamations; or that it may not all consist of words? Again, how can the law say with what degree of anguish the words shall be uttered? One person complains cheerfully, and even laughs and jokes, when he is suffering intense agony, while another complains most dolefully about the slightest affliction. For these reasons, I cannot agree with the majority or with the New York cases, which attempt to make a distinction between words describing present existing suffering and other exclamations indicating such suffering.” *Williams v. R. Co.*, 68 Minn. 55, 65, 70 N. W. 860 (1897), per Canty, J.

2. An exclamation of a person, when taking a dose of supposed medicine, that it burns her stomach, is admissible on the trial of a charge of poisoning such person. *State v. Buck* (Kan. 1912), 127 Pac. 631.

3. *Alabama*.—*Birmingham Ry. L. & P. Co. v. Moore*, 151 Ala. 327, 43 So. 841 (1907).

Georgia.—*Cedartown v. Brooks*, 2 Ga. App. 583, 59 S. E. 836 (1907).

Indiana.—*Elkhart v. Ritter*, 66 Ind. 136 (1879).

Iowa.—*Duffey v. Consolidated Block Coal Co.*, 147 Iowa 225, 124 N. W. 609 (1910).

Maine.—*Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249 (1845).

Michigan.—*Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622 (1902).

Minnesota.—*Williams v. Great Northern R. Co.*, 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199 (1897).

Missouri.—*Brown v. Hannibal, etc., R. Co.*, 66 Mo. 588 (1877).

Nebraska.—*Ward v. Aetna Life Ins. Co.*, 82 Neb. 499, 118 N. W. 70 (1908).

New Hampshire.—*Southern Ry. Co. v. Hardin*, 76 N. H. 160, 80 Atl. 336 (1911); *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229 (1869); *Towle v. Blake*, 48 N. H. 92 (1868).

When specifically presented, the utterances may show themselves to be of any degree of coherence. Whatever this may be, whether that of a cry, a word, or series of words, a disjointed or completed sentence, the evidentiary purpose is the same. We are dealing with circumstantial evidence, logically tending to establish the existence of a relevant bodily condition. On this ground, exclamations indicative of present pain,⁴ suffering or distress,⁵ are normally received without objection.

New York.—*Uransky v. Dry Dock, etc.*, R. Co., 44 Hun 119, 7 N. Y. St. Rep. 395, *reversed* 118 N. Y. 304, 23 N. E. 451, 16 Am. St. Rep. 759 (1887); *De Long v. Delaware, etc.*, R. Co., 37 Hun 282 (1885); *Caldwell v. Murphy*, 11 N. Y. 416 (1854).

Texas.—*Missouri, etc.*, R. Co. v. Johnson, (Sup. 1902) 67 S. W. 768; *Missouri, etc. R. Co. v. Zwiener*, (Civ. App. 1896) 38 S. W. 375; *Missouri, etc.*, R. Co. v. Sanders, 12 Tex. Civ. App. 5, 33 S. W. 245 (1895); *International, etc. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58 (1893). See also *Hicks v. Galveston, etc. R. Co.*, (Tex. Civ. App. 1902) 71 S. W. 322 (1902), *reversed* on other points in 96 Tex. 355, 72 S. W. 835 (1903); *St. Louis, etc.*, R. Co. v. Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010 (1902).

4. *Alabama.*—*Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 So. 276 (1892); *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148 (1889); *Phillips v. Kelly*, 29 Ala. 628 (1857).

Colorado.—*Colorado Springs & I. R. Co. v. Allen*, 48 Colo. 4, 108 Pac. 990 (1910).

Dakota.—*Sanders v. Reister*, 1 Dak. 151, 46 N. W. 680 (1875).

Georgia.—*Powell v. State*, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277 (1897).

Illinois.—*West Chicago St. R. Co. v. Kennelly*, 170 Ill. 508, 48 N. E. 996 (1897).

Indiana.—*Peirce v. Jones*, 22 Ind.

App. 163, 53 N. E. 431 (1898); *Hancock County v. Leggett*, 115 Ind. 544, 18 N. E. 53 (1888); *Porter County v. Dombke*, 94 Ind. 72 (1883). See also *Southern Indiana R. Co. v. Davis*, 32 Ind. App. 569, 69 N. E. 550 (1904); *Indiana R. Co. v. Maurer*, 160 Ind. 25, 66 N. E. 156 (1902).

Iowa.—*Hamilton v. Mendota Coal etc., Co.*, 120 Iowa 147, 94 N. W. 282 (1903); *Gray v. McLaughlin*, 26 Iowa 279 (1868); *Frink v. Coe*, 4 G. Greene 555, 61 Am. Dec. 141 (1854).

Massachusetts.—*Barber v. Merriam*, 11 Allen 322 (1865); *Bacon v. Charlton*, 7 Cush 581 (1851). See also *Hayes v. Pitts-Kimball Co.*, 183 Mass. 262, 67 N. E. 249 (1903) (conscious suffering).

Michigan.—*Heddle v. City Electric R. Co.*, 112 Mich. 547, 70 N. W. 1096 (1897); *People v. Meservy*, 76 Mich. 223, 42 N. W. 1133 (1889); *Hyatt v. Adams*, 16 Mich. 180 (1867). See also *Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622 (1902).

New Hampshire.—*Plummer v. Osipee*, 59 N. H. 55 (1879).

New York.—*Hagenlocher v. Coney Island, etc.*, R. Co., 33 Hun 664, *affirming* 99 N. Y. 136, 1 N. E. 536 (1895); *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696 (1892); *Kennedy v. Rochester City, etc.*, R. Co., 130 N. Y. 654, 29 N. E. 141, 3 Silv. Ct. App. 591 (1891); *People v. Murphy*, 37 Hun 638, 3 N. Y. Cr. 338 (*reversed*) 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661 (1885). See also *Scheir*

§ 2627. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statement as Probative Facts; Bodily Sensation; Form of Statements*); Inarticulate.—Most convincing of manifestations of pain are those which are inarticulate.¹ Sus-

v. Guirin, 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956 (1902).

North Carolina.—Lush v. McDaniel, 35 N. C. 485, 57 Am. Dec. 566 (1852).

South Carolina.—Welch v. Brooks, 10 Rich. Law 123 (1856). See also Gosa v. Southern R. Co., 67 S. C. 347, 45 S. E. 810 (1903); Oliver v. Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307 (1902).

Texas.—St. Louis S. W. R. Co. v. Garber, (Civ. App. 1908) 108 S. W. 742; St. Louis Southwestern R. Co. v. Martin, 26 Tex. Civ. App. 231, 63 S. W. 1089 (1901); Tyler Southeastern R. Co. v. Wheeler, (Civ. App. 1897) 41 S. W. 517; *modified* 91 Tex. 356, 43 S. W. 876; Texas, etc., R. Co. v. Barron, 78 Tex. 421, 14 S. W. 698 (1890); Galveston v. Barbour, 62 Tex. 172, 50 Am. Rep. 519 (1884). See also Ft. Worth, etc., R. Co. v. Partin, (Civ. App. 1903) 76 S. W. 236; Hicks v. Galveston, etc., R. Co., (Civ. App. 1902), 71 S. W. 322; *reversed* on other points in 96 Tex. 355, 72 S. W. 835 (1903); Arrington v. Texas, etc., R. Co., (Civ. App. 1902) 70 S. W. 551.

Wisconsin.—Bredlau v. York, 115 Wis. 554, 92 N. W. 261 (1902); McKeigue v. Janesville, 68 Wis. 50, 31 N. W. 298 (1887).

United States.—Northern Pac. R. Co. v. Urlin, 158 U. S. 271, 15 S. Ct. 840, 39 L. ed. 977 (1895); Chicago Travelers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 439 (1869).

5. *Alabama*.—Helton v. Alabama Midland R. Co., 97 Ala. 275, 12 So. 276 (1892).

California.—Lange v. Schoelttter, 115 Cal. 388, 47 Pac. 139 (1896).

Indiana.—Peirce v. Jones, 22 Ind. App. 163, 53 N. E. 431 (1898).

Massachusetts.—Com. v. Leach, 156 Mass. 99, 30 N. E. 163 (1892); Com. v. Fenno, 134 Mass. 217 (1883).

Michigan.—Ellicott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668 (1875).

New York.—Kennedy v. Rochester City, etc., R. Co., 130 N. Y. 654, 29 N. E. 141, 3 Silv. Ct. App. 591 (1891).

Oregon.—Thomas v. Herrall, 18 Ore. 546, 23 Pac. 497 (1890).

Wisconsin.—Bredlau v. York, 115 Wis. 554, 92 N. W. 261 (1902); Hall v. American Masonic Acc. Assoc., 86 Wis. 518, 57 N. W. 366 (1893); McKeigue v. Janesville, 68 Wis. 50, 31 N. W. 298 (1887).

Canada.—Reg. v. Berube, 3 L. C. Rep. 212, 4 R. J. R. Q. 10 (1852).

§ 2627-1. Wilkins v. Wilmington, 2 Marv. (Del.) 132, 42 Atl. 418 (1898); Heiberger v. Missouri & K. T. Co., 133 Mo. App. 452, 113 S. W. 730 (1908); Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573 (1892); Link v. Sheldon, 136 N. Y. 1, 9, 32 N. E. 696 (1892); Kennedy v. R. Co., 130 N. Y. 656, 29 N. E. 141 (1891); Roche v. R. Co., 105 N. Y. 294, 11 N. E. 630 (1887).

For earlier New York rulings, see Teachout v. People, 41 N. Y. 7 (1869); Matteson v. R. Co., 35 N. Y. 487, 91 Am. Dec. 67 (1866); Brown v. N. Y. Cent. R. Co., 32 N. Y. 597, 88 Am. Dec. 353 (1865).

"Screaming, or some similar exclamation, is the natural language of pain in all men, and in all animals as well. It usually, and almost invariably, accompanies intense pain. . . . While the necessity for the reception of such evidence is not so great since parties have been per-

picion of invention seldom is present to diminish the proving power of such utterances. On the contrary, the case is frequently presented of an existing physical condition which is not so much expressed by the mind of a person in question as expressing itself, brushing aside, as it were, all attempts at full control. Groaning² is apparently of this description.

§ 2628. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Bodily Sensation*); Inference Excluded.—An injured person's inferences from his sensations as to the effect of his injuries are not generally admissible¹ and it seems that the declarations of a person as to the state of his health will not be received for the purpose of showing that he was afflicted with a disease where unaccompanied by proof of any symptoms or appearance indicative of disease.² Declarations of this character have, however, in some instances been regarded as a part of the *res gestae*,³ and have been admitted as indicative of the feelings of the injured person and as tending to show what his sufferings and condition were at the time.⁴ A certain proportion of inference as to bodily condition made by a patient to his physician for purposes of treatment may well be admitted as not being likely to mislead a skilled observer who is best able to judge as to its truth.⁵

§ 2629. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Bodily Sensation*); Narrative Excluded.—That the declaration which indi-

mitted to be witnesses in their own behalf as it was before, yet, the rule allowing such evidence has not been abrogated, and it must still have operation." *Hagenlocher v. R. Co.*, 99 N. Y. 136, 137, 1 N. E. 536 (1885), *affg.* 33 Hun 664 (1904).

2. *Cicero, etc., R. Co. v. Priest*, 190 Ill. 592, 60 N. E. 814 (1901). *Compare* *Donnelly v. Chicago City Ry. Co.*, 131 Ill. App. 302 (1908).

§ 2628-1. *Southern Anthracite Coal Co. v. Hodge*, 99 Ark. 302, 139 S. W. 292 (1911); *Corbett v. St. Louis, etc., R. Co.*, 26 Mo. App. 621 (1887); *Williams v. Great Northern R. Co.*, 68 Minn. 55, 70 N. W. 860, 37 L. R. A.

199 (1897); *Firkins v. Chicago Great Western R. Co.*, 61 Minn. 31, 63 N. W. 172 (1895); *Louisville, etc., R. Co. v. Stacker*, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840 (1888).

2. *Marr v. Hill & Haynes*, 10 Mo. 320 (1847).

3. *Marr v. Hill & Haynes*, 10 Mo. 320 (1847); *Hall v. American Masonic Acc. Assoc.*, 86 Wis. 518, 57 N. W. 366 (1893).

4. *Plummer v. Ossipee*, 59 N. H. 55 (1879).

5. *Indiana Union Traction Co. v. Jacobs*, 167 Ind. 85, 78 N. E. 325 (1906).

See also § 2624.

cates a bodily condition should be contemporaneous with the injury or other ultimate cause which produced the situation in question is not required.¹ It is considered that such declarations should more properly be regarded by judicial administration as narratives of past transactions than as circumstantial evidence of a then present physical state. From the time of the occurrence which has caused the bodily condition, the unsworn statement may be separated by a considerable interval,² thereby, in many cases, diminishing the probative force of the evidence.³ On the other hand, the extrajudicial utterance, articulate or inarticulate, should be practically contemporaneous with the existence of the bodily state or sensation which it tends to prove. Although intimately connected with a present bodily condition, the extrajudicial statement of past occurrences is to be rejected.⁴ It must not be a nar-

§ 2629-1. In New York the rule is otherwise, unless the statement be made to a physician. *Grant v. Groton*, 77 Hun (N. Y.) 497, 28 N. Y. Suppl. 1014, 60 N. Y. St. Rep. 594 (1894); *Kennedy v. Rochester City, etc., R. Co.*, 130 N. Y. 654, 29 N. E. 141, 3 Silv. Ct. App. 591 (1891); *Ryan v. Porter Mfg. Co.*, 57 Hun (N. Y.) 253, 589, 10 N. Y. Suppl. 774 (1890); *Barrelle v. Pennsylvania R. Co.*, 51 Hun 640, 4 N. Y. Suppl. 127, 21 N. Y. St. Rep. 109, affirmed 121 N. Y. 697 (1889); *Olp v. Gardner*, 48 Hun 169, 15 N. Y. St. Rep. 544 (1888).

2. *Colorado Springs & I. Ry. Co. v. Allen*, 48 Colo. 4, 108 Pac. 990 (1910) (several months); *Bacon v. Charlton*, 7 Cush. (Mass.) 581 (1851). See also, *Lake St. El. R. Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374 (1903), reversing 103 Ill. App. 662 (1902); *Bredlau v. York*, 115 Wis. 554, 92 N. W. 261 (1902).

3. *Central R. Co. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31 (1886); *Southern Indiana R. Co. v. Davis*, 32 Ind. App. 569, 69 N. E. 550 (1904).

See also § 2834.

4 *Alabama*.—*Western Steel Car & F. Co. v. Bean*, 163 Ala. 255, 50 So. 1012 (1909).

Colorado.—*Colorado Midland Ry. Co. v. McGarry*, 41 Colo. 398, 92 Pac. 915 (1907).

Connecticut.—*Rowland v. R. Co.*, 63 Conn. 415, 418, 28 Atl. 102 (1893); *State v. Dart*, 29 Conn. 153, 155, 76 Am. Dec. 596 (1860) (subject to fits).

Florida.—*Weightnovel v. State*, 35 So. 856, (1903) (abortion).

Illinois.—*West Chicago St. R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992 (1897); *Illinois C. R. Co. v. Sutton*, 42 Ill. 438, 92 Am. Dec. 81 (1867).

Indiana.—*Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653 (1885).

Iowa.—*Etzkorn v. City of Oelwein*, 142 Iowa 107, 120 N. W. 636 (1909); *Hall v. Cedar R. & M. C. R. Co.*, 115 Iowa 18, 87 N. W. 739 (1901) *Keist v. R. Co.*, 110 Iowa 32, 81 N. W. 181 (1899); *Gray v. McLaughlin*, 26 Iowa 279 (1868).

Kentucky.—*Koke's Adm'r v. Andrews Steel Co.*, 149 S. W. 968 (1912).

Massachusetts.—*Brown v. Brown*, 208 Mass. 290, 94 N. E. 465 (1911); *Roosa v. Boston Loan Co.*, 132 Mass. 439 (1882); *Morrissey v. Ingham*, 111 Mass. 63 (1872); *Ashland v. Marlborough*, 99 Mass. 47 (1868); *Chapin*

rative of a past state, condition or other fact. Such an account has no legitimate tendency to establish the characteristic nature of the declarant's present physical state. Accordingly, it cannot be received under the present rule.⁵ So far as such a history of past events possesses relevancy at all, it must be that of tending to prove the truth of the facts asserted. In such a connection, the detail of bygone occurrences is merely hearsay.⁶ More spe-

v. Marlborough, 9 Gray 244, 69 Am. Dec. 281 (1857); *Bacon v. Charlton*, 7 Cush. 581 (1851).

Michigan.—*People v. Foglesong*, 116 Mich. 556, 74 N. W. 730 (1898); *Dundas v. Lansing*, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143, 13 Am. St. Rep. 457 (1889); *Merkle v. Bennington*, 58 Mich. 156, 160, 24 N. W. 776, 55 Am. Rep. 666 (1885).

Minnesota.—*Williams v. Great Northern R. Co.*, 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199 (1897); *Cooper v. R. Co.*, 54 Minn. 379, 383, 56 N. W. 42 (1893); *Johnson v. R. Co.*, 47 Minn. 430, 50 N. W. 473 (1891).

Missouri.—*Dunlap v. Chicago R. I. & P. R. Co.*, 145 Mo. App. 215, 129 S. W. 262 (1910); *Gibler v. Quincy O. & K. C. R. Co.*, 129 Mo. App. 93, 107 S. W. 1021 (1908).

New York.—*People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 22 L. R. A. 193 (1901).

Texas.—*Travelers' Protective Ass'n v. Roth*, (Civ. App. 1908) 108 S. W. 1039; *Newman v. Dodson*, 61 Tex. 91 (1884); *Rogers v. Crain*, 30 Tex. 284 (1867).

Vermont.—*Hawks v. Chester*, 70 Vt. 271, 40 Atl. 727 (1898); *Plummer v. Ricker*, 71 Vt. 114, 41 Atl. 1045, 76 Am. St. Rep. 757 (1898); *Drew v. Sutton*, 55 Vt. 586, 589, 45 Am. Rep. 644 (1882); *Earl v. Tupper*, 45 Vt. 275 (1873).

Virginia.—*O'Boyle v. Com.*, 100 Va. 785, 40 S. E. 121 (1901).

Wisconsin.—*McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298 (1887).

England.—*Gardener Peerage Case*, Le Marchant's Rep. 170, 174 (1825).

Canada.—*Garner v. Township of Stamford*, 7 O. L. R. 50 (1903); *Regina v. McMahon*, 18 O. R. 502 (1889).

"Expressions of present existing pain and of its locality are exceptions to the general rule which excludes hearsay evidence. They are admitted upon the ground of necessity as being the only means of determining whether pain or suffering is endured by another. . . . The rule is not to be extended beyond the necessity upon which it is founded." *Cleveland C. C. & I. R. Co. v. Newell*, 104 Ind. 264, 269, 270, 3 N. E. 836, 54 Am. Rep. 312 (1885), per Mitchell, J.

A witness cannot testify to a declaration as to physical sensations made after they passed from declarant. *Brown v. Brown*, 203 Mass. 290, 94 N. E. 465 (1911).

5. In an action for personal injuries, evidence of expressions of pain uttered by plaintiff long after the injury, and after the plaintiff had decided to bring suit, are not admissible. *McCormick v. Detroit*, G. H. & M. Ry. Co., 141 Mich. 17, 104 N. W. 390, 12 Detroit Leg. N. 326 (1905).

6. *Alabama*.—*Stone v. Watson*, 37 Ala. 279 (1861); *Barker v. Coleman*, 35 Ala. 221 (1859); *Wilkinson v. Moseley*, 30 Ala. 572 (1857); *Eckles v. Brown & Bates*, 26 Ala. 655 (1855); *Rowland v. Walker*, 18 Ala. 749 (1851).

Georgia.—*Powell v. State*, 101 Ga.

cifically considered, the rule is found to reject an extrajudicial narration of the causes⁷ which have produced the physical con-

9, 29 S. E. 309, 65 Am. St. Rep. 277 (1897).

Kansas.—St. Louis & S. F. R. Co. v. Burrows, 62 Kan. 89, 61 Pac. 439 (1900); Atchison, T. & S. F. R. Co. v. Frazier, 27 Kan. 463 (1882).

Michigan.—Burleson v. Reading, 110 Mich. 512, 68 N. W. 294 (1896); Will v. Mendon, 108 Mich. 251, 66 N. W. 58 (1896); Girard v. Kalamazoo, 92 Mich. 610, 611, 52 N. W. 1021 (1892); Lacas v. R. Co., 92 Mich. 412, 416, 52 N. W. 745 (1892); Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 543 (1878).

New Hampshire.—Towle v. Blake, 48 N. H. 92 (1868).

Texas.—Wheeler v. R. Co., 91 Tex. 876, 43 S. W. 876 (1898).

Vermont.—State v. Fournier, 68 Vt. 262, 35 Atl. 178 (1896).

See, however, to the contrary effect, Morrison v. State, 40 Tex. Cr. Rep. 473, 51 S. W. 358 (1899).

"The ground of receiving those declarations is, that they are reasonable and natural evidence of the true situation and feelings of the person for the time being. But, in reference to the past periods they have no such claim to confidence, as they are manifestly, to that purpose, but the narrative of one not on oath." Lush v. McDaniel, 13 Ired. L. (N. C.) 485, 487 (1852), per Ruffin, C. J.

7. *Arkansas*.—Fordyce v. McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296 (1889).

Connecticut.—Morse v. Consolidated Ry. Co., 81 Conn. 395, 71 Atl. 553 (1908).

Georgia.—Fink v. Ash, 99 Ga. 106, 24 S. E. 976 (1896).

Illinois.—Clark v. People, 224 Ill. 554, 79 N. E. 94 (1906) (abortion); Globe Acc. Ins. Co. v. Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486 (1896).

Iowa.—Hall v. Cedar R. & M. C. R. Co., 115 Iowa 18, 87 N. W. 739 (1901); Gray v. McLaughlin, 26 Iowa 279 (1868).

Kansas.—Atchison, etc., R. Co. v. Frazier, 27 Kan. 463 (1882).

Kentucky.—Matthews' Adm'r v. Louisville & N. R. Co., 130 Ky. 551, 113 S. W. 459 (1908).

Massachusetts.—Gettins v. Kelley, 212 Mass. 171, 98 N. E. 874 (1912); Roosa v. Boston Loan Co., 132 Mass. 439 (1882); Morrissey v. Ingham, 111 Mass. 63 (1872); Chapin v. Marlborough, 9 Gray 244, 69 Am. Dec. 281 (1858); Bacon v. Charlton, 7 Cush. 581 (1851).

Mississippi.—Scaggs v. State, 8 Sm. & M. 722 (1847).

New York.—People v. Williams, 3 Park. Cr. R. 84 (1855).

North Carolina.—Hill v. Aetna Life Ins. Co., 150 N. C. 1, 63 S. E. 124 (1908).

Ohio.—Lake Shore, etc., R. Co. v. Yokes, 12 Ohio Cir. Ct. 499, 5 Ohio Cir. Dec. 599 (1895).

Oregon.—Sullivan v. Oregon R., etc., Co., 12 Oreg. 392, 7 Pac. 508, 53 Am. Rep. 364 (1885).

South Dakota.—Fallon v. Rapid City, 17 S. D. 570, 97 N. W. 1009 (1904).

Tennessee.—Nored v. Adams, 2 Head 449 (1859).

Texas.—Houston Electric Co. v. Jones, (Civ. App. 1910) 129 S. W. 863; Missouri, etc., R. Co. v. Sanders, 12 Tex. Civ. App. 5, 33 S. W. 245 (1895); Gulf, etc., R. Co. v. Ross, 11 Tex. Civ. App. 201, 32 S. W. 730 (1895); Newman v. Dodson, 61 Tex. 91 (1884).

Virginia.—O'Boyle v. Com., 100 Va. 785, 40 S. E. 121 (1901).

United States.—National Masonic Acc. Assoc. v. Shryock, 73 Fed. 774, 20 C. C. A. (1896).

dition of body involved in the inquiry, the adoption of a given line of conduct or the happening of any particular event. The account of the circumstances attending the infliction of an injury⁸ stand in the same administrative position. The declarant cannot be permitted to recount the effects⁹ or past symptoms regarding bodily condition which a given event has produced¹⁰ or tell at what time such an occurrence happened¹¹ or the manner in which an act of this nature was done.¹² For similar reasons, the extrajudicial narrative statements of a sufferer cannot be employed to show what was his physical condition at a former time,¹³ even one

England.—*R. v. Gloster*, 16 Cox Cr. 471, 473 (1888).

But see *Wadlow v. Perryman's Adm'r*, 27 Mo. 279 (1858).

8. *Equitable Mut. Acc. Assoc. v. McCluskey*, 1 Colo. App. 473, 29 Pac. 383 (1892); *West Chicago St. R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992 (1897); *Winn v. Christian County Coal Co.*, 156 Ill. App. 179 (1910); *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193 (1901).

9. *Rowland v. Philadelphia, etc., R. Co.*, 63 Conn. 415, 28 Atl. 102 (1893); *Williams v. Great Northern R. Co.*, 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199 (1897); *Boston, etc., R. Co. v. O'Reilly*, 158 U. S. 334, 15 S. Ct. 830, 39 L. ed. 1006 (1894). See also *Chicago, etc., R. Co. v. Donworth*, 203 Ill. 192, 67 N. E. 797 (1903), *reversing* 105 Ill. App. 400 (1903); *Lake St. El. R. Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374 (1903), *reversing* 103 Ill. App. 662 (1902); *Kennedy v. Kennedy* (Nev. 1903), 74 Pac. 71; *International, etc., R. Co. v. Boykin*, (Tex. Civ. App. 1903) 74 S. W. 93; *Hicks v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1902) 71 S. W. 322, *reversed* on other points in 96 Tex. 355, 72 S. W. 835 (1903); *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800 (1896).

10. *Alabama*.—*Smith v. State*, 53 Ala. 486 (1875); *Eckles v. Bates*, 26 Ala. 655 (1855).

Connecticut.—*Rowland v. Philadel-*

phia, etc., R. Co., 6 Conn. 415, 28 Atl. 102 (1893).

Illinois.—*Winnebago County v. Rockford*, 61 Ill. App. 656 (1895).

Maine.—*Heald v. Thing*, 45 Me. 392 (1858).

Massachusetts.—*Com. v. Leach*, 156 Mass. 99, 30 N. E. 163 (1892); *Barber v. Merriam*, 11 Allen 322 (1865).

Minnesota.—*Williams v. Great Northern R. Co.*, 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199 (1897).

Missouri.—*Reid v. Piedmont, etc., L. Ins. Co.*, 58 Mo. 421 (1874).

New Hampshire.—*Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229 (1869).

New York.—*Donohue v. Brooklyn, etc., R. Co.*, 53 N. Y. App. Div. 348, 65 N. Y. Suppl. 634 (1900); *Page v. New York Cent. R. Co.*, 6 Duer. 523 (1857).

North Carolina.—*Lush v. McDaniel*, 35 N. C. 485, 57 Am. Dec. 566 (1852).

Texas.—*Gulf, etc., R. Co. v. Bruce*, (Civ. App. 1893) 24 S. W. 927.

Wisconsin.—*Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800 (1896).

11. *Ashland v. Marlborough*, 99 Mass. 47 (1868) *Hunter v. McClintock, Dudley* (S. C.) 327 (1838).

12. *Hanceck County v. Leggett*, 115 Ind. 544, 18 N. E. 53 (1881). See also *Fallon v. Rapid City*, 17 S. D. 570, 97 N. W. 1009 (1904).

13. *Alabama*.—*Kelly v. Cunning-*

separated from the time of the declaration by a short interval,¹⁴ except so far as the present utterance is circumstantially probative as to the prior bodily condition.

Duration of sickness.— Though in strictness they are an account of a past event, extrajudicial statements have been received as establishing the duration of an illness.¹⁵ This would appear to be a distinct trespass into the proper field of the rule against hearsay.

Massachusetts rule.— Massachusetts, appreciative of the evidence of skilled witnesses,¹⁶ has introduced the qualification in this connection that while the extrajudicial narratives of ordinary observers with regard to bodily sensation are, as a rule, to be rejected, they may, nevertheless, be received if made to a physician regarding past feelings or symptoms of his patient,¹⁷ but not as to the cause of an injury or concerning its attendant circumstances.

ham, 36 Ala. 78 (1860); Barker v. Coleman, 35 Ala. 221 (1859); Hollo-way v. Catten, 33 Ala. 529 (1859).

California.— Green v. Pacific Lum-ber Co., 130 Cal. 435, 62 Pac. 747 (1900).

Indiana.— Hancock County v. Leg-gett, 115 Ind. 544, 18 N. E. 53 (1881).

Maryland.— McCeney v. Duvall, 21 Md. 166 (1863).

New York.— Kennedy v. Rochester City, etc., R. Co., 130 N. Y. 654, 29 N. E. 141, 3 Silv. Ct. App. 591 (1891); Olp v. Gardner, 48 Hun 169 (1888); Roche v. Brooklyn City, etc., R. Co., 105 N. Y. 294, 11 N. E. 630, 59 Am. Rep. 506 (1887).

North Carolina.— Lush v. Mc-Daniel, 35 N. C. 485, 57 Am. Dec. 566 (1852).

Wisconsin.— Keller v. Gilman, 93 Wis. 9, 66 N. W. 800 (1896).

14. What a patient told a witness on several successive mornings as to his inability to sleep because of pain during the previous night, is not re-garded as competent. Kelley v. De-troit, etc., R. Co., 80 Mich. 237, 45 N. W. 90, 20 Am. St. Rep. 514 (1890).

Comparison of a present condition with that existing at a past time is not regarded as narrative, and has been received. Fleming v. Springfield, 154 Mass. 520, 28 N. E. 910, 26 Am. St. Rep. 268 (1891).

15. Wilkins v. Missouri Valley, (Ia. 1903), 96 N. W. 868; Looper v. Bell, 1 Head (Tenn.) 373 (1858); Yeat-man v. Armistead, 6 Humph. (Tenn.) 375 (1845); Rogers v. Crain, 30 Tex. 284 (1867).

16. See, for example, § 1906.

17. "While a witness, not an ex-pert, can testify only to such excla-mations and complaints as indicate present existing pain and suffering, a physician may testify to a state-ment or narrative given by his pa-tient in relation to his condition, symptoms, sensations, and feelings, both past and present. In both cases these declarations are admitted from necessity, because in this way only can the bodily condition of the party who is the subject of the injury, and who seeks to obtain damages, be as-certained. But the necessity does not extend to the declarations by the party as to the cause of the injury." Roosa v. Boston Loan Co., 132 Mass. 439 (1882) per Endicott, J.

This anomaly has been followed in certain quarters¹⁸ and repudiated in others.¹⁹

Causation.—Deductions by an observer as to the causal connection between bodily suffering and the employment of a particular line of conduct by the injured person are not within the former's legitimate function as a witness.²⁰

§ 2630. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Bodily Sensation; Narrative Excluded*); Confusion with the Res Gestae Rule.—In connection with bodily suffering, the declarations which attend it may usually be viewed in one of two aspects; frequently in both. As regards the existence of the bodily condition, the independently relevant statements are treated as primary evidence tending to prove it. Here the spontaneity of the utterance, the fact that it is automatic and instinctive, rather than a deliberate result of reflection, adds merely to the weight or probative force of the evidence by showing that it was forced from the declarant by a sort of *vis major* and is not feigned to serve his views of his own self-interest. The same overpowering force, numbing the reflective faculties and bringing forward the automatism of nature, may well have a further effect. Under the rule which admits hearsay statements when made as part of the *res gestae*¹ or when the relevancy rests upon spontaneity,² the unsworn statement may be evidence of the facts asserted in it. In case of two rules running upon such closely parallel lines, it would be hard to expect that they should at all times be kept separate by judicial administration. It is not surprising, therefore, to find conditions and limitations occasionally imposed on the operation of the rule under consideration which would be appropriate only to the use of the statement in its assertive capacity,³ where

18. *Cleveland C. C. & I. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312 (1885); *Omberg v. U. S. Mut. Ass'n*, 101 Ky. 303, 40 S. W. 909, 19 Ky. Law Rep. 462, 72 Am. St. Rep. 413 (1897); *State v. Gedicke*, 43 N. J. L. 86 (1881); *Hathaway v. Ins. Co.*, 48 Vt. 335, 350 (1875).

19. *Weber v. R. Co.*, 67 Minn. 155, 69 N. W. 716 (1897); *Williams v. R. Co.*, 68 Minn. 55, 70 N. W. 860 (1897).

20. *Etzkorn v. City of Oelwein*, 142 Iowa 107, 120 N. W. 636 (1909).

§ 2630-1. § 2593.

2. §§ 2982 *et seq.*

3. *Wilkinson v. Mosely*, 30 Ala. 562 (1857); *Penn Mutual L. I. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769 (1884); *Jones v. White*, 11 Humphr. (Tenn.) 268 (1850); *Dowlen v. State*, 14 Tex. App. 61 (1883).

subjective relevancy on the part of the declarant is demanded by administration and found in a contemporaneous incorporation with a material *res gestae* fact or the spontaneity of the statement.

Exclusion of narration.—A further point of contact between the rule under consideration and that which admits extrajudicial statements as part of the *res gestae*, the proof of the facts asserted, is a circumstance that narration of past occurrences is rejected under both rules. In neither connection is such a declaration normally regarded as relevant. Thus, while a spontaneous statement as to the causes of a bodily condition may properly be received, being said to constitute part of the *res gestae*,⁴ a purely narrative account on the same subject will be rejected under either rule.⁵ The marked confusion between the two rules is illustrated in an illuminating way where the courts formulate the rule excluding narrative statements as to bodily sensations by saying that “unless such complaints form a part of the *res gestae* they cannot be admitted.”⁶ In pursuance of the same line of thought, weight is given to a consideration elsewhere seen⁷ to be of importance in determining whether a statement is spontaneous, viz., whether the declarant is still at the scene of his injury at the time when his extrajudicial statement as to bodily condition is made.⁸

§ 2631. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Bodily Sensation*); Not Exception to the Rule Against “Hearsay.”—A confusing misapprehension appears to exist in several jurisdictions to the effect that exclamations or mere connected declarations indicative of bodily sensation are received as an exception to the rule excluding hearsay and as part of the *res gestae*.¹ This is unsound. The independently relevant statement is not used as proof of the fact which it asserts. It cannot, therefore, be an exception to the general rule which excludes extrajudicial statements when offered in proof of the facts asserted.² The recognized exceptions

4. *Stiles v. Danville*, 42 Vt. 282 (1869).

5. § 2629.

6. *Kennedy v. Rochester City, etc.*, R. Co., 130 N. Y. 654, 656, 29 N. E. 141, 3 Silv. Ct. App. 591 (1891).

7. § 3019.

8. *Merkle v. Bennington Tp.*, 58

Mich. 156, 24 N. W. 776, 55 Am. Rep. 666 (1885).

§ 2631-1. *Wilkinson v. Mosely*, 30 Ala. 562 (1857); *Jones v. White*, 11 Humphr. (Tenn.) 268 (1850); *Dowlen v. State*, 14 Tex. App. 61 (1883).

2. §§ 2698 *et seq.*

to the hearsay rule are viewed by practical administration as secondary evidence,³ the primary proof being the testimony of the declarant as a witness. This now being unavailable, the secondary evidence of the unsworn statement is received, under the ordinary conditions of necessity and relevancy,⁴ upon ordinary administrative principles. The independently relevant statement, on the other hand, is a fact of a primary grade of proof.⁵

The confusion of the present rule with that relating to statements incorporated in the *res gestae* when viewed as evidence of the facts asserted, is examined at another place.⁶

§ 2632. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Bodily Sensations*); Who Are Competent as Declarants.—Physiological facts, sensations which have their seat in the bodily frame,¹ like psychological ones,² can be directly known only to the individual

3. §§ 2762 *et seq.*

4. §§ 339 *et seq.*, § 1711.

5. § 2596.

6. § 2630.

§ 2632-1. § 43.

2. § 43.

"In cases where the existence of pain in any particular part of the body is, in its very nature, incapable of proof, except by the declarations of the sufferer, his declarations of its existence must, from necessity, be admitted as evidence of its existence, if its existence at the time such declarations were made be a material question. . . . The law is not so inconsistent with itself, and with reason, as to declare that a plaintiff may prove a thing, and at the same time also to declare that the only proof of which the thing is in its nature capable, shall not be heard or considered." *Phillips v. Kelly*, 29 Ala. 628, 633, 634 (1857), per Rice, C. J.

"Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evi-

dence in his favor. And the rule is founded upon the consideration, that such expressions are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence. . . . Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany, and furnish evidence of, a present existing pain or malady." *Bacon v. Charlton*, 7 Cush. (Mass.) 581, 586 (1851), per Bigelow, J.

"It would be impossible in most cases to know of the existence or extent or character of pain without them. . . . The unstudied expressions of daily life, or the statements on which a medical adviser is expected to act, and which if feigned he should have skill enough to subject to some test of truth, stand on a footing which removes them in general from suspicion." *Grand Rapids*

of whose organism they form part. Bodily sensations, e.g., those of pain, are as little subject to direct observation as are the phases of the mind. Physical facts alone are susceptible of direct perception by witnesses. In other words, a bodily feeling or peripheral sensation is a fact known only to the consciousness of the person affected. It must be learned, so far as learned at all, only by means of such voluntary or involuntary manifestations as the latter may give to other persons. The person experiencing a bodily sensation possesses complete and exclusive knowledge on the subject. At least two consequences flow from this circumstance. Judicial administration, in the first place, receives the declaration, notwithstanding that the interest of the declarant may make his statement obviously self-serving. In the second place, the number of competent declarants is effectually restricted to the person in question.³

Upon principle, this would seem quite justified. The statement is made by a person of adequate knowledge without controlling motive to misrepresent. It would seem, decidedly anomalous, as being in distinct opposition to the rule against hearsay and in no way justified by the rule at present under consideration. No other unsworn statement to the same effect is subjectively relevant, where it is sought to use it as evidence of the facts asserted. No mere intimacy of relation admits this species of testimony. It follows that, however intimately⁴ acquainted a person may be with the bodily condition of another

& *I. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321 (1878), per Campbell, J.

"It is one of the natural concomitants of illness and of physical injuries, for the sick or injured person to complain of pain and distress." *Caldwell v. Murphy*, 11 N. Y. 416, 419 (1854), per Denio, J.

"The declarations of the party are received to show the extent of latent injuries upon the person, upon the general ground that such injuries are incapable of being shown in any other mode except by such declarations as to their effect." *State v. Davidson*, 30 Vt. 377, 383, 73 Am. Dec. 312 (1858), per Redfield, C. J.

3. *St. Kevin Min. Co. v. Isaacs*, 18

Colo. 400, 32 Pac. 822 (1893); *Harrington v. Hamburg*, 85 Iowa 272, 52 N. W. 201 (1892).

On proceedings growing out of a homicide, the deceased may be a competent declarant as to his own physical condition. Thus, his extrajudicial statement that he possessed a peculiar tooth has been received as evidence of that fact. *Edmonds v. State*, 34 Ark. 720 (1879).

4. *Heald v. Thing*, 45 Me. 392 (1858) (wife); *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894 (1887) (mother); *Kienninger v. Interurban St. Ry. Co.*, 113 N. Y. Suppl. 96 (1908) (husband); *Witt v. Vickers*, 8 Watts (Pa.) 227 (1839) (mother).

human being⁵ or of an animal,⁶ his direct extrajudicial statement regarding it will not be received, even if made in the presence of the person whose condition is in question.⁷ Not even a wife may properly make an extrajudicial statement to indicate the bodily condition of her husband;⁸ nor are the extrajudicial statements of a parent admissible to establish the bodily condition of a child.⁹ It is to be noted, moreover, that, viewed as proof of the facts asserted, the extrajudicial statement of the most friendly and sympathetic bystander lacks an element of spontaneity which may be present in that of the person himself, and is rejected although made in the latter's presence.¹⁰ It has, however, been decided that evidence of the declaration of a third person to a physician explanatory of his call upon him in a professional capacity to go to a wounded man will be received.¹¹

§ 2633. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Bodily Sensation; Who Are Competent as Declarants*); Declarant May Be a Party.—That an extrajudicial statement by a party may be used to establish his experience of pain, or other bodily sensation, at a particular time, not too remote to be relevant, is a commonplace to the observer of judicial trials.¹

Secondary Evidence.—The practice of introducing the extrajudicial statements of a party to establish his bodily condition, especially the presence of pain or suffering, has been due to a great extent to the necessity for such evidence caused by the inability of the injured person to testify as a witness on his own

5. *St. Kevin Min. Co. v. Isaacs*, 18 Colo. 400, 32 Pac. 822 (1893); *Harrington v. Hamburg*, 85 Iowa 272, 52 N. W. 201 (1892).

6. *Welch v. Norton*, 73 Iowa 721, 36 N. W. 758 (1887).

7. *Wilt v. Vickers*, 8 Watts (Pa.) 227 (1839); *Missouri, etc., R. Co. v. Dawson*, 10 Tex. Civ. App. 19, 29 S. W. 1106 (1895).

8. *Heald v. Thing*, 45 Me. 392 (1858).

9. *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894 (1887); *Wilt v. Vickers*, 8 Watts. (Pa.) 227 (1839).

10. *Wilt v. Vickers*, 8 Watts (Pa.) 227 (1839); *Missouri, etc., R. Co. v. Dawson*, 10 Tex. Civ. App. 19, 29 S. W. 1106 (1895).

11. *State v. Warren* (Iowa, 1912), 137 N. W. 466.

§ 2633-1. *State v. Mackey*, 12 Oreg. 154, 158, 6 Pac. 648 (1885). "The declarations of a party are received to prove his condition, ills, pains, and symptoms, whether arising from sickness, or an injury by accident or violence." *State v. Mackey*, 12 Oreg. 154, 158, 6 Pac. 648 (1885), per Lord, J.

behalf. The change in the law permitting parties to testify has led certain courts, notably Georgia, to lay down the rule that the extrajudicial statement is secondary evidence, and that, as the primary evidence of the testimony of the declarant has now become available, necessity no longer exists for receiving the extrajudicial statements and they are accordingly rejected.² Viewing the unsworn statement as hearsay, i. e., as proof of the facts asserted, the ruling seems to be sound. So far, however, as the extrajudicial statement is independently relevant, i. e., by reason of its bare existence, the evidence which it furnishes is primary.³

§ 2634. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Bodily Sensation*); Weight of the Evidence.—The probative force, i. e., the proving power, of extrajudicial statements indicative of bodily condition is practically determined by the extent to which the utterances may fairly be regarded as involuntary and automatic rather than a result of premeditation or deliberation. To put the matter in a slightly different way, the weight of the evidence is determined by whether the utterances are the natural manifestations of a bodily condition or are feigned. Such a question, like others relating to the probative weight, is to be decided by the jury.¹ It seems pertinent, however, to observe that the evidentiary power of the testimony seems to be greater in proportion to the spontaneousness of the utterance. Consequently, that the more rapidly the statement follows upon the infliction of the injury² the greater will be the improbability that the utterance or other display

2. *Atlanta St. R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48 (1893).

3. § 2596.

§ 2634-1. *Alabama*.—*Phillips v. Kelly*, 29 Ala. 628 (1857).

California.—*Lange v. Schoeltter*, 115 Cal. 388, 47 Pac. 139 (1896); *People v. Lowen*, 109 Cal. 381, 42 Pac. 32 (1895).

Massachusetts.—*Chapin v. Marlborough*, 9 Gray (Mass.) 244, 69 Am. Dec. 281 (1857); *Bacon v. Charlton*, 7 Cush. (Mass.) 581 (1851).

New York.—*People v. Murphy*, 97 Hun 638, 3 N. Y. Cr. 338, *reversed* 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661 (1885).

Texas.—*Houston, etc., R. Co. v. Shafer*, 54 Tex. 641 (1881).

United States.—*Chicago Travelers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397, 19 L. ed. 437 (1869).

2. *Topeka v. High*, 6 Kan. App. 162, 51 Pac. 306 (1897); *Mulliken v. Corunna*, 110 Mich. 212, 68 N. W. 141 (1896); *Lewke v. Dry Dock, etc., R. Co.*, 46 Hun (N. Y.) 283, 11 N. Y. St. Rep. 510 (1887); *Powers v. West Troy*, 25 Hun (N. Y.) 561 (1881); *Baker v. Griffen*, 10 Bosw. (N. Y.) 140 (1863); *Wereley v. Persons*, 28 N. Y. 344, 84 Am. Dec. 346 (1863).

of emotion has been feigned³ or fabricated⁴ and the consequent increase of probative force.

Ante litem motam.—Self interest comes into operation in a marked degree upon a *lis mota*. Probative force, therefore, is much increased where the statements are made *ante litem motam*. So long, however, as probative relevancy is preserved, no rigid requirement is made that the declaration regarding bodily condition should have been uttered before any controversy arose in the matter.⁵ Declarations regarding bodily sensation or condition have been received, though made *post litem motam*⁶ after suit has been brought⁷ or even during the trial itself.⁸

§ 2635. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Bodily Sensation; Weight of the Evidence*); Statements to Physicians.—Among extrajudicial statements regarding bodily condition, to which a marked degree of probative force seems to attach, are statements to physicians¹ or surgeons as to the location and nature

3. *Michigan*.—Butts v. Eaton Rapids, 116 Mich. 539, 74 N. W. 372 (1898).

Oregon.—Thomas v. Herrall, 18 Oreg. 546, 23 Pac. 497 (1890).

Texas.—Texas, etc., R. Co. v. Barron, 78 Tex. 421, 14 S. W. 698 (1890).

Vermont.—Bagley v. Mason, 69 Vt. 175, 37 Atl. 287 (1896).

United States.—Delaware, etc., R. Co. v. Ashley, 67 Fed. 209, 14 C. C. A. 368 (1895).

4. Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616 (1895); Bagley v. Mason, 69 Vt. 175, 37 Atl. 287 (1896).

On the other hand, even the contemplation of litigation has been held to exclude the testimony.

5. McCormick v. Detroit, G. H. & M. Ry. Co., 141 Mich. 17, 104 N. W. 390, 12 Detroit Leg. N. 326 (1905).

6. Rowland v. Philadelphia, etc., R. Co., 63 Conn. 415, 28 Atl. 102 (1893).

7. Norris v. Haverhill, 65 N. H. 89, 18 Atl. 85 (1888); Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am.

Rep. 229 (1869); Towle v. Blake, 48 N. H. 92 (1868); Jackson v. Missouri, etc., R. Co., 23 Tex. Civ. App. 319, 55 S. W. 376 (1900).

8. Fleming v. Springfield, 154 Mass. 520, 28 N. E. 910. 26 Am. St. Rep. 268 (1891).

§ 2635-1. *Alabama*.—Grasselli Chemical Co. v. Davis, 166 Ala. 471, 52 So. 35 (1910); Birmingham Ry. L. & P. Co. v. Moore, 151 Ala. 327, 43 So. 841 (1907); Stone v. Watson, 37 Ala. 279 (1861).

California.—Green v. Pacific Lumber Co., 130 Cal. 435. 62 Pac. 747 (1900).

Connecticut.—Wilson v. Granby, 47 Conn. 59, 36 Am. Rep. 51 (1879).

Georgia.—East Tennessee, etc., R. Co. v. Smith, 94 Ga. 580, 20 S. E. 127 (1894); Feagin v. Beasley, 23 Ga. 17 (1857).

Illinois.—Maxey v. City of East St. Louis, 158 Ill. App. 627 (1910); Greinke v. Chicago City Ry. Co., 234 Ill. 564, 85 N. E. 327 (1908); *affirming judgment* 136 Ill. App. 77

of a present physical condition,² where made for purposes of diag-

(1907); *Salem v. Webster*, 192 Ill. 369, 1 N. E. 323 (1901).

Indiana.—*Indianapolis Southern R. Co. v. Tucker*, (App. 1912) 98 N. E. 431.

Iowa.—*Townsend v. Des Moines*, 42 Iowa 657 (1876).

Kansas.—*Atchison, etc., R. Co. v. Frazier*, 27 Kan. 463 (1882).

Kentucky.—*Chesapeake & O. R. Co. v. Wiley*, 134 Ky. 461, 121 S. W. 402 (1909).

Massachusetts.—*Roosa v. Boston Loan Co.*, 132 Mass. 439 (1882); *Fay v. Harlan*, 128 Mass. 244, 35 Am. Rep. 372 (1880).

Michigan.—*Marshall v. Saginaw Valley Tr. Co.*, 157 Mich. 541, 122 N. W. 131, 16 Det. Leg. N. 357 (1909); *Heddl v. City Electric R. Co.*, 112 Mich. 547, 70 N. W. 1096 (1897).

Missouri.—*Poumeroule v. Postal Tele. Cable Co.*, (App. 1912) 152 S. W. 114; *Richardson v. Metropolitan St. R. Co.*, 166 Mo. App. 162, 147 S. W. 1126 (1912); *Brown v. Springfield Tr. Co.*, 141 Mo. App. 382, 125 S. W. 236 (1910); *Brady v. Springfield Tr. Co.*, 140 Mo. App. 421, 124 S. W. 1070 (1910).

Nebraska.—*Albrecht v. Morris*, 136 N. W. 48 (1912).

New Hampshire.—*Perkins v. Concord R. Co.*, 44 N. H. 223 (1862).

New York.—*Tobin v. Fairport*, 12 N. Y. Suppl. 224 (1890); *Meigs v. Buffalo*, 44 Hun 624, 7 N. Y. St. 855 (1887); *Matteson v. New York Cent. R. Co.*, 35 N. Y. 487, 91 Am. Rep. 67 (1866).

Oregon.—*Willenmier v. Oregon Water Power Co.*, 55 Ore. 129, 105 Pac. 706 (1909).

Pennsylvania.—*Lake Shore, etc., R. Co. v. Rosenzweig*, 113 Pa. St. 519, 6 Atl. 545 (1886).

Tennessee.—*Looper v. Bell*, 1 Head 373 (1858); *Yeatman v. Hart*, 6 Humphr. 375 (1845).

Texas.—*Missouri K. T. R. Co. v.*

Dalton, 56 Tex. Civ. App. 82, 120 S. W. 240 (1909); *El Paso & S. W. R. Co. v. Polk*, 49 Tex. Civ. App. 269, 108 S. W. 761 (1908); *Rogers v. Crain*, 30 Tex. 284 (1867).

Vermont.—*Williams' Adm'r v. Brock*, 81 Vt. 332, 70 Atl. 572 (1908).

Wyoming.—See *Acme Cement Plaster Co. v. Westman*, 122 Pac. 89 (1912).

United States.—*Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 275, 15 S. Ct. 840, 30 L. ed. 977, (1894) per Shiras, J.

Consulting physician may testify to such declarations. *Judd v. Caledonia Tp.*, 150 Mich. 480, 114 N. W. 346, 14 Det. Leg. N. 756 (1907).

Explanation.—A statement to a physician may be independently relevant as explaining, because forming part of the basis of, his diagnosis and treatment. *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315 (1895); *Cronin v. R. Co.*, 181 Mass. 202, 63 N. E. 335 (1902); *Williams v. Great Northern Ry. Co.*, 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199 (1897).

2. *Alabama*.—*Johnson v. State*, 17 Ala. 618 (1850).

California.—*People v. Lowen*, 109 Cal. 381, 42 Pac. 32 (1895).

Connecticut.—*Gilmore v. American Tube & S. C.*, 79 Conn. 498, 66 Atl. 4 (1907); *Wilson v. Granby*, 47 Conn. 59, 36 Am. Rep. 51 (1879).

Georgia.—*Georgia Ry. & E. Co. v. Gilleland*, 133 Ga. 621, 66 S. E. 944 (1909); *Feagin v. Beasley*, 23 Ga. 17 (1857).

Illinois.—*Salem v. Webster*, 192 Ill. 369, 61 N. E. 323 (1901); *Salem v. Webster*, 95 Ill. App. 120, *affirmed* 192 Ill. 369, 61 N. E. 323 (1901); *Globe v. Acc. Ins. Co. v. Gerisch*, 61 Ill. App. 140, *reversed* 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486 (1895); *Collins v. Waters*, 54 Ill. 485 (1870).

Iowa.—*Townsend v. Des Moines*, 42 Iowa 657 (1876).

nosis and treatment.³ The inducement to tell the truth under

Kansas.—*Atchicon, etc., R. Co. v. Frazier*, 27 Kan. 463 (1882).

Massachusetts.—*Fay v. Harlan*, 128 Mass. 244, 35 Am. Rep. 372 (1880); *Morrissey v. Ingham*, 111 Mass. 63 (1872); *Barber v. Merriam*, 11 Allen 322 (1865); *Chapin v. Marlborough*, 9 Gray 244, 69 Am. Dec. 281 (1857).

Michigan.—*Heddle v. City Electric R. Co.*, 112 Mich. 547, 70 N. W. 1096 (1897).

Minnesota.—*Edlund v. St. Paul City R. Co.*, 78 Minn. 434, 81 N. W. 214 (1899).

New Hampshire.—*Craig v. Gerish*, 58 N. H. 513 (1879); *Towle v. Blake*, 48 N. H. 92 (1868); *Perkins v. Concord R. Co.*, 44 N. H. 223 (1862).

New Jersey.—*State v. Gedicke*, 43 N. J. L. 86 (1881) (pregnancy).

New York.—*Martin v. Wood*, 52 Hun 613, 5 N. Y. Suppl. 274, 23 N. Y. St. Rep. 457, 1 Silv. 212 (1889); *Cleveland v. New Jersey Steamboat Co.*, 5 Hun 523, *reversed* 68 N. Y. 306 (1875); *Matteson v. New York Cent. R. Co.*, 62 Barb. 364 (1862), *affirmed* 35 N. Y. 487, 91 Am. Dec. 67 (1866).

Pennsylvania.—*Lake Shore, etc., R. Co. v. Rosenzweig*, 113 Pa. St. 519, 6 Atl. 545 (1886).

South Carolina.—*State v. Belcher*, 13 S. C. 459 (1880); *Hunter v. McClintock, Dudley* 327 (1838).

Tennessee.—*Yeatman v. Hart*, 6 Humphr. 375 (1845).

Texas.—*Wheeler v. Tyler South Eastern R. Co.*, 91 Tex. 356, 43 S. W. 876 (1898); *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608 (1897); *Missouri, etc., R. Co. v. Sanders*, 12 Tex. Civ. App. 5, 33 S. W. 245 (1895); *Newman v. Dodson*, 61 Tex. 91 (1884); *Rogers v. Crain*, 30 Tex. 284 (1867).

Vermont.—*Knox v. Wheelock*, 54 Vt. 150 (1881); *Earl v. Tupper*, 45 Vt. 275 (1873).

Wisconsin.—*Curran v. A. H. Stange Co.*, 98 Wis. 598, 74 N. W. 377 (1898).

United States.—*Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 15 S. Ct. 840, 30 L. ed. 977 (1894).

"It is well settled, that what a patient has said of his own feelings, pains, etc, while afflicted with a disease which is the subject of judicial decision may be told by the witness, and is competent evidence. Such expressions are the indications or symptoms of the disease itself; and cannot be separated from it. A dumb patient would write and point to the seat of his pain; while one, who spoke, would indicate the same thing in words. In such cases, the words or gestures, are equally the signs of the disease felt by the patient." *Hunter v. McClintock, Dudley* (S. C.) 327, 328 (1838), per Richardson, J.

Manner of examination.—A physician called as an expert may properly characterize the manner of a medical examination made by him as having been careful, thorough or the like. *Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 275, 15 S. Ct. 840, 30 L. ed. 977 (1895).

3. *Georgia*.—*Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389 (1895).

Illinois.—*Greinke v. Chicago City Ry. Co.*, 234 Ill. 564, 85 N. E. 327 (1908); *affirming judgment*, 136 Ill. App. 77 (1907); *City of Chicago v. McNally*, 117 Ill. App. 434 (1904); *affirmed* 227 Ill. 14, 81 N. E. 23 (1907).

Massachusetts.—*Barber v. Merriam*, 11 Allen 322 (1865).

Michigan.—*Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616 (1895).

Missouri.—*Poumeroule v. Postal Cable Co.*, (App. 1912) 152 S. W. 114; *Richardson v. Metropolitan St. Ry. Co.*, 166 Mo. App. 162, 147 S. W. 1126 (1912); *Brown v. Spring-*

such circumstances appears to the average man, to be persuasive ⁴

field Tr. Co., 141 Mo. App. 382, 125 S. W. 236 (1910); *Brady v. Springfield Tr. Co.*, 140 Mo. App. 421, 124 S. W. 1070 (1910).

New Jersey.—Consolidated Traction Co. v. Lambertson, 60 N. J. L. 452, 38 Atl. 683 (1897); *State v. Gedicke*, 43 N. J. L. 86 (1881).

New York.—*Matteson v. New York Cent. R. Co.*, 62 Barb. 364, *affirmed* 35 N. Y. 487, 91 Am. Dec. 67 (1862).

South Carolina.—*Hunter v. McClintock*, Dudley 327, 328 (1838).

Texas.—*Newman v. Dodson*, 61 Tex. 91 (1884).

Wisconsin.—*Curran v. A. H. Stange Co.*, 98 Wis. 598, 74 N. W. 377 (1898); *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800 (1896); *Stone v. R. Co.*, 88 Wis. 98, 105, 59 N. W. 457 (1894).

New York rule.—In New York, the declarations of a patient to his physician, to enable the latter to diagnose and treat his case, are regarded as if offered in proof of facts asserted. So considered, they are very properly regarded as secondary evidence, not to be used so long as the patient himself is available as a witness. *Barrelle v. Pennsylvania R. Co.*, 4 N. Y. Suppl. 127 (1889).

Necessity.—This species of evidence, originally received by virtue of the necessity of learning from the patient himself at a time when he was unable to testify, the facts known only to himself regarding his bodily sensations which an attending physician must know for a proper understanding of the case is still received by virtue of the exigencies of proof. *State v. Gedicke*, 43 N. J. L. 86 (1881) (pregnancy); *Matteson v. New York Cent. R. Co.*, 62 Barb. 364, (1862), *affd.* 35 N. Y. 487, 91 Am. Dec. 67 (1866).

4. *Omberg v. U. S. Mutual Acc. Assoc.*, 101 Ky. 303, 40 S. W. 909, 19 Ky. L. R. 462, 72 Am. St. Rep.

413 (1897); *Fay v. Harlan*, 128 Mass. 244, 35 Am. Rep. 372 (1880); *Barber v. Merriam*, 11 Allen (Mass.) 322 (1865); *State v. Gedicke*, 43 N. J. L. 86 (1881).

"We are of the opinion also that the declaration of a patient to his attending physician, to the effect that the injury was the result of a bite, was competent. A narrative of the events attending the mishap would not be competent, but the patient may tell what the injury is, if he knows; he is suffering and is seeking relief; to get it he must tell the truth; any other course would mislead his physician and might result disastrously; he knows whether he has bruised the inflamed parts or whether he has been bitten by an insect. Such statements are part of the description of the wound, and inseparable from the patient's complaint with respect thereto." *Omberg v. U. S. Mutual Acc. Assoc.*, 101 Ky. 303, 309, 40 S. W. 909, 19 Ky. L. R. 462, 72 Am. St. Rep. 413 (1897), per Hazelrigg, J.

"Its admissibility is an exception to the general rule of evidence, which has its origin in the necessity of the case. . . . To the argument against their competency founded on the danger of deception and fraud, the answer is that such representations are competent only when made to a person of science and medical knowledge, who has the means and opportunity of observing and ascertaining whether the statements and declarations correspond with the conditions and appearance of the persons making them, and the present existing symptoms which the eye of experience and skill may discover. Nor is it to be forgotten that statements made to a physician for the purpose of medical advice and treatment are less open to suspicion than the ordinary declarations of a party. They

especially in a serious matter, where life or limb is involved.⁵ It has even been suggested, more or less obscurely, that statements regarding bodily sensations are receivable in evidence only when made in the course of a consultation with a physician.⁶ That this confidence in the trustworthiness of extrajudicial declarations to a medical man should arise, certain conditions must be fulfilled. It is said to be essential that the statements should have been

are made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth." *Barber v. Merriam*, 11 Allen (Mass.) 322, 325 (1865), per Bigelow, C. J.

5. *Fleming v. Springfield*, 154 Mass. 520, 28 N. E. 910, 26 Am. St. Rep. 268 (1891).

The extreme limit.—It may fairly be said that evidence of this class marks the extreme limit to which evidence of extrajudicial independently relevant statements has been permitted by the courts to extend. *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724 (1890). The danger that the jury will use the declarations as proof of the facts which they assert seems to be quite apparent.

"They are not to be considered as mere hearsay, if made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth." *Fay v. Harlan*, 128 Mass. 244, 35 Am. Rep. 372 (1880), per Ames, J.

6. *California*.—*Green v. Pacific L. Co.*, 130 Cal. 435, 62 Pac. 747 (1900); *James' Estate*, 124 Cal. 653, 57 Pac. 578 (1899).

Connecticut.—*Martin v. Sherwood*, 74 Conn. 475, 51 Atl. 526 (1902); *Wilson v. Granby*, 47 Conn. 59, 36 Am. Rep. 51 (1879); *Kelsey v. Ins. Co.*, 35 Conn. 225, 236 (1868).

Delaware.—*Wilkins v. Wilming-*

ton, 2 Marv. 132, 42 Atl. 418 (1898).

Georgia.—*Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389 (1896); *Savannah F. & W. R. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622 (1896); *Atlanta St. R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48 (1895).

Illinois.—*Lake St. El. R. Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374 (1903); *Cicero & P. S. R. Co. v. Priest*, 190 Ill. 592, 60 N. E. 814 (1901); *Salem v. Webster*, 192 Ill. 369, 61 N. E. 323 (1901).

Indiana.—*Indiana R. Co. v. Maurer*, 106 Ind. 25, 66 N. E. 156 (1902); *Louisville N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 559, 37 N. E. 343 (1895); *Cleveland C. C. & St. L. R. Co. v. Prewitt*, 134 Ind. 557, 562, 33 N. E. 367 (1893).

Minnesota.—*Firkins v. Chicago Great Western R. Co.*, 61 Minn. 31, 63 N. W. 173 (1895); *Brusch v. St. Paul City R. Co.*, 52 Minn. 512, 513, 55 N. W. 57 (1893).

New York.—*Reed v. R. Co.*, 45 N. Y. 578 (1871).

Wisconsin.—*Bredlau v. York*, 115 Wis. 554, 92 N. W. 261 (1902); *Curran v. Stange Co.*, 98 Wis. 598, 74 N. W. 377 (1898); *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800 (1896).

United States.—*Union P. R. Co. v. Novak*, 15 U. S. App. 400, 414, 9 C. C. A. 629, 61 Fed. 573, 17 S. Ct. 1001, 41 L. ed. 1184 (1894).

Restriction repudiated.—Any such restriction of the admissibility of independently relevant extrajudicial statements regarding bodily sensations to those made to physicians or

made *ante litem motam*.⁷ Should it appear that the declarations were made *post litem motam* to an attending physician or to a skilled medical observer for the purpose of enabling the latter to testify as a witness for the declarant, the inference of trustworthiness largely disappears⁸ or is even reversed, the declarations being rejected by careful administrators as unreliable.⁹ In other

surgeons has been distinctly repudiated in certain other jurisdictions.

Iowa.—Keyes v. Cedar Falls, 107 Iowa 509, 78 N. W. 227 (1899).

Kansas.—Brooks v. Hall, 36 Kan. 697, 14 Pac. 236 (1887).

Nebraska.—Hewitt v. Eisenbart, 36 Nebr. 794, 55 N. W. 252 (1893).

South Carolina.—Oliver v. R. Co., 65 S. C. 1, 43 S. E. 307 (1902).

Vermont.—Kidder v. Bacon, 74 Vt. 263, 52 Atl. 322 (1902); Brown v. Mt. Holly, 69 Vt. 364, 38 Atl. 69 (1897); Bagley v. Mason, 69 Vt. 175, 37 Atl. 287 (1896).

United States.—Northern P. R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. ed. 977 (1894); Baltimore & O. R. Co. v. Rambo, 16 U. S. App. 277, 280, 8 C. C. A. 6, 59 Fed. 75 (1893).

7. *City of Chicago v. McNally*, 117 Ill. App. 434 (1904), affirmed 227 Ill. 14, 81 N. E. 23 (1907); *Indianapolis Southern R. Co. v. Tucker* (Ind. App. 1912), 98 N. E. 431; *Alexandria v. Young*, 20 Ind. App. 672, 51 N. E. 109 (1898); *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616 (1895); *International, etc., R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58 (1893).

8. *Indiana*.—Board v. Nichols, 139 Ind. 611, 38 N. E. 526 (1894) (admissible to time of action brought); *Cleveland C. C. & I. R. Co. v. Newell*, 104 Ind. 271, 3 N. E. 836 (1885).

Maryland.—Sellman v. Wheeler, 95 Md. 751, 54 Atl. 512 (1903).

Massachusetts.—Hatch v. Fuller, 131 Mass. 574 (1881).

New Hampshire.—Norris v. Haver-

hill, 65 N. H. 89, 18 Atl. 85 (1888); *Towle v. Blake*, 48 N. H. 92 (1868).

New York.—Matteson v. R. Co., 62 Barb. 364, affirmed 35 N. Y. 487, 91 Am. Dec. 67 (1862).

Vermont.—Bagley v. Mason, 69 Vt. 175, 37 Atl. 285 (1896); *Kent v. Lincoln*, 32 Vt. 591, 598 (1860).

Wisconsin.—Quaife v. R. Co., 48 Wis. 526, 4 N. W. 658, 33 Am. Rep. 821 (1879).

United States.—*Kansas C. F. S. & M. R. Co. v. Stoner*, 10 U. S. App. 209, 225, 2 C. C. A. 437, 51 Fed. 649 (1892).

9. *Connecticut*.—*Rowland v. Philadelphia, etc., R. Co.*, 63 Conn. 415, 28 Atl. 102 (1893); *Darrigan v. N. Y. & N. E. R. Co.*, 52 Conn. 285, 291, 309, 52 Am. Rep. 590 (1884).

Illinois.—*Cole v. City of East St. Louis*, 158 Ill. App. 494 (1910); *Shaughnessy v. Holt*, 236 Ill. 485, 86 N. E. 256, reversing 140 Ill. App. 572 (1908); *Greimke v. Chicago City Ry. Co.*, 234 Ill. 564, 85 N. E. 327 (1908), affirming judgment, 136 Ill. App. 77 (1907); *City of Chicago v. McNally*, 117 Ill. App. 434 (1904), affirmed 227 Ill. 14, 81 N. E. 23 (1907); *Chicago City Ry. Co. v. Mauger*, 128 Ill. App. 512 (1906); *Salem v. Webster*, 95 Ill. App. 120, affirmed 192 Ill. 369, 61 N. E. 323 (1901); *Illinois C. R. Co. v. Sutton*, 42 Ill. 38, 92 Am. Dec. 81 (1867).

Michigan.—*Mott v. Detroit, etc., R. Co.*, 120 Mich. 127, 79 N. W. 3 (1899); *Butts v. Eaton Rapids*, 116 Mich. 539, 74 N. W. 872 (1898); *Hedde v. R. Co.*, 112 Mich. 547, 70 N. W. 1096 (1897); *McKormick v.*

cases, it has not been insisted that the statements should have been made *ante litem motam*, where there are no circumstances of suspicion indicating fabrication¹⁰ or tending to show that the per-

West Bay City, 110 Mich. 265, 68 N. W. 148 (1896).

New Jersey.—The Consolidated, etc., Traction Co. v. Lambertson, 60 N. J. L. 452, 38 Atl. 683 (1897).

Ohio.—Pennsylvania Co. v. Files, 65 Ohio St. 403, 62 N. E. 1047 (1902); Lake Shore, etc., R. Co. v. Yokes, 12 Ohio Cir. Ct. 499, 5 Ohio Cir. Dec. 599 (1895).

Texas.—Missouri K. & T. R. Co. v. Johnson, 95 Tex. 409, 67 S. W. 768 (1901); Tyler South Eastern R. Co. v. Wheeler, (Civ. App. 1897) 41 S. W. 517, modified 91 Tex. 356, 43 S. W. 876 (1897). See also International, etc., R. Co. v. Boykin, 32 Tex. Civ. App. 72, 74 S. W. 93 (1903); Hicks v. Galveston, etc., R. Co., (Civ. App. 1902) 71 S. W. 322, reversed on other points in 96 Tex. 355, 72 S. W. 835 (1903).

Wisconsin.—Kath v. Wisconsin Cent. Ry. Co., 121 Wis. 503, 99 N. W. 217 (1904); Tebo v. Augusta, 90 Wis. 408, 63 N. W. 1045 (1895); Abbot v. Heath, 84 Wis. 320, 54 N. W. 574 (1893); Stewart v. Everts, 76 Wis. 35, 42, 44 N. W. 1092 (1890).

United States.—Delaware L. & W. R. Co. v. Roalefs, 16 C. C. A. 601, 70 Fed. 21 (1895).

Under the Illinois rule the declarations made by an injured person to a physician concerning his sufferings, etc., are inadmissible, unless they are a part of the *res gestae*, or made to the physician during treatment or on an examination prior thereto, and without reference to the bringing of an action to recover damages for the injury, unless the examination is made at the instance of the defendant with a view to the trial. *City of Chicago v. McNally*, 117 Ill. App. 434 (1904), affirmed 227 Ill. 14, 81 N. E. 23 (1907).

The physician "may state what his patient said, in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of *res gestae*." *Illinois C. R. Co. v. Sutton*, 42 Ill. 438, 440, 92 Am. Dec. 81 (1867), per Lawrence, J.

"It has all the evils of manufactured testimony, without any possible means of detecting the falsity of it." *Jones v. Portland*, 88 Mich. 598, 604, 50 N. W. 731, 16 L. R. A. 437 (1891), per Champlin, J.

"We cannot think it safe to receive such statements which are made for the very purpose of getting up testimony, and not under ordinary circumstances. The physicians here were not called in to aid or give medical treatment. . . . They were sent for merely to enable the plaintiff below to prove her case. . . . [Her expressions] were therefore made under a strong temptation to feign suffering if dishonest, and a hardly less strong tendency if honest to imagine or exaggerate it. The purpose of the examination removed the ordinary safe-guards which furnish the only reason for receiving declarations which bear in a party's own favor. . . . It is not necessary to consider whether there may not be properly received in some cases the natural and usual expressions of pain made under circumstances free from suspicion, even *post litem motam*. The case must at least be a very plain one which will permit this." *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537, 544, 545 (1878), per Campbell, J.

10. Where it is evident that the questions of a physician on the examination of his patient and her replies

son was feigning.¹¹ Under such circumstances, the fact that the witness was expected to testify upon the basis, in part at least, of the truth of the statements made to him by the patient, is merely looked upon as an infirmative¹² consideration affecting weight¹³ and the declaration as to the existence¹⁴ or location¹⁵ of present suffering is accordingly received.

*The rule excluding a narrative of past transactions*¹⁶ applies even to statements made to physicians for purpose of diagnosis and treatment.¹⁷

thereto were merely introduced for the purpose of showing that the physician's opinion as to her condition was partly based on his statements and not as direct evidence of her past sufferings, the jury could not have been misled, although the examination was made *post litem motam*. Kansas City, etc., R. Co. v. Stoner, 51 Fed. 649, 2 C. C. A. 437 (1892).

Examination under an order of court.—Declarations at such a time have been looked upon as self serving and inadmissible. Dehaven v. Danville Gaslight Co., (Ky. C. A. 1912) 150 S. W. 322.

Examination as basis for expert testimony.—Exclamation at such a time have been received. Ft. Worth & D. C. R. Co. v. Hays, (Tex. Civ. App. 1910) 131 S. W. 416.

11. An examining physician may be asked whether, in his opinion, the patient showed signs of simulation. Plummer v. Ossipee, 59 N. H. 55 (1879).

12. Salem v. Webster, 95 Ill. App. 120, *aff'd* 192 Ill. 369, 61 N. E. 323 (1900); Barber v. Merriam, 11 Allen (Mass.) 322 (1865).

13. **Involuntary symptoms.**—Wincing under pressure, Ft. Worth & D. C. R. Co. v. Hays, (Tex. Civ. App. 1910) 131 S. W. 416, exclamations of pain made during a manipulation of a patient's body or members for the sake of ascertaining the nature and extent of his injuries, and the like, are regarded as objective symptoms and not exposed to the administrative strictures applicable to facts

more clearly within the patient's control. Broyles v. Prisock, 97 Ga. 643, 25 S. E. 389 (1896); Missouri, etc., R. Co. v. Johnson, (Tex. Civ. App. 1901) 67 S. W. 769; *affirmed* in 95 Tex. 409, 67 S. W. 768 (1902).

14. Jones v. Niagara Junction R. Co., 63 N. Y. App. Div. 607, 71 N. Y. Suppl. 647 (1901); Bagley v. Mason, 69 Vt. 175, 37 Atl. 287 (1896); Kent v. Lincoln, 32 Vt. 591 (1860).

15. Kent v. Lincoln, 32 Vt. 591 (1860).

16. § 2629.

17. *Alabama.*—Kelly v. Cunningham, 36 Ala. 78 (1860); Blackman v. Johnson, 35 Ala. 252 (1859).

Arkansas.—Fordyce v. McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296 (1889).

California.—Jenkin v. Pacific Mut. L. Ins. Co., 131 Cal. 121, 63 Pac. 180 (1900).

Connecticut.—Rowland v. Philadelphia, etc., R. Co., 63 Conn. 415, 28 Atl. 102 (1893).

Georgia.—East Tennessee, etc., R. Co. v. Maloy, 77 Ga. 237, 2 S. E. 941 (1886).

Indiana.—Citizens' St. R. Co. v. Stoddard, 10 Ind. App. 278, 37 N. E. 723 (1894).

Kentucky.—Allen v. Vancleave, 15 B. Mon. 236, 61 Am. Dec. 184 (1854). But see Omberg v. U. S. Mutual Acc. Assoc., 101 Ky. 303, 309, 40 S. W. 909, 19 Ky. L. Rep. 462, 72 Am. St. Rep. 413 (1897).

Louisiana.—Marler v. Texas, etc.,

¹ *Facts not required for a satisfactory diagnosis*, such as the cause of an injury,¹⁸ as to the instrument with which it was inflicted¹⁹ or the like²⁰ are regarded as a narrative of the incidents of a past transaction, and are accordingly rejected.

Deliberative relevancy.—An extrajudicial declaration concerning bodily conditions, though probatively relevant for the purpose of establishing this fact, may still be relevant in a deliberative

R. Co., 52 La. Ann. 727, 27 So. 176 (1900).

Maine.—Asbury L. Ins. Co. v. Warren, 66 Me. 523, 22 Am. Rep. 590 (1876).

Massachusetts.—Emerson v. Lowell Gas Light Co., 6 Allen 146, 83 Am. Dec. 621 (1863).

Michigan.—People v. O'Brien, 92 Mich. 17, 52 N. W. 84 (1892); Dundas v. Lansing, 75 Mich. 499, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143 (1889); Merkle v. Bennington Tp., 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666 (1885).

Minnesota.—Weber v. St. Paul City R. Co., 67 Minn. 155, 69 N. W. 716 (1897).

Missouri.—Poumeroule v. Postal Teleg. Cable Co., (App. 1912) 152 S. W. 114.

South Carolina.—Hunter v. McClintock, Dudley 327 (1838).

Texas.—Hardin v. St. Louis Southwestern Ry. Co. of Texas, (Civ. App. 1905) 88 S. W. 440; Ft. Worth, etc., R. Co. v. Stone, (Civ. App. 1894) 25 S. W. 808. But see Missouri, etc., R. Co. v. Rose, 19 Tex. Civ. App. 470, 49 S. W. 133 (1878).

Correspondence by a patient to his physician has been rejected for similar reasons. Witt v. Witt, 32 L. J. P. & M. 179, 8 L. T. Rep. (N. S.) 175, 3 Swab. & Tr. 143, 11 Wkly. Rep. 154 (1862).

Where statements to a physician are of past pain and suffering, when that information is necessary to a correct diagnosis, they may be testified to by the physician as forming a part of the basis of his opinion. In such cases, the statements of the

patient have no hearsay quality but are treated merely as observed facts, forming part of the physicians data and hearing upon the weight of his opinion, without regard to their correctness or incorrectness. William's Adm'r v. Brock, 81 Vt. 332, 70 Atl. 572 (1908), per Rowell, C. J.

¹⁸ *Connecticut.*—Rowland v. R. Co., 63 Conn. 415, 28 Atl. 102 (1893).

Illinois.—Collins v. Waters, 54 Ill. 485 (1870) (kick); Illinois, etc., R. Co. v. Sutton, 42 Ill. 438, 92 Am. Dec. 81 (1867).

Massachusetts.—Roosa v. Boston Loan Co., 132 Mass. 439 (1882); Morrissey v. Ingham, 111 Mass. 63 (1872); Chapin v. Marlborough, 9 Gray 244, 69 Am. Dec. 281 (1857).

Michigan.—Dundas v. Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143 (1889).

Ohio.—Lake Shore, etc., R. Co. v. Yokes, 12 Ohio Cir. Ct. 499, 5 Ohio Cir. Dec. 599 (1895).

Tennessee.—Denton v. State, 1 Swan 279 (1851).

There is authority to the contrary. Omberg v. U. S. Mut. Ass., 101 Ky. 303, 40 S. W. 909, 19 Ky. L. Rep. 462, 72 Am. St. 413 (1897) (mosquito bite).

¹⁹ Collins v. Waters, 54 Ill. 485 (1870).

²⁰ Fordyce v. McCants, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296 (1889); Heald v. Thing, 45 Me. 392 (1858); Morrissey v. Ingham, 111 Mass. 63 (1872); Barber v. Merriam, 11 Allen (Mass.) 322 (1865); Tyler, etc., R. Co. v. Wheeler (Tex. Civ. App. 1897), 41 S. W. 517 (1897).

way. It may, for example, establish the fact of a contradictory statement.²¹

Mental condition.—A statement to a physician regarding mental condition may be equally competent.²²

Declarations by physicians as to the injury or ailment of a patient are not admissible to establish the latter's physical condition.²³ Nor is the patient permitted to testify to what his doctor has said to him relative to his condition.²⁴

§ 2636. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Bodily Sensation*); Administrative Details.—In certain jurisdictions it has been held that only when the statement was shown to be involuntary will it be received.¹ The administrative danger that a party may take advantage of the rule under consideration to manufacture evidence for himself has seemed to indicate such a course with sufficient plainness.²

21. *Johnson v. Chicago, etc., R. Co.*, 51 Iowa 25, 50 N. W. 543 (1879); *Smith v. State*, 46 Tex. Cr. 267, 81 S. W. 936, 108 Am. St. Rep. 991 (1904).

22. *Texas Cent. R. Co. v. Wheeler*, 52 Tex. Civ. App. 603, 116 S. W. 83 (1909); *Hathaway v. National L. Ins. Co.*, 48 Vt. 335 (1875).

23. *Johnson v. Powell* (Kan. 1912), 123 Pac. 881; *Tate v. Wabash R. Co.*, 159 Mo. App. 475, 141 S. W. 459 (1911); *Johnson v. Town of Iron River* (Wis. 1912), 135 N. W. 522.

24. *St. Louis & S. F. R. Co. v. Savage*, 163 Ala. 55, 50 So. 113 (1909); *Louisville & N. R. Co. v. Lynch*, 137 Ky. 696, 126 S. W. 362 (1910).

Prognosis.—The prognosis of a physician is as incompetent in relation to bodily condition as his other statements would be. Accordingly, it was proper not to permit plaintiff to be asked whether a physician had told him that, if he did not stop drinking, it would render him insane. *St. Louis & S. F. R. Co. v. Savage*, 163 Ala. 55, 50 So. 113 (1909).

§ 2636-1. *West Chicago St. R. Co.*

v. Kennelly, 170 Ill. 508, 48 N. E. 996 (1897); *Hewitt v. Eisenhart*, 36 Nebr. 794, 55 N. W. 252 (1893); *Schuler v. Third Ave. R. Co.*, 1 Misc. (N. Y.) 351, 20 N. Y. Suppl. 683, 48 N. Y. St. Rep. 663 (1892); *Kennedy v. Rochester City, etc., R. Co.*, 130 N. Y. 654, 29 N. E. 141, 3 Silv. 591 (1891); *Smith v. Dittman*, 16 Daly (N. Y.) 427, 11 N. Y. Suppl. 769, 34 N. Y. St. Rep. 303 (1890); *Olp v. Gardner*, 48 Hun (N. Y.) 169 (1888); *Texas State Fair v. Marti*, 30 Tex. Civ. App. 132, 69 S. W. 432 (1902). "The rule is that declarations made at the time which are in their nature involuntary, and indicate pain or show the condition of the party, may be proved, and his condition may be shown afterwards, but not his complaints. A man cannot make out a case for himself by complaining to other people." *Wilkins v. Wilmington*, 2 Marv. (Del.) 132, 134, 42 Atl. Rep. 418 (1895), per Love, C. J.

2. *Wilkins v. Wilmington*, 2 Marv. (Del.) 132, 42 Atl. 418 (1895).

§ 2637. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts*); Identification.

—Among the most common uses to which an unsworn statement when employed in its independently relevant capacity, may be put, is that of *identification*.¹ Regarded as proof of the facts asserted, the unsworn statement may possess no evidentiary value. It may, however, whenever the fact is relevant,² serve, in a circumstantial way, to identify a person,³ place,⁴ or any article of property, real⁵ or personal.⁶ It may segregate a particular transaction from all others.⁷ Its existence may be a proper fact by which to fix a date,⁸ as for example to determine the time of a pay-

§ 2637-1. *Blodgett v. Park* (N. H. 1912), 84 Atl. 42 (testimony of witness).

2. *Perry v. Smith*, 22 Vt. 301 (1850).

3. *Connecticut*.—*Loomis v. Smith*, 17 Conn. 115 (1845).

Maryland.—See *Suman v. Harvey*, 114 Md. 241, 79 Atl. 187 (1911).

New Hampshire.—*Willis v. Quimby*, 31 N. H. 485 (1855).

Ohio.—*Sperry v. Tebbs*, 10 Ohio Dec. (Reprint) 318, 20 Wkly. Law Bul. 181 (1888).

Pennsylvania.—*Winder v. Little*, 1 Yeates 152 (1792).

Rhode Island.—*State v. McAndrews*, 15 R. I. 30, 23 Atl. 304 (1885).

South Carolina.—*Horry, etc., v. Glover*, 2 Hill Eq. 515 (1837).

Texas.—*Keck v. Woodward*, 53 Tex. Civ. App. 267, 116 S. W. 75 (1909); *Morgan v. Butler*, 23 Tex. Civ. App. 470, 56 S. W. 689 (1900); *Schatt v. Pellerim*, (Civ. App. 1897) 43 S. W. 944; *Cook v. Carroll Land, etc., Co.*, (Civ. App. 1897) 39 S. W. 1006; *Nix v. Cole*, (Civ. App. 1895) 29 S. W. 561; *Carter v. State*, 23 Tex. App. 508, 5 S. W. 128 (1887); *McCall v. State*, 14 Tex. App. 353 (1883).

United States.—*J. S. Toppan Co. v. McLaughlin*, 120 Fed. 705 (1903).

4. *Fairfield v. Amherst*, 57 N. H. 479 (1876).

5. *Illinois*.—*Hoffner v. Custer*, 237 Ill. 64, 86 N. E. 737 (1908).

Louisiana.—*Patterson v. Behan*, 12 La. 227 (1838).

Maine.—*Simpson v. Blaisdell*, 85 Me. 199, 27 Atl. 101, 35 Am. St. Rep. 348 (1892).

Maryland.—*Mitchell v. Dall*, 2 Harr. & G. 159 (1828).

Pennsylvania.—*Russell v. Wernitz*, 24 Pa. St. 337 (1855); *Rossiter's Appeal*, 2 Pa. St. 371 (1845).

South Carolina.—*Baynard v. Eddings*, 2 Strobb. 374 (1847).

6. *Patterson v. Behan*, 12 La. 227 (1838); *Pool v. Bridges*, 4 Pick. (Mass.) 378 (1826); *People v. Dowling*, 84 N. C. 478 (1881); *Parrott v. Watts*, 47 L. J. C. P. 79, 37 L. T. Rep. (N. S.) 755 (1878).

7. *Earle v. Earle*, 11 Allen (Mass.) 1 (1865); *State v. Ward*, 61 Vt. 153, 17 Atl. 483 (1888); *Hill v. North*, 34 Vt. 604 (1861).

8. *Alabama*.—*Jordan v. Roney*, 23 Ala. 758 (1853).

Georgia.—*Harris v. Central R. Co.*, 78 Ga. 525, 3 S. E. 355 (1887).

Michigan.—*Grosvenor v. Ellis*, 44 Mich. 452, 7 N. W. 59 (1880).

New Jersey.—*Browning v. Skillman*, 24 N. J. L. 351 (1854).

Vermont.—*State v. Ward*, 61 Vt. 153, 17 Atl. 483 (1888); *Westmore v. Sheffield*, 56 Vt. 239 (1883); *Hill v. North*, 34 Vt. 604 (1861).

ment.⁹ Judicial administration may properly add the proviso that evidence of this class will be received when more cogent or conclusive proof cannot be produced.¹⁰

§ 2638. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts*); Mental Condition.—An extrajudicial statement may serve, as few other things can, to illustrate the condition of the mind of the speaker.¹ Distinguishing, in the present connection, the actual force and power of the mind itself from proof of its contents, those mental states² which are also seen to be established by the relevant utterances to which they give rise, it may fairly be said that the actual constitution of the mind is often appropriately shown by these verbal manifestations,³ as in the case of declarations by a testator.⁴ In

9. *Mitchell v. Dall*, 2 Harr. & G. (Md.) 159 (1828); *Bewley v. Atkinson*, 13 Ch. D. 283, 49 L. J. Ch. 153, 41 L. T. Rep. (N. S.) 603, 28 Wkly. Rep. 638 (1880).

10. *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 403 (1849).

The suggestion has even been made that the declarant must be affirmatively shown to be dead if his unsworn statement is to be received. *Nehring v. McMurrian* (Tex. Civ. App. 1898) 46 S. W. 369.

§ 2638-1. The probative declaration may follow, in case of a continuous mental condition, the precise time of the transaction in question. *Piercy v. Piercy*, 18 Cal. App. 751, 124 Pac. 561 (1912). This may be put into the form of saying that the illustrative declaration need not be part of the *res gestae*. *Piercy v. Piercy*, 18 Cal. App. 751, 124 Pac. 561 (1912).

2. §§ 2643 *et seq.*

3. *California*—*Lamb v. Wilke*, (Cal. App. 1912) 125 Pac. 757 (intended disposition of property); *Piercy v. Piercy*, 18 Cal. App. 751, 124 Pac. 561 (1912); *In re Mullin*, 110 Cal. 252, 42 Pac. 645 (1895).

Iowa.—*Curtis v. Armagast*, 138 N. W. 873 (1912).

Kansas.—*Mooney v. Olsen*, 22 Kan. 69 (1879).

Maine.—*State v. Walker*, 77 Me. 488, 490, 1 Atl. 357 (1885).

Massachusetts.—*Shailer v. Bumstead*, 99 Mass. 112 (1868).

Vermont.—*Sargent v. Burton*, 74 Vt. 24, 52 Atl. 72 (1901).

See also *Thorn v. Cosand*, 160 Ind. 566, 67 N. E. 257 (1903).

"A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances. So that it is generally true that, whenever a party's state of mind is a subject of inquiry, his declarations are admissible as evidence thereof. In other words, a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay if not made upon oath, but a declaration which is sought as evidence of what the declarant thought or felt, or of his mental capacity, is of the best kind of evidence." *Mooney v. Olsen*, 22 Kan. 69, 77 (1879), per Brewer, J.

4. *California*.—*Estate of Ricks*, 160

their assertive capacity, as proof of the facts which they declare, the unsworn statements are hearsay;⁵ and, in the absence of some

Cal. 450, 117 Pac. 532 (1911); *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130 (1911); *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598 (1910).

District of Columbia.—*Lippard v. Humphrey*, 28 App. D. 355 (1906).

Illinois.—*Wilkinson v. Service*, 249 Ill. 146, 94 N. E. 50, 22 Am. & Eng. Ann. Cas. 41 (1911); *Healea v. Keenan*, 244 Ill. 484, 91 N. E. 646 (1910); *Garrus v. Davis*, 234 Ill. 326, 84 N. E. 924 (1908); *Peet v. Peet*, 229 Ill. 341, 82 N. E. 376, 13 L. R. A. (N. S.) 780 n. (1908); *Cheney v. Goldy*, 225 Ill. 394, 80 N. E. 289, 116 Am. St. Rep. 145 (1907).

Indiana.—*Ditton v. Hart*, 175 Ind. 181, 93 N. E. 961 (1911); *Thomas Madden, Son & Co. v. Wilcox*, 174 Ind. 657, 91 N. E. 933 (1910), *reversing* (Ind. App. 1909) 88 N. E. 871.

Iowa.—*In re Brown's Will*, 120 N. W. 667 (1909); *Smith v. Ryan*, 136 Iowa 335, 112 N. W. 8 (1907); *Vannest v. Murphy*, 135 Iowa 123, 112 N. W. 236 (1907); *Johnson v. Johnson*, 134 Iowa 33, 111 N. W. 430 (1907).

Kentucky.—*Murphy's Exr. v. Hoagland*, 32 Ky. L. Rep. 839, 107 S. W. 303 (1908).

Michigan.—*O'Dell v. Goff*, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989, 14 Detroit Leg. N. 399, 119 Am. St. Rep. 662 (1907).

Missouri.—*Beyer v. Schlenker*, 150 Mo. App. 671, 131 S. W. 465 (1910); *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46 (1908); *Seibert v. Hatcher*, 205 Mo. 83, 102 S. W. 962 (1907); *Gibson v. Gibson*, 24 Mo. 227 (1857).

New Jersey.—*In re Cooper's Will* 75 N. J. Eq. 177, 71 Atl. 676 (1909).

New York.—*In re Campbell's Will*, 136 N. Y. Suppl. 1086 (1912); *In re Benjamin's Will*, 136 N. Y. Suppl.

1070 (1911); *In re Crumb's Estate*, 127 N. Y. Suppl. 269 (1911).

North Carolina.—*Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709 (1906).

Utah.—*In re Miller's Estate*, 31 Utah 415, 88 Pac. 338 (1906).

Vermont.—*In re Esterbrook's Estate*, 83 Vt. 229, 75 Atl. 1 (1909).

Virginia.—*Wallen v. Wallen*, 107 Va. 131, 153, 57 S. E. 596 (1907).

West Virginia.—*La Rue v. Lee*, 63 W. Va. 388, 129 Am. St. Rep. 978, 60 S. E. 388, 14 L. R. A. (N. S.) 968 n. (1908).

United States.—*Throckmorton v. Holt*, 180 U. S. 552, 573, 45 L. ed. 663, 21 Sup. Ct. 474 (1901).

"It is quite apparent, therefore, that declarations of the deceased are properly received upon the question of a state of mind, whether mentally strong and capable, or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy." *Throckmorton v. Holt*, 180 U. S. 573, 45 L. ed. 663, 21 Sup. Ct. 474 (1900), per Mr. Justice Peckham; quoted in *Lipphard v. Humphrey*, 209 U. S. 272, 52 L. ed. 783, 28 Sup. Ct. 561 (1907).

"Evidence of the testator's declarations to the effect that, if he and his children were to live in peace and avoid trouble, they would have to do just as his wife said, and that he requested his children to do anything his wife asked so that he could have peace, and that, 'after a scene with her, he always suffered from nervous attacks,' has been held admissible. *In re Miller's Estate*, 36 Utah 228, 102 Pac. 996 (1909).

5. While the declarations of a testator at the time of executing his will are evidence of his mental condition, they will not be received as

special reason for receiving them, are to be rejected. As a general rule, narrative statements of past transactions which are without a circumstantially relevant quality are to be excluded.⁶

Who may be declarants.—The only person whose extrajudicial statement indicating mental condition is regarded as admissible, because possessing an independently relevant or circumstantially probative quality, is the individual whose mental condition is in question. Coming from any other declarant the statement is to

evidence of the truth of the facts which he asserts.

California.—Estate of Chevallier, 159 Cal. 161, 113 Pac. 130 (1911); Estate of Snowball, 157 Cal. 301, 107 Pac. 598 (1910).

Georgia.—Mallery v. Young, 94 Ga. 804, 22 S. E. 142 (1894).

Illinois.—Wilkinson v. Service, 249 Ill. 146, 94 N. E. 50, 22 Am. & Eng. Ann. Cas. 41 (1911); Healea v. Keenan, 244 Ill. 484, 91 N. E. 646 (1910).

New Jersey.—*In re Cooper's Will*, 75 N. J. Eq. 177, 71 Atl. 676 (1909).

New York.—*In re Benjamin's Will*, 136 N. Y. Suppl. 1070 (1911); *In re Crumb's Estate*, 127 N. Y. Suppl. 269 (1911).

"When such an issue (one of mental capacity) is made it is one which relates to a state of mind which was involuntary, and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity." *Throckmorton v. Holt*, 180 U. S. 573, 45 L. ed. 663, 21 Sup. Ct. 474 (1900), per Mr. Justice Peckham; quoted in *Lipphard v. Humphrey*, 209 U. S. 272, 52 L. ed. 783, 28 Sup. Ct. 561 (1907).

"The previous declarations of the testator, offered to prove the mental facts involved, are competent. Intention, purpose, mental peculiarity and

condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of mind is the fact to be shown, are, therefore, received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the fact stated. It is only to be used as showing what manner of man he is who makes it." *Shailer v. Bumstead*, 99 Mass. 112, 120 (1868), per Colt, J.

"The difference is certainly very obvious between receiving declarations of a testator to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case, it is mere hearsay, . . . while in the latter it is the most direct and appropriate species of evidence, . . . and the same evidence is admissible in every such case as in cases where insanity or absolute incompetency of the testator is alleged. . . . The difference between the two cases consists in the different nature of the inquiries involved. One relates to a voluntary and conscious act of the mind; the other to its involuntary state or condition." *Waterman v. Whitney*, 11 N. Y. 157 (1854), per Selden, J.

6. *Steel v. Shafer*, 39 Ill. App. 185 (1890); *Church of Jesus Christ, etc. v. Watson*, 25 Utah 45, 69 Pac. 531 (1902).

be rejected as hearsay.⁷ Not even the closest relationship, such as that of a father,⁸ wife,⁹ or other members of the family¹⁰ or the most confidential intercourse, e. g., that with a legal adviser,¹¹ enables a person so circumstanced to make an effective unsworn statement regarding the mental condition of another.

§ 2639. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental Condition*); A Wide Range Permitted.—As usual in connection with proof of a psychological fact so intangible and perplexed with conflicting explanations as is mental condition,¹ a wide range of inquiry is permitted in respect to extrajudicial statements bearing upon the strength or weakness of the mind. The same considerations affect the *time* as of which the utterance may be proved. While undoubtedly the connection between a given event and the indications of mental condition which characterize it is made clear and the probative force of the whole, in many instances, correspondingly increased, where the two are practically contemporaneous, no requirement that such should appear to be the fact seems essential to admissibility. Not contemporaneousness, but relevancy is the legal test of admissibility. Where mental condition is to be shown, the probative extrajudicial statement may well, so long as relevancy is maintained, precede,² accompany³ or follow⁴ a principal event.

7. *People v. Pico*, 62 Cal. 50 (1882); *Smith v. Hickenbottom*, 57 Iowa 733, 11 N. W. 664 (1882); *Barker v. Pape*, 91 N. C. 165 (1884).

8. *Gray v. Obeare*, 59 Ga. 675 (1877).

9. *Cook v. Osborn*, 2 Root (Conn.) 31 (1793); *Heald v. Thing*, 45 Me. 392 (1858); *Kimball v. Currier*, 5 Gray (Mass.) 458 (1855).

10. *Hopkins v. Wampler*, 108 Va. 705, 62 S. E. 926 (1908).

11. *Clifford v. Taylor*, 204 Mass. 358, 90 N. E. 862 (1910); *Renaud v. Pageot*, 102 Mich. 568, 61 N. W. 3 (1894).

§ 2639-1. § 1741d.

2. *In re Goldthorp*, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400 (1895); *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322 (1883); *Dinges*

v. Branson, 14 W. Va. 100 (1878).

3. *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322 (1883).

4. *Georgia*.—*Dennis v. Weekes*, 51 Ga. 24 (1874); *Howell v. Howell*, 47 Ga. 492 (1873).

Iowa.—*In re Goldthorp*, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400 (1895); *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564 (1885).

Kansas.—*Mooney v. Olsen*, 22 Kan. 69 (1879).

Massachusetts.—*Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322 (1883); *Shailer v. Bumstead*, 99 Mass. 112 (1868).

Minnesota.—*Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144 (1880).

When used in its assertive capacity, where the subjective relevancy growing out of the spontaneousness of an utterance is a requisite of admissibility the contemporaneousness or continued operation of the exciting cause may well be required. There seems little propriety in seeking to treat the independently relevant or circumstantially probative utterance indicative of mental condition as part of the broad American rule in relation to the *res gestae*, except upon the theory that "*res gestae*" and "relevancy" are practically synonymous terms. This has, however, been done⁵ and extrajudicial statements subsequent to the principal event have been rejected⁶ in accordance with the well-established principle which excludes narrative statements, not spontaneous in their nature, when offered as proof of the facts asserted as part of the *res gestae*.⁷

§ 2640. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental Condition*); Capacity for Resistance.—The significant aspect of the condition of a given mind may be its amenability to suggestion,¹ the extent to which it is capable of opposing effective resistance to outside pressure, e. g., that exerted by fraudulent misrepresentations² or undue influence.³ This may be shown by the unsworn

New York.—*Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71 (1854).

Pennsylvania.—*Herster v. Herster*, 116 Pa. St. 612, 11 Atl. 410 (1887); *McTaggart v. Thompson*, 14 Pa. St. 149 (1850).

West Virginia.—*Dinges v. Branson*, 14 W. Va. 100 (1878).

5. *Linch v. Linch*, 1 Lea (Tenn.) 526 (1878).

6. *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 254, 20 Am. Dec. 110 (1830); *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71 (1854).

7. § 2992.

§ 2640-1. § 1774 n. 19.

2. *Shailer v. Bumstead*, 99 Mass. 112 (1868); *Herster v. Herster*, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95 (1887); *Quick v. Quick*, 10 Jur. (N. S.) 682, 33 L. J. P. 146, 10

L. T. Rep. (N. S.) 619, 3 Swab. & Tr. 442, 12 Wkly. Rep. 1119 (1864).

Doe v. Hardy, 1 M. & Rob. 525 (1836).

3. *Connecticut*.—*Canada's Appeal*, 47 Conn. 450 (1880).

Iowa.—*In re Goldthorp*, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400 (1895); *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072 (1895).

Kentucky.—*Milton v. Hunter*, 13 Bush 163 (1877).

Massachusetts.—*Lane v. Moore*, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430 (1890); *Shailer v. Bumstead*, 99 Mass. 112 (1868).

Mississippi.—*Sheehan v. Kearney*, 82 Miss. 688, 21 So. 41 (1896).

Missouri.—*Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552 (1889).

New York.—*Waterman v. Whit-*

statements of the person in question, written⁴ or oral.⁵ In general, the operation of influence upon the mind of the declarant may be shown by the extrajudicial declarations of the latter.⁶

§ 2641. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental Condition*); Mental Weakness.—More specifically speaking, mental weakness¹ from slight impairment but little distinguishable from soundness of mind down to idiocy may be established in this way. Even insanity² may be shown by proof of relevant unsworn statements. Not as proof of the truth of what is said, but as character-

ney, 11 N. Y. 157, 62 Am. Dec. 71 (1854).

Pennsylvania.—Smith v. Loafman, 145 Pa. St. 628, 23 Atl. 395 (1892); Herster v. Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95 (1887).

Rhode Island.—Gardner v. Frieze, 16 R. I. 640, 19 Atl. 113 (1889).

South Carolina.—Kaufman v. Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808 (1896).

Tennessee.—Linch v. Linch, 1 Lea 526 (1878).

Utah.—Church of Jesus Christ, etc. v. Watson, 25 Utah 45, 69 Pac. 531 (1902).

West Virginia.—Dinges v. Branson, 14 W. Va. 100 (1878).

4. Bulger v. Ross, 98 Ala. 267, 12 So. 803 (1893) (letters); Barker's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90 (1893) (diaries); Tatham v. Wright, 2 Russ. & M. 1, 11 Eng. Ch. 1, 39 Eng. Reprint 295 (1831) (letters); Wheeler v. Anderson, 3 Hagg. Eccl. 574 (1831) (letters); Dew v. Clark, 3 Addams, 79 (1826) (letters); Eagleton v. Kingston, 8 Ves. Jr. 438, 32 Eng. Reprint 425 (1803) (letters).

Correspondence.—When the declarations of letters constituting part of a correspondence are received in order to show the condition of the writer's mind, the balance of the correspondence may be received if it tends to

throw light on the same subject. Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90 (1893).

5. *California*.—Kyle v. Craig, 125 Cal. 107, 57 Pac. 791 (1899); *In re Mullin*, 110 Cal. 252, 42 Pac. 645 (1895).

Iowa.—*In re Goldthorp*, 94 Iowa, 336, 62 N. W. 845, 58 Am. St. Rep. 400 (1895); Bever v. Spangler, 93 Iowa 576, 61 N. W. 1072 (1895); Smith v. Hickenbottom, 57 Iowa 733, 11 N. W. 664 (1882).

Kentucky.—Milton v. Hunter, 13 Bush 163 (1877).

Massachusetts.—Shailer v. Bumstead, 99 Mass. 112 (1868).

Pennsylvania.—Smith v. Loafman, 145 Pa. St. 628, 23 Atl. 395 (1892).

6. Ball v. Kane, 1 Pennew. (Del.) 90, 39 Atl. 778 (1897); Sheehan v. Kearney, 82 Miss. 688, 21 So. 41, 35 L. R. A. 102 (1896); Kaufman v. Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808 (1897).

§ 2641-1. Wilkinson v. Pearson, 23 Pa. St. 117 (1854). See also Thorn v. Cosand, 116 Ind. 566, 67 N. E. 257 (1903).

2. Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473 (1874); Fitzgerald v. Shelton, 95 N. C. 519 (1886); Vance v. Upson, 66 Tex. 476, 1 S. W. 179 (1886); Hathaway v. National L. Ins. Co., 48 Vt. 335 (1875). See also Thorn v. Cosand, 160 Ind. 566, 67 N. E. 257 (1903).

izing the mind from which they emanate, are such utterances regarded as evidentiary. They are as probative as any other conduct raising the same inferences would be.

§ 2642. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental Condition*); Other Modes of Proof.—Extrajudicial statements are not, however, the sole means by which the strength or weakness of a particular mind may be shown to a judicial tribunal. Other legitimate proof may be employed, with or without such utterances. Thus, the power of the faculty of memory assisting to constitute a particular mentality may be shown by acts of recollection upon specified occasions.¹ Equally competent is the exhibition of instances in which the memory in question appeared in an impaired or failing condition.²

§ 2643. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts*); Mental States.—Mental states may properly be proved by extrajudicial utterances which logically tend to indicate their existence.¹

§ 2642-1. *Donnelly v. State*, 26 N. J. L. 601, 495 (1857).

2. *McRae v. Malloy*, 93 N. C. 154 (1885); *Rouch v. Zehring*, 59 Pa. St. 74 (1868); *Chess v. Chess*, 1 Penr. & W. (Pa.) 32, 21 Am. Dec. 350 (1829).

§ 2643-1. *Alabama*.—*Jacobi v. State*, 133 Ala. 1, 32 So. 158, writ of error dismissed 187 U. S. 133, 23 S. Ct. 48, 47 L. ed. 106 (1902).

Arkansas.—*Edmonds v. State*, 34 Ark. 720, 732 (1879) ("harsh, passionate and inhuman").

Connecticut.—*Spencer v. New York, etc., R. Co.*, 62 Conn. 242, 25 Atl. 350 (1892); *Dunham's Appeal*, 27 Conn. 192 (1858).

Florida.—*Ortiz v. State*, 30 Fla. 256, 11 So. 611 (1892).

Georgia.—*Murphy v. Griggs*, 41 Ga. 464 (1871).

Indiana.—*Anderson v. Citizens' St. R. Co.*, 12 Ind. App. 194, 38 N. E. 1109 (1894); *Davidson v. State*, 135 Ind. 254, 34 N. E. 972 (1893).

Kansas.—*Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492 (1904).

Maine.—*Smith v. Tarbox*, 70 Me. 127 (1879).

Massachusetts.—*Marsh v. Austin*, 1 Allen 235 (1861).

Michigan.—*People v. Flynn*, 96 Mich. 276, 55 N. W. 834 (1893).

Mississippi.—*Ward v. Yazoo, etc., R. Co.*, 79 Miss. 145, 29 So. 829 (1901); *Stovall v. Farmers', etc., Bank*, 8 Sm. & M. 305, 47 Am. Dec. 85 (1847).

North Carolina.—*State v. Uteley*, 132 N. C. 1022, 43 S. E. 820 (1903) (intelligence notwithstanding intoxication). But see *State v. Dula*, 61 N. C. 211 (1867).

Ohio.—*Moore v. State*, 2 Ohio St. 500 (1853).

Tennessee.—*Nashville, etc., R. Co. v. Messino*, 1 Sneed 220 (1853).

Texas.—*Ezell v. State*, (Cr. App. 1902) 71 S. W. 283; *Denson v. State*,

Psychological states for the time being, as distinguishable from a more settled and intrinsic condition by way of strength or weakness, are of marked forensic importance. The relations in which they may stand to judicial inquiries are numerous and their influence is frequently controlling. Chief among these relations are three: (1) The psychological fact of a mental state may possess a distinctly probative quality as bearing upon the existence of a physical fact. Thus, on an issue as to whether A actually went to a given place, the fact that he intended to go there may well be admissible in the absence of direct evidence.² Or again, the question being whether A actually committed a given offence, the fact that he had a *motive*, or had conceived the *purpose* of doing it, may be a highly significant fact.³ (2) The mental state may be so blended with an act which it accompanies and characterizes as to determine its meaning.⁴ Under such circumstances, the mental state colors, as it were, the act which it accompanies. So intimate may be its connection that the act without it would be different. Extrajudicial statements of this kind have been spoken of, employing Greenleaf's phrase,⁵ as verbal acts, and their admissibility has been said to be by virtue of a so-called "verbal act doctrine." No reason is perceived, however, for assigning in case of an independently relevant extrajudicial statement any special inference to the fact that it accompanies or characterizes an act.⁶ In all such cases the mental state is proved because it is a relevant fact and the extrajudicial statement is offered in evidence because

(Cr. App. 1896) 35 S. W. 150; Black v. State, 8 Tex. App. 329 (1880).

Vermont.—State v. Howard, 32 Vt. 380, 78 Am. Dec. 609 (1859).

United States.—New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 S. Ct. 1039, 30 L. ed. 1049 (1887).

Whatever is material to prove the state of one's mind and what were his intentions can be shown by his declarations and statements, the truth of such utterances being immaterial. Wilkinson v. Service, 249 Ill. 146, 94 N. E. 50, 22 Eng. & Am. Ann. Cas. 41 (1911).

"The intent or disposition, when it constitutes an element of crime,

can only be ascertained, as all moral qualities are, from the acts and declarations of the party." Com. v. Abbott, 130 Mass. 472 (1881), per Colt, J.

2. § 2654.

3. § 2673.

4. State v. Huntley, 3 Ired. L. (N. C.) 418 (1843).

5. 1 Greenl. Ev. (15th ed.), § 108.

6. *Spontaneity.*—In determining as to the spontaneity of a hearsay statement, its probative force in proof of the facts asserted, contemporaneous incorporation with a probative or *res gestae* fact may well have an important bearing. §§ 2983 et seq.

it is a logically sound way of proving this relevant fact.⁷ (3) The relevancy of the mental state may be *constituent*, forming an element in the right or liability involved in the inquiry. Many civil and most serious criminal liabilities come into being only upon the exhibition to the tribunal of a particular mental state on the part of the person to be affected. Thus, one abandoning a domicile or waiving a right must be shown to have intended to do so. The receiver of stolen goods must have *known* them to be stolen. The murderer must have done his act maliciously, and so forth.

The evidence is primary.—The evidence of unsworn statements in proof of mental states is primary, there being no superior grade of proof for establishing such a fact. No forensic necessity need be shown by way of justification for receiving it, admissibility being conceded even where the declarant is present in court and available as a witness.⁸

§ 2644. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Limitations upon Admissibility.—The rule has been laid down that extrajudicial statements circumstantially indicative of mental state cannot be received unless shown to be part of the *res gestae*.¹

7. Spontaneity.—Should the relevancy not reside in the statement itself, but be conferred by incorporation with a relevant fact as where a spontaneous utterance confers subjective relevancy and consequent probative force upon an unsworn statement offered as proof of the facts asserted, a different situation is presented. As the necessary probative force resides in the spontaneity, the conditions under which it arises naturally must be shown to exist. Among these may well be found practical incorporation with a true *res gestae* or a probative fact, § 2984.

8. Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485 (1883).

§ 2644-1. *Alabama.*—Worthington v. Gwin, 119 Ala. 44, 24 So. 739, 43 L. R. A. 382 (1898).

California.—People v. Costello, 15 Cal. 350 (1860). See, also, Rogers

v. Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348 (1903).

Georgia.—Johnson v. State, 88 Ga. 203, 14 S. E. 208 (1891).

Illinois.—Brennan v. People, 15 Ill. 511 (1854).

Iowa.—Piles v. Hughes, 10 Iowa 579 (1860).

Maryland.—Robinson v. State, 57 Md. 14 (1881).

Massachusetts.—Stevens v. Miles, 142 Mass. 571, 8 N. E. 426 (1886).

Missouri.—State v. Smith, 125 Mo. 2, 28 S. W. 181 (1894).

New York.—People v. Murphy, 37 Hun 638, 3 N. Y. Cr. 338, *reversed* 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661 (1885).

Oregon.—State v. Brown, 28 Ore. 147, 41 Pac. 1042 (1895)

Tennessee.—Nashville, etc., R. Co. v. Messino, 1 Sneed 220 (1853).

Texas.—Western Union Tel. Co. v.

No such limitation upon admissibility seems, however, justified upon principle, if the phrase is used in what seems to be its appropriate meaning.² Should "*res gestae*" be employed as equivalent to "relevant," as seems to be the practical effect of employing it in its wider range,³ the rule as announced is superfluous, a simple repetition of the fundamental principle of the law of evidence which requires relevancy.⁴ This universal requirement is controlling and sufficient in connection with the *time* at which it is required that the extrajudicial statement should be made in relation to the particular act, if any, which the mental state explains or characterizes. The declaration may precede,⁵ accompany⁶ or follow it.⁷

Davis, 24 Tex. Civ. App. 427, 59 S. W. 46 (1900).

United States.—Wrought Iron Range Co. v. Graham, 80 Fed. 474, 25 C. C. A. 570 (1897); Lightcap v. Philadelphia Traction Co., 60 Fed. 212 (1894).

2. § 2582.

3. §§ 2583 *et seq.*

4. § 1711.

5. *Georgia.*—Small v. Williams, 87 Ga. 681, 13 S. E. 589 (1891).

Louisiana.—Marigny v. Union Bank, 5 Rob. 354 (1843).

Mississippi.—Fulton v. Fulton, 36 Miss. 517 (1858).

Pennsylvania.—Loudon v. Blythe, 16 Pa. St. 532, 55 Am. Dec. 527, 27 Pa. St. 22, 67 Am. Dec. 442 (1851).

Wisconsin.—Taylor v. Collins, 51 Wis. 123, 8 N. W. 22 (1881).

United States.—Miller v. Clark, 40 Fed. 15, appeal dismissed 138 U. S. 223, 11 S. Ct. 300, 34 L. ed. 966 (1889).

6. Walker v. State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17 (1888); Duling v. Johnson, 32 Ind. 155 (1869); Jones v. Brownfield, 2 Pa. St. 55 (1845); Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085 (1891).

7. *Connecticut.*—Bartram v. Stone, 31 Conn. 159 (1862).

Georgia.—Meeks v. State, 51 Ga. 429 (1874); McLean v. Clark, 47 Ga. 24 (1872).

Massachusetts.—Scott v. Berkshire County Sav. Bank, 140 Mass. 157, 2 N. E. 925 (1885). See also Hayes v. Pitts Kimball Co., 183 Mass. 262, 67 N. E. 249 (1903) (consciousness after injury).

Missouri.—State v. Smith, 125 Mo. 2, 28 S. W. 181 (1894).

New York.—People v. Sherry, 2 Edm. Sel. Cas. 52 (1849).

Ohio.—Moore v. State 2 Ohio St. 500 (1853).

Pennsylvania.—Kutz's Appeal, 100 Pa. St. 75 (1882). See also Knabb's Estate, 2 Woodw. Dec. 386 (1878).

Texas.—Weathersby v. State, 29 Tex. App. 278, 15 S. W. 823 (1890); Clampitt v. State, 9 Tex. App. 27 (1880).

England.—Sugden v. St. Leonards, 1 P. D. 154, 45 L. J. P. 49, 34 L. T. Rep. (N. S.) 372, 24 Wkly. Rep. 860 (1876).

Subsequent threats have been excluded. Caw v. People, 3 Nebr. 357 (1874); Newman v. Goddard, 5 Thomps. & C. (N. Y.) 299, 3 Hun 70; 48 How. Prac. 363 (1875).

§ 2645. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Minor Mental States.—The same rule is applied where the mental state in question may properly be designated as a minor one. That the given person was conscious, i. e., aware of his surroundings, or sensations, may be shown by extrajudicial statements.¹ Indifference may be proved in the same way,² as where, on an action by a son's wife against her father-in-law for alienation of her husband's affection, unsworn declarations of the husband, though not a party, are received to show the mental effect produced by the unwarranted interference.³ Melancholy⁴ and cheerfulness⁵ are equally provable by such statements. Recognition⁶ of a person, the truth of a proposition or any other thing, physical or mental, may be established in the same way. Recklessness⁷ may also be so proven. In like manner the actual cause for conduct may be so established, as where conversations between a seller, purchaser and real estate agent are admissible, even in the absence of one who has brought suit for the commission, to show what was the actual, procuring cause for the sale.⁸ That the speaker is relying upon a certain agreement⁹ or other fact may be proven in the same way.

§ 2646. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Relevancy of Mental State Required.—To be admissible under the principle which is being considered, the mental state indicated by the unsworn statement must itself be a relevant fact.¹ A wide

§ 2645-1. *Hayes v. Pitts-Kimball Co.*, 183 Mass. 262, 67 N. E. 249 (1903).

2. *Perry v. State*, 110 Ga. 234, 36 S. E. 781 (1900).

3. *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492 (1904).

4. *Spencer Cowper's Trial*, 13 How. St. Tr. 1105, 1165ff (1699).

5. *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318, writ of error *dismissed*, 129 U. S. 52, 9 S. Ct. 192, 32 L. ed. 640 (1886).

6. *Alabama*.—*Wesley v. State*, 52 Ala. 182 (1875).

Illinois.—*Lander v. People*, 104 Ill. 248 (1882).

Iowa.—*State v. Schmidt*, 73 Iowa 469, 35 N. W. 590 (1887).

Louisiana.—*State v. Hamilton*, 27 La. Ann. 400 (1875).

Michigan.—*People v. Wallin*, 55 Mich. 497, 22 N. W. 15 (1885).

Texas.—*Means v. State*, 10 Tex. App. 16, 38 Am. Rep. 640 (1881).

7. *State v. Brown*, 28 Ore. 147, 41 Pac. 1042 (1895) ("I am the toughest son of a — that ever struck this town").

8. *Mead v. Arnold*, 131 Mo. App. 214, 110 S. W. 656 (1908).

9. *Sullivan v. Fant*, 51 Tex. Civ. App. 6, 110 S. W. 507 (1908).

§ 2646-1. *Marler v. State*, 67 Ala.

administrative difference in treatment is readily to be observed where the declaration is employed as proof of the facts asserted and where, therefore, the relevancy of the statement is to be drawn, if at all, from the presence of circumstances or other facts which may exhibit the necessary subjective relevancy on the part of the declarant. Where the mental state is irrelevant, the extrajudicial declaration indicating it cannot be received. Thus, the question being whether A made a given contract, his assertion that he did not intend to make any such agreement² is not admissible.

§ 2647. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Narrative Excluded.—What has been said must, however, be taken in connection with the fact that here, as elsewhere when independently relevant unsworn statements are used, purely narrative declarations as to past transactions are to be excluded.¹ Only

55, 42 Am. Rep. 95 (1880); Louisville, etc., R. Co. v. Webb, 99 Ky. 332, 35 S. W. 1117, 18 Ky. L. Rep. 258 (1896); Brewer v. Com., 8 S. W. 339, 10 Ky. L. Rep. 122 (1888); Gardner v. Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49 (1894); Newcomb v. State, 37 Miss. 383 (1859).

Misleading jury.—If a mental state be relevant and material, the fact that, as where reckless disregard of human life is shown, its proof tends to make an accused person obnoxious to the jury, furnishes no ground for rejecting evidence of it. People v. Martin (Cal. App. 1912), 125 Pac. 919.

2. Mack v. Porter, 72 Fed. 236, 18 C. C. A. 527 (1896).

§ 2647-1. *Alabama.*—McPherson v. Foust, 81 Ala. 295, 8 So. 193 (1886); McAdams v. Beard, etc., 34 Ala. 478 (1859).

Arkansas.—Martin v. Tucker, 35 Ark. 279 (1880).

Connecticut.—State v. Bradnack, 69 Conn. 212, 37 Atl. 492, 43 L. R. R. A. 620 (1897); Ford v. Haskell, 32 Conn. 489 (1865); Hatch v. Straight, 3 Conn. 31, 8 Am Dec. 152 (1819).

Illinois.—See Steurer v. Ried, 56 Ill. App. 245 (1894).

Indiana.—New York Home Ins. Co. v. Marple, 1 Ind. App. 411, 27 N. E. 633 (1890).

Kentucky.—Hift v. Masden, 51 S. W. 574, 21 Ky. L. Rep. 390 (1899); Gano v. McCarthy's Adm'r, 79 Ky. 409, 3 Ky. Law Rep. 32 (1881).

Maine.—Battles v. Batchelder, 39 Me. 19 (1854).

Maryland.—Groff v. Rohrer, 35 Md. 327 (1871).

Massachusetts.—Fiske v. Cole, 152 Mass. 335, 25 N. E. 608 (1890); Com. v. Felch, 132 Mass. 22 (1882); Merrill v. Sawyer, 8 Pick. 397 (1829).

Missouri.—Merchants' Bank v. Berthold, 45 Mo. 527 (1870).

New York.—Flannery v. Van Tassel, 127 N. Y. 631, 27 N. E. 393, 3 Silvernail 456 (1891). See also Whitman v. Egbert, 27 N. Y. App. Div. 374, 50 N. Y. Suppl. 3 (1898).

Pennsylvania.—Oller v. Bonebrake, 65 Pa. St. 338 (1870); Duvall v. Darby, 38 Pa. St. 56 (1860); Light v. Light, 21 Pa. St. 407 (1853); Lester v. McDowell, 18 Pa. St. 91 (1851); Kidder v. Lovell, 14 Pa. St.

as proof of the facts asserted can such accounts be relevant and when so regarded they are merely hearsay.² The natural infirmities of hearsay, which are evident on the surface,³ are further aggravated where the declarations are seen to be self-serving⁴ or made *post litem motam*.⁵

§ 2648. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Assent or Dissent.—That the mental state of a given individual at a particular time was that of assent may be proved by his extrajudicial statements fairly indicative of such a feeling.¹ Dissent, where relevant, may be proved in the same way.²

§ 2649. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Belief.—*The existence of belief* may be shown by extrajudicial statements which logically tend to prove it.¹ In much the same

214 (1850); *Taylor v. Adams*, 2 Serg. & R. 534, 7 Am. Dec. 665 (1816).

Tennessee.—*Mayfield v. State*, 101 Tenn. 673, 49 S. W. 742 (1898); *Hollingsworth v. Miller*, 5 Sneed 472 (1858).

Texas.—*Gulf, etc., R. Co. v. Southwick* (Civ. App. 1895), 30 S. W. 592.

Vermont.—*Kidder v. Bacon*, 74 Vt. 263, 52 Atl. 322 (1900).

Virginia.—*Wright v. Rambo*, 21 Gratt. 158 (1871).

United States.—*Fidelity, etc., Co. v. Haines*, 111 Fed. 337, 49 C. C. A. 379 (1901).

2. *Sugden v. St. Leonards*, 1 P. D. 154, 251, 45 L. J. P. 49, 34 L. T. Rep. (N. S.) 372, 24 Wkly. Rep. 860 (1876), per Mellish, L. J.

3. § 2711.

4. *Colquitt v. Thomas*, 8 Ga. 258 (1850); *Pinner v. Pinner*, 47 N. C. 398 (1855); *McGee v. McGee's Heirs*, 26 N. C. 105 (1843); *Corder v. Talbott*, 14 W. Va. 277 (1878); *Blakeslee v. Rossman*, 44 Wis. 553 (1878); *Felt v. Amidon*, 43 Wis. 467 (1877).

5. *Eldrege v. Sherman*, 79 Mich. 484, 44 N. W. 948 (1890); *Lewis v.*

Rice, 61 Mich. 97, 27 N. W. 867 (1886); *Tucker v. Tucker*, 32 Mo. 464 (1862).

Admissions.—The narrative statements of a party stand in a different position. At the instance of his opponent, (*Proprietary's Lessee v. Ralston*, 1 Dall. (Pa.) 18 L. ed. 18 (1773)) they may be available as his admission. *Kershner v. Kershner's Lessee*, 36 Md. 309 (1872).

§ 2648-1. *Cook v. Lawson*, 63 Kan. 854, 66 Pac. 1028 (1901); *King v. Com.*, 20 S. W. 224, 14 Ky. L. Rep. 254 (1892); *March v. Austin*, 1 Allen (Mass.) 235 (1861); *Davis v. Davis*, 44 Tex. Civ. App. 238, 98 S. W. 198 (1906) (deed).

Acceptance of a gift may be shown by evidence of declarations to that effect. *Supple v. Suffolk Bank*, 198 Mass. 393, 84 N. E. 432, 126 Am. St. Rep. 451 (1908).

2. *Wood v. Fiske*, 62 N. H. 173 (1882); *Brown v. State* (Tex. Cr. App. 1894), 28 S. W. 536; *Evarts v. Young*, 52 Vt. 329 (1880).

§ 2649-1. *California*.—*In re Rick's Estate*, 160 Cal. 450, 117 Pac. 532 (1911); *Huyek v. Rennie*, 151 Cal.

way, the unsworn statements of others shown to have been brought to the attention of the party whose belief is involved may be proved to show the basis upon which the state of mind itself rests.² So of *opinions*, political, religious, or social. Thus, the opinions of members of a community that a given individual had been bewitched³ may be shown by their extrajudicial utterances. A person's belief may be shown, in the same way, by extrajudicial declarations *made to him*⁴ and which he has credited.

Statements of a testator.—The circumstantially probative quality of a statement, judicial or extrajudicial, in establishing the truth of that which is asserted, is well illustrated in cases involving the statements of a testator, made subsequent to the making of a will, as to the contents, execution or revocation of the instrument. Except under the doctrine of *Sugden v. Lord St. Leonards*,⁵ such extrajudicial utterances will not be received as direct evidence of the facts alleged.⁶ The unsworn declarations, however, of a testator that he has made a certain will or revoked it, may properly be independently relevant circumstantial evidence, under the present rule of an existing *belief* in the fact of such execution or revocation. From the existence of this mental state at the time of the declaration, it may perhaps be logically inferred that the circumstances believed in actually took place.⁷ In other words, the

411, 90 Pac. 929 (1907); *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791 (1899).

Indiana.—*Ferguson v. Boyd*, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064 (1907).

Massachusetts.—*Motte v. Alger*, 15 Gray 322 (1860).

Minnesota.—*Fitzgerald v. Evans*, 49 Minn. 541, 52 N. W. 143 (1892).

Ohio.—*McCracken v. Wset*, 17 Ohio 16 (1848).

Vermont.—*In re Mason's Will*, 82 Vt. 160, 72 Atl. 329 (1909).

2. *Jones v. State*, 103 Ala. 1, 15 So. 891 (1894); *Ferguson v. Boyd*, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064 (1907); *Ponsony v. Debaillon*, 6 Mart. N. S. (La.) 238 (1827); *Lansky v. West End St. R. Co.*, 173 Mass. 20, 53 N. E. 129 (1899); *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724 (1889).

3. *Hathaway's Trial*, 14 How. St. Tr. 653 (1702).

4. *Hoare v. Allen*, 3 Esp. 276 (1801).

5. *Sugden v. St. Leonards*, L. R. 1 P. D. 203 (1876).

§§ 2654, 2766.

6. §§ 2622, 2654.

7. *Alabama.*—*McBeth v. McBeth*, 11 Ala. 596 (1847).

Connecticut.—*Johnson's Will*, 40 Conn. 587 (1873).

District of Columbia.—*Throckmorton v. Holt*, 12 D. C. App. 552 (1898).

Georgia.—*Burge v. Hamilton*, 72 Ga. 568 (1884).

Illinois.—*In re Page*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395 (1886).

Kentucky.—*Steele v. Price*, 5 B. Monr. 58 (1844).

Maine.—*Collagan v. Burns*, 57 Me. 449 (1867).

logical inference may arise that the declarant could not have had the subsequent belief which his statements indicate except for the reason that the prior fact believed in actually existed. If so, the subsequent declaration may be accepted in proof of the earlier fact, not by reason of any exception to the hearsay rule, but on account of the sound administrative principle that an extrajudicial statement should properly be received, under the essential conditions

Maryland.—Hoppe v. Byers, 60 Md. 381 (1883).

Ohio.—Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. 209 (1890).

Pennsylvania.—Foster's Appeal, 87 Pa. 67, 30 Am. Rep. 340 (1878).

Tennessee.—Smiley v. Gambill, 2 Head 164 (1858).

Wisconsin.—Steinke's Will, 95 Wis. 121, 70 N. W. 61 (1897); Valentine's Will, 93 Wis. 45, 67 N. W. 12 (1896).

United States.—Bergere v. U. S., 168 U. S. 66, 18 Sup. Ct. 4, 42 L. ed. 383 (1897).

England.—Gould v. Lakes, L. R. 6 P. D. 1 (1880); Sugden v. St. Leonards, L. R. 1 P. D. 203 (1876); Keen v. Keen, L. R. 3 P. & D. 107 (1873); Whiteley v. King, 10 Jur. (N. S.) 1079 (1864); Patten v. Poulton, 4 Jur. (N. S.) 341 (1854).

Canada.—Pike's Will, 4 Morris Newf. 445 (1882).

"It is certainly true, that the declarations of the testator should be received with great caution, as such declarations are frequently made for the purpose of misleading, and of stifling the importunity of relatives and friends. To entitle them to much weight, there ought to be intrinsic evidence of their sincerity, and such we think is the case here. The conversation with Flora Blue, has all the evidences of sincerity and reality about it, which might be looked for where the object was not merely to parry or evade a disagreeable subject or baffle impertinent curiosity, . . . here there is that fullness of detail, and reference to persons and events, and also spec-

ulations of the probable conduct of those opposed to the will, as gives it all the appearance of reality, and attests its genuineness and sincerity." *McBeth v. McBeth*, 11 Ala. 596, 602 (1847), per Ormond, J.

"Why should he have spoken falsely in this respect, and this, too, in the face of impending death realized by him? Not the shadow of an excuse is shown." *In re Page*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395 (1886), per Schofield, J.

"Believing, as I do, the testator made these statements shewing a belief in his mind that the will was in existence at a time subsequently to that at which he could have revoked it, I am led to the conclusion that he had not, in fact, revoked it at any time when he had the opportunity of getting access to it. . . . I come rather to the conclusion that his declarations down to the latest period of his life shew that he died under the belief that that will was still in existence, and rebut the presumption that he had revoked it." *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 202, 203 (1876), per Hannen, J.

"A statement by the testator that he has altered his mind as to the disposition of his property, and that he has therefore destroyed his will, although it may not be evidence of the fact of the destruction of the will, is evidence of intention, from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion." *Keen v. Keen*, L. R. 3 P. & D. 105, 107 (1873), per Hannen, J.

of Necessity and Relevancy, in support of any inference to which it logically gives rise. As an administrative matter, it has not escaped judicial attention that much doubt exists as to whether the declarations of a testator, desirous of concealing the true state of the case from those with whom he is in constant association, can reasonably be relied upon as a true indication of the actual state of his mind.⁸

Verbal Act.—An extrajudicial statement indicative of a belief that a given will has or has not been revoked has at times, when accompanying a relevant occurrence, been received as a verbal act.⁹

§ 2649a. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Disgust or Annoyance.—Disgust or annoyance may be shown by the use of appropriate extrajudicial statements or exclamations. Thus, the utterances of a deceased wife upon smelling the odors claimed to constitute a nuisance may be given in evidence to show their effect upon her.¹ Such declarations cannot, without the addition of other elements of relevancy to that end, be used as proof of the facts which they assert.²

§ 2650. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*);

8. *Boylan v. Meeker*, 28 N. J. L. 274 (1860).

"The plaintiffs relied upon the declarations and conduct of Meeker, both before and after the day of execution, to show that while living he never knew of the existence of such a will and that therefore he had never knowingly executed the paper. . . . The admissibility of this evidence on the issue of fraud and forgery has been argued upon two grounds: first, that they were exterior manifestations of an inward condition of mind, that is to say, ignorance of the existence of the will. It is argued . . . that sanity and ignorance are both states of mind—that exterior manifestations must be relied upon to prove both. If this were so, there might be some force in the argument. But ignorance is not a state of the mind in the sense

that sanity and insanity are. . . . The exterior manifestations of insanity are involuntary, those of knowledge purely voluntary. . . . A devisor . . . may, to secure his own peace and comfort during life . . . conceal the nature of his testamentary dispositions and make statements calculated and intended to deceive those with whom he is conversing. He has neither the sanctity of an oath nor the strong bond of self-interest to secure his adherence to the truth." *Boylan v. Meeker*, 28 N. J. L. 274 (1860), per Whelpley, J.

9. *Patterson v. Hickey*, 32 Ga. 156 (1861).

§ 2649a-1. *Kearney v. Farrell*, 23 Conn. 317, 73 Am. Dec. 677 (1859).

2. *Glovstine v. Com.*, 33 S. W. 824, 17 Ky. L. Rep. 1187 (1896).

Duress.—That a person was in a state of duress at the time of doing a certain act may undoubtedly be shown by his extrajudicial declarations in a proper case as, for instance, where a confession is signed to avoid further torture by one who is being tortured for the very purpose of obtaining a confession. However, the question seems to have assumed importance only in connection with the consideration of the validity of a will. It has been intimated¹ that declarations of a testator accompanying the making of a will might be introduced in evidence to show duress, but that declarations made subsequent to the making of the will are not admissible for that purpose.² The reason for this rule is clearly stated in the opinion by Thompson, J., in *Jackson v. Kniffen* (cited *infra*) as follows: "It [testimony concerning declarations] could not, if placed in the strongest possible terms, amount to a revocation, without a direct violation of the statute, which declare that no will shall be revoked, or altered, except by writing, executed with all the requisites of a will, or by cancelling the same. . . . This will might have been executed under circumstances which ought to invalidate it; but to allow it to be impeached by the parol declarations of the testator, would, in my judgment, be eluding the statute."

§ 2651. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Fear.—Fear, like other relevant mental states, may be proved by the unsworn declarations of the person in question.¹ On the other hand, a defendant's extrajudicial statement of his anxiety

§ 2650-1. "These cases must, I think, be sufficient to establish the position, that declarations of a testator, made either before or after the execution of the will, are not competent evidence to impeach its validity, on the ground of fraud, duress, imposition or other like cause." *Waterman v. Whitney*, 11 N. Y. 157, 164 (1854).

2. *Jackson v. Kniffen*, 2 Johns. (N. Y.) 37, 3 Am. Dec. 390 (1806); *Earp v. Edgington*, 107 Tenn. 23, 64 S. W. 40 (1901).

§ 2651-1. *Louisiana.*—*Regan's Succession*, 9 La. Ann. 364 (1854).

Massachusetts.—*Com. v. Crowley*, 165 Mass. 569, 43 N. E. 509 (1896).

Texas.—*Nelson v. State* (Cr. App. 1900), 58 S. W. 107.

Utah.—*People v. O'Loughlin*, 3 Utah 133, 1 Pac. 653 (1882).

Vermont.—*Barney v. Quaker Oats Co.*, 82 Atl. 113 (1912); *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438 (1892).

England.—*R. v. Vincent*, 9 C. & P. 275 (1840); *Redford v. Birley*, 1 State Tr. (N. S.) 1071 (1821).

Should it be too remote to be logically indicative of a mental state, it will also be rejected. *Evans v. El-*

to avoid meeting the deceased² or fear for his own safety³ has been rejected. Apprehension lest the circumstantially probative declaration might be taken as evidence of the facts asserted, a danger which might readily occur,⁴ has apparently led to a ruling that the declaration will not be received unless accompanied by an act which might reasonably be assumed to render it spontaneous, i. e., in the common phrase, part of the *res gestae*.⁵ On still clearer grounds a narrative statement, i. e., one not shown to have been spontaneous, is to be rejected.⁶

§ 2652. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Good and Bad Faith.—The existence of good faith¹ or its opposite² may be proved, in part at least, by extrajudicial statements

wood, 123 Iowa 92, 98 N. W. 584 (1904).

2. Birdsong v. State, 47 Ala. 68 (1872).

3. Fields v. State, 46 Fla. 84, 35 So. 185 (1903).

4. As proof of the facts asserted, the declaration would be incompetent. Barney v. Quaker Oats Co. (Vt. 1912), 82 Atl. 113.

See also § 2580.

5. Monroe v. State, 5 Ga. 85 (1848).

6. Red v. State, 39 Tex. Cr. 414, 46 S. W. 408 (1898).

§ 2652-1. *Alabama*.—Montgomery-Moore Mfg. Co. v. Leeth (Ala. App. 1911), 56 So. 770.

Colorado.—Wilcoxon v. Morgan, 2 Colo. 473 (1875).

Illinois.—Chicago Union Traction Co. v. Bethauer, 125 Ill. App. 204 (1905), *aff'd*. 223 Ill. 521, 79 N. E. 287 (1906).

Indian Territory.—Dorrance v. McAlester, 1 Indian Terr. 473, 45 S. W. 141 (1898).

New York.—Vilas Nat. Bank v. Newton, 25 N. Y. App. Div. 62, 48 N. Y. Suppl. 1009 (1898); Tompkins County v. Bristol, 99 N. Y. 316, 1 N. E. 878 (1885); Crary v. Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110 (1834).

Oregon.—Robson v. Hamilton, 41 Ore. 239, 69 Pac. 651 (1902); Bergman v. Twilight, 10 Ore. 337 (1882).

Pennsylvania.—Kenyon v. Ashbridge, 35 Pa. St. 157 (1860).

Wisconsin.—Tuckwood v. Hawthorn, 67 Wis. 326, 30 N. W. 705 (1886); Bates v. Ableman, 13 Wis. 644 (1861).

United States.—U. S. v. Gentry, 119 Fed. 70, 55 C. C. A. 658 (1902); Barreda v. Silsbee, 21 How. 146, 16 L. ed. 86 (1858).

2. *California*.—Davis v. Drew, 58 Cal. 152 (1881).

Georgia.—Pearson v. Forsyth, 61 Ga. 537 (1878).

Iowa.—Goldstein v. Morgan, 122 Iowa 27, 96 N. W. 897 (1903) (fraud in execution of bill of sale).

Maine.—Smith v. Tarbox, 70 Me. 127 (1879).

Maryland.—Sanborn v. Lang, 41 Md. 107 (1874); Powles v. Dilley, 9 Gill. & J. 222 (1850).

Missouri.—Potter v. McDowell, 31 Mo. 62 (1860).

New Hampshire.—Tenney v. Evans, 14 N. H. 343, 40 Am. Dec. 194 (1843).

New Jersey.—See Cowen v. Bloomberg, 69 N. J. L. 462, 55 Atl. 36 (1903).

North Carolina.—Black v. Baylees,

whenever this fact is relevant.³ The only effective limits which can be set to the scope of such declarations are those prescribed by probative or deliberative relevancy. Should the actual mental state be relevant, as where the substantive law itself fixes fraud as the consequence of certain acts, unsworn statements tending to establish the existence of the psychological fact will be excluded.⁴ This is a very common phenomenon in the law of evidence where the substantive law absolutely determines the relevancy of testimony by prescribing what facts may and may not be proved as objectives.⁵

§ 2652a. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Hatred or Hostility.—Hatred or hostility¹ or their absence² may be established by showing extrajudicial statements fairly indicative of an appropriate mental state in any case where the fact is a relevant one, e. g., to impeach the credibility of a witness.³ The existence of *threats* may serve to establish a feeling of hostility,⁴ as well as of an intention or design to do the act threatened.⁵ It is an excellent illustration of the difficulty, if not the impossi-

86 N. C. 527 (1882); *Rollins v. Henry*, 84 N. C. 569 (1881).

Pennsylvania.—*York County Bank v. Carter*, 38 Pa. St. 446, 80 Am. Dec. 494 (1861).

Vermont.—*Spaulding v. Albin*, 63 Vt. 148, 21 Atl. 530 (1890).

Wisconsin.—*McGowan v. Supreme Court of Independent Order of Foresters*, 104 Wis. 173, 80 N. W. 603 (1899); *Gillet v. Phelps*, 12 Wis. 392 (1860).

United States.—*Klein v. Hoffheimer*, 132 U. S. 367, 10 S. Ct. 130, 33 L. ed. 373 (1889); *Warner v. Daniels*, 29 Fed. Cas. No. 17,181, 1 Woodb. & M. 90 (1845).

3. *Banfield v. Parker*, 36 N. H. 353 (1858); *Smith v. Betty*, 11 Gratt. (Va.) 752 (1854).

4. *Gruber v. Howles*, 1 Brev. (S. C.) 266, 2 Am. Dec. 665 (1803).

5. § 1718i.

§ 2652a-1. *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22 (1871); *Day v. Stickney*, 14 Allen (Mass.) 255

(1867); *Dalton v. Dregge*, 99 Mich. 250, 58 N. W. 57 (1894); *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784 (1894).

"The usual expressions of such feelings are original evidence, and often the only proof of them which can be had." *Jacobs v. Whitcomb*, 10 Cush. (Mass.) 255, 257 (1852), per Bigelow, J.

2. *Poole v. State*, 45 Tex. Cr. R. 348, 76 S. W. 565 (1903) (no wish for trouble).

3. "His prejudices can be known only by his expressions of them; and therefore such declarations are the legitimate evidence of their existence." *Day v. Stickney*, 14 Allen (Mass.) 255, 258 (1867), per Wells, J.

4. *State v. Callaway*, 154 Mo. 91, 55 S. W. 444 (1900).

5. *Scott v. Sovereign Camp of Woodmen of the World*, 149 Iowa 562, 129 N. W. 302 (1910).

The threat of a third person un-

bility, of distinguishing between the independently relevant and the assertive capacity of direct statements of intent,⁶ when relevancy to both purposes is presented, that on any issue as to whether A committed a particular crime the fact that he threatened to commit it is regarded as probative.⁷ On the other hand, a *narrative* statement, i. e., one not shown to be spontaneous, asserting the past existence of threats against the speaker, will not be received as evidence of their having been made.⁸ In general, whether the declarations accompanies an act⁹ is an immaterial circumstance, except so far as it bears upon the spontaneousness of the statement, whether, in current parlance, it is "part of the *res gestae*."

§ 2653. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Impressions.—An extrajudicial statement may, by reason of its mere existence, show the impression produced by certain occurrences upon the mind of the declarant. As in case of physical pain,¹ the utterances may be mere inarticulate ejaculations or exclamations. They may, on the other hand, be more coherent or even form completed sentences. In many instances, a very effective method of showing the nature of appearances,² conduct,³

connected with the doing of an overt act is hearsay. The rule, however, does not apply to threats tending to elucidate or give character to any material fact shown in the case. *Scott v. Sovereign Camp of Woodmen of the World*, 149 Iowa 562, 129 N. W. 302 (1910).

6. § 2580.

7. *New Gloucester v. Bridgham*, 28 Me. 60 (1848).

8. *Colquit v. State*, 107 Tenn. 381, 64 S. W. 713 (1901).

9. *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22 (1871).

§ 2653-1. §§ 2627 *et seq.*

2. *Chase v. Lowell*, 151 Mass. 422, 22 N. E. 212 (1890); *Du Bost v. Beresford*, 2 Campb. 511 (1810).

3. *Georgia*.—*Monday v. State*, 32 Ga. 672, 79 Am. Dec. 314 (1861).

Michigan.—*Hitchcock v. Burgett*, 38 Mich. 501 (1878).

Missouri.—*Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392 (1869).

New York.—*Hallahan v. New York*, etc., R. Co., 102 N. Y. 194, 6 N. E. 287 (1886).

Pennsylvania.—*Walter v. Gernant*, 13 Pa. St. 515, 53 Am. Dec. 491 (1850).

Tennessee.—*O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 639, 46 L. R. A. 614 (1899).

Texas.—*McAdoo v. State* (Cr. App. 1896), 35 S. W. 966; *Ft. Worth*, etc., R. Co. v. *Stingle*, 2 Tex. App. Civ. Cas. § 704 (1885).

Accident.—The exclamations of one familiar with standards of due care, who has witnessed an accident, may be given in order to establish the effect which it produced on his mind. *Omaha*, etc., R. Co. v. *Chollette*, 41 Nebr. 578, 59 N. W. 921

force or the like ⁴ is by exhibiting it in terms of the effect which it has caused. The imminence of a given peril may be shown in this way.⁵

§ 2654. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Intent and Intention.—Pre-eminent in importance among mental states stand intent and intention.¹ In connection with moral conduct, especially that for which criminal sanctions are invoked, intent apparently plays by far the more important role, while intention seems supreme in the field of intellect. However this may be, both intent and intention ² may be shown by the use of extra-

(1894). The declarant is not permitted to express his opinion as to the propriety of the conduct which he has observed. *Kaelin v. Com.*, 84 Ky. 354, 1 S. W. 594, 8 Ky. L. Rep. 293 (1886); *Seipp v. Dry Dock, etc., R. Co.*, 45 N. Y. App. Div. 489, 61 N. Y. Suppl. 409 (1899); *Carlisle v. State* (Tex. Cr. App. 1900), 56 S. W. 365; *Eddy v. Lowry* (Tex. Civ. App. 1894), 24 S. W. 1076. See also *Carr v. State*, 76 Ga. 592 (1886); *Beck v. State*, 76 Ga. 452 (1886); *Hughes v. Louisville, etc., R. Co.*, 104 Ky. 774, 48 S. W. 671, 20 Ky. L. Rep. 1029 (1898).

4. *Kearney v. Farrell*, 28 Conn. 317, 73 Am. Dec. 677 (1859) (complaints of odors in an action for a nuisance).

5. *Georgia*.—*Atlanta Consol. St. R. Co. v. Bagwell*, 107 Ga. 157, 33 S. E. 191 (1899).

Illinois.—*Galena, etc., R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323 (1855).

Indiana.—*Baker v. Gausin*, 76 Ind. 317, 321, 322 (1881).

Kentucky.—*Stroud v. Com.*, 19 S. W. 976, 14 Ky. L. Rep. 179 (1892).

Missouri.—*Kleiber v. People's R. Co.*, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613 (1891).

North Carolina.—*State v. Rollins*, 113 N. C. 722, 18 S. E. 394 (1893).

§ 2654-1. "Intent" and "intention" contrasted.—While it will fre-

quently be found that "intention" is employed as equivalent to "intent," there is little advantage in confusing a mental state and a mental operation. The inquiry, for example, whether an act was done accidentally or intentionally evidently involves a different mental function from that involved in the inquiry whether the same act was done innocently or with felonious intent." 16 Cyc. p. 1185.

2. *Intent. Alabama*.—*Campbell v. State*, 133 Ala. 81, 31 So. 802, 91 Am. St. Rep. 17 (1902); *Burton v. State*, 115 Ala. 1, 22 So. 585 (1897); *Prater v. State*, 107 Ala. 26, 18 So. 238 (1895); *Harris v. State*, 96 Ala. 24, 11 So. 255 (1892); *David v. David*, 66 Ala. 139 (1880).

Arkansas.—*Pitman v. State*, 22 Ark. 354 (1860).

California.—*Estate of Snowball*, 157 Cal. 301, 107 Pac. 598 (1910); *Dennie v. Clark*, 3 Cal. App. 760, 87 Pac. 59 (1906); *Rogers v. Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (1903); *Harp v. Harp*, 136 Cal. 421, 69 Pac. 28 (1902); *People v. Roach*, 17 Cal. 297 (1861).

Colorado.—*Denver & R. G. R. Co. v. Spencer*, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121 (1900); *Denver & R. G. R. Co. v. Spencer*, 25 Colo. 9, 52 Pac. 211 (1898).

Connecticut.—*Mills v. Swords*

judicial statements of a person accompanying the doing by him of

Lumber Co., 63 Conn. 103, 26 Atl. 689 (1893); *State v. Hawley*, 63 Conn. 47, 27 Atl. 417 (1893); *Spencer v. New York, etc., R. Co.*, 62 Conn. 242, 25 Atl. 350 (1892); *State v. Smith*, 49 Conn. 376 (1881); *In re Johnson*, 40 Conn. 587 (1874).

District of Columbia.—*Miller v. Payne*, 28 App. D. C. 396 (1906).

Florida.—*Weightnovel v. State*, 46 Fla. 1, 35 So. 856 (1903); *Anthony v. State*, 44 Fla. 1, 32 So. 818 (1902); *Hardee v. Langford*, 6 Fla. 13 (1855).

Georgia.—*Mallery v. Young*, 94 Ga. 804, 22 S. E. 142 (1894); *Price v. State*, 72 Ga. 441 (1884); *Southwestern R. Co. v. Rowan & McCaury*, 43 Ga. 411 (1871); *Patterson v. Hickey*, 32 Ga. 156 (1861).

Illinois.—*People v. Alton*, 179 Ill. 615, 54 N. E. 421 (1899); *Quinn v. Eagleston*, 108 Ill. 248 (1883).

Indiana.—*Seifert v. State*, 160 Ind. 464, 67 N. E. 100, 98 Am. St. Rep. 340 (1903); *Boyd v. Jackson*, 82 Ind. 525 (1882).

Iowa.—*State v. Peffers*, 80 Iowa 580, 46 N. W. 662 (1890).

Kentucky.—*Walling v. Com.*, 38 S. W. 429, 18 Ky. L. Rep. 812 (1896).

Louisiana.—*Ray v. Harris*, 7 La. Ann. 138 (1852); *Harkins' Succession*, 2 La. Ann. 923 (1847).

Maine.—*Callagan v. Burns*, 57 Me. 449 (1870); *Corinth v. Lincoln*, 34 Me. 310 (1850); *Baring v. Calais*, 11 Me. 463 (1834); *Gorham v. Canton*, 5 Greenl. 266, 17 Am. Dec. 231 (1828).

Massachusetts.—*Com. v. Trefethen*, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235 (1892); *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322 (1883); *Wilson v. Terry*, 9 Allen 214 (1864); *Kilburn v. Bennett*, 3 Metc. 199 (1841).

Michigan.—*Albion State Bank v. Knickerbocker*, 125 Mich. 311, 84 N. W. 311 (1900); *Lawyer v. Smith*, 8

Mich. 411, 77 Am. Dec. 460 (1860); *Dawson v. Hall*, 2 Mich. 390 (1852).

Minnesota.—*Hale v. Life Co.*, 65 Minn. 548, 68 N. W. 182 (1896); *State v. Hayward*, 62 Minn. 474, 65 N. W. 63 (1895).

Mississippi.—*Archer v. Helm*, 70 Miss. 874, 12 So. 702 (1893); *Wilson v. Beauchamp*, 50 Miss. 24 (1874); *Block v. Cross*, 36 Miss. 549 (1858).

Missouri.—*McDonald v. McDonald*, 86 Mo. App. 122 (1900) (gift); *State v. Brandau*, 76 Mo. App. 305 (1898); *Falks v. Burnett*, 47 Mo. App. 564 (1891); *Siebold v. Christman*, 75 Mo. 308 (1882); *Colt v. La Due*, 54 Mo. 486 (1874).

New Jersey.—*Frome v. Dennis*, 45 N. J. L. 515 (1883); *Hunter v. State*, 40 N. J. L. 495 (1878); *Speer v. Speer*, 14 N. J. Eq. 240 (1862).

New York.—*People v. Conklin*, 157 N. Y. 333, 67 N. E. 624 (1903); *Crary v. Crary*, 18 N. Y. Suppl. 753, 46 N. Y. St. Rep. 307 (1892); *People v. Doyle*, 58 Hun 535, 12 N. Y. Suppl. 836, 36 N. Y. St. Rep. 128 (1890) (gift); *McGraw v. Tatham*, 84 N. Y. 677 (1881); *Davis v. Newkirk*, 5 Den. 92 (1847).

North Carolina.—*Moore v. Gwyn*, 26 N. C. 275 (1884).

Ohio.—*Lake Shore R. Co. v. Herick*, 49 Oh. St. 25, 29 N. E. 1052 (1892); *Larimore v. Wells*, 29 Ohio St. 13 (1875); *Harris v. Protection Ins. Co.*, Wright 548 (1834).

Pennsylvania.—*Real Estate Title Ins. etc., Co. v. Maguire*, 17 Montg. Co. Rep. 25 (1900); *Huntington v. Fairmount*, 2 Kulp 441 (1882); *Oller v. Bonebrake*, 65 Pa. St. 338 (1870); *Jones v. Brownfield*, 2 Pa. St. 55 (1855).

Tennessee.—*Carroll v. State*, 22 Tenn. 321 (1842); *Kirby v. State*, 7 Yerg. 259 (1834).

Texas.—*Houston, etc., R. Co. v. White*, 23 Tex. Civ. App. 280, 56 S.

the act in question and which tend logically to explain or characterize it. In this way the fact that persons intended

W. 204 (1900); *Wallace v. Byers*, 14 Tex. Civ. App. 574, 38 S. W. 228 (1896); *Hamby v. State*, 36 Tex. 523, 526 (1871).

Utah.—*State v. Martensen*, 26 Utah 312, 73 Pac. 562, 663 (1903).

Vermont.—*Hathaway v. National L. Ins. Co.*, 48 Vt. 335 (1875); *State v. Goodrich*, 19 Vt. 116, 47 Am. Dec. 676 (1847).

Wisconsin.—*Kelley v. Kelley*, 20 Wis. 443 (1866).

United States.—*Connecticut M. L. Ins. Co. v. Hillmon*, 188 U. S. 208, 23 Sup. Ct. 294, 47 L. ed. 446 (1903); *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 48 L. ed. 788 (1892); *U. S. v. Lee*, 26 Fed. Cas. No. 15,584, 2 Cranch. C. C. 104 (1814); *U. S. v. Omeara*, 27 Fed. Cas. No. 15,919, 1 Cranch. C. C. 165 (1804).

"The fundamental proposition is, that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these for the sole purpose of showing state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred. . . . Although evidence of the conscious voluntary declarations of a person as indications of his state of mind has in it some of the elements of hearsay, yet it closely resembles evidence of the natural expression of feeling which has always been regarded in the law, not as hearsay, but as original evidence; and when the person making the declarations is dead, such evidence is often not only the best, but the only evidence of what was in his mind at the time." *Com. v. Trefethen*, 157 Mass. 180, 186, 31 N. E. 961, 24 L. R. A. 235 (1892), per Field, C. J.

Advancement.—Declaration of a parent is admissible to show intent on question of advancement. *Hinshaw v. Security Trust Co.* (Ind. App. 1911), 93 N. E. 567.

Desertion of wife.—An intent on the part of a husband to desert his wife and family may be shown by a letter to that effect from him to a third person. *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313, 22 Am. & Eng. Ann. Cas. 567 (1910).

Gifts.—Declarations of a donor are admissible as corroborative evidence of an intent to establish a gift. *Garrison v. Union Trust Co.*, 164 Mich. 345, 129 N. W. 691, 17 Det. Leg. N. 1131, 32 L. R. A. 219 n. (1911); *Campbell v. Sech*, 155 Mich. 634, 638, 119 N. W. 922 (1909); *McElween Adm'r v. King*, 88 S. C. 346, 70 S. E. 801 (1911). Declarations, however, made subsequent to a gift and which were inconsistent therewith should not be received until other evidence is produced tending to prove want of mental capacity. *Gick v. Stumpf*, 204 N. Y. 413, 97 N. E. 865 (1912), *revg.* 134 App. Div. 910, 118 N. Y. Suppl. 1108 (1909). Evidence of self-serving declarations in this connection will not be received. *In re Klehr's Will*, 147 Wis. 653, 133 N. W. 1105 (1912).

Occupation of property as a home-stead.—Declaration of an intention by a husband to so occupy property is admissible. *Steves v. Smith*, 49 Tex. Civ. App. 126, 107 S. W. 141 (1908).

Intention. *Alabama*.—*Harris v. State*, 96 Ala. 24, 11 So. 255 (1892); *Martin v. State*, 77 Ala. 1 (1884).

Arkansas.—*Carr v. State*, 43 Ark. 99 (1884); *Cornelius v. State*, 12 Ark. 782 (1852).

California.—*Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (1903).

to enter upon a journey may frequently be established by their

Connecticut.—Sallies v. Johnson, 85 Conn. 77, 81 Atl. 974 (1911); Meriden Sav. Bank v. Wellington, 64 Conn. 553, 30 Atl. 774 (1894); Mills v. Swords Lumber Co., 63 Conn. 103, 26 Atl. 689 (1893).

District of Columbia.—Tuohy v. Trail, 19 App. Cas. 79 (1901); U. S. v. Nardello, 4 Mackey 503 (1886).

Georgia.—Jackson v. Du Bose, 87 Ga. 761, 13 S. E. 916 (1891); Johnson v. State, 72 Ga. 679 (1884); Thomas v. State, 67 Ga. 460 (1881); Oliver v. Wilson, 29 Ga. 642 (1860).

Illinois.—Towne v. Towne, 93 Ill. App. 159, affirmed 191 Ill. 478, 61 N. E. 426 (1901); Riggs v. Powell, 142 Ill. 453, 32 N. E. 482 (1899); Quinn v. Eagleston, 108 Ill. 248 (1883).

Indiana.—Robbins v. Spencer, 140 Ind. 483, 38 N. E. 522, 40 N. E. 263 (1894).

Iowa.—Bever v. Spangler, 93 Iowa 576, 61 N. W. 1072 (1895); State v. Vincent, 24 Iowa 570, 95 Am. Dec. 753 (1868); State v. Shelledy, 8 Iowa 477 (1859).

Kansas.—State v. Winner, 17 Kan. 298 (1876).

Kentucky.—Ellis v. Ellis, 128 S. W. 1057 (1910); State v. Hayden, 1 Ky. L. Rep. 71 (1880); Steele v. Logan, 3 A. K. Marsh. 394 (1821).

Louisiana.—State v. Vallery, 47 La. Ann. 182, 16 So. 745, 49 Am. St. Rep. 363 (1895).

Maryland.—Curtis v. Moore, 20 Md. 93 (1863); Smith v. Morgan, 8 Gill 133 (1849); Kolb v. Whitely, 3 Gill & J. 188 (1831).

Massachusetts.—Elmer v. Fessenden, 151 Mass. 359, 22 N. E. 635, 24 N. E. 208, 5 L. R. A. 724 (1889); Kilburn v. Bennett, 3 Metc. 199 (1841).

Minnesota.—Matthews v. Great Northern R. Co., 81 Minn. 363, 84 N. W. 101, 83 Am. St. Rep. 383 (1900).

Mississippi.—Baker v. Kelly, 41 Miss. 696, 93 Am. Dec. 274 (1868).

Missouri.—Folks v. Burnett, 47 Mo. App. 564 (1891); Seibold v. Christman, 75 Mo. 308 (1882).

Montana.—State v. Dotson, 26 Mont. 305, 67 Pac. 938 (1902).

New Hampshire.—Hadley v. Carter, 8 N. H. 40 (1835).

New Jersey.—Hunter v. State, 40 N. J. L. 495 (1878).

New York.—Landon v. Preferred Acc. Ins. Co., 167 N. Y. 577, 60 N. E. 1114 (1901); Matter of Swade, 65 N. Y. App. Div. 592, 72 N. Y. Suppl. 1030 (1901); Hoffman v. Hoffman, 6 N. Y. App. Div. 84, 39 N. Y. Suppl. 494 (1896).

Pennsylvania.—Jones v. Brownfield, 2 Pa. St. 55 (1845).

Tennessee.—Kirby v. State, 7 Yerg. 259 (1834).

Texas.—Chew v. Jackson, 45 Tex. Civ. App. 656, 102 S. W. 427 (1907); Martin v. State, 44 Tex. Cr. 538, 72 S. W. 386 (1903); Smith v. McElyea, 68 Tex. 70, 3 S. W. 258 (1887).

Utah.—State v. Mortensen, 26 Utah 312, 73 Pac. 562 (1903).

Vermont.—Redding v. Redding, 69 Vt. 500, 38 Atl. 230 (1897); Perkins v. Blood, 36 Vt. 273 (1863); State v. Howard, 32 Vt. 380, 78 Am. Dec. 609 (1859).

Virginia.—Chiverius v. Com., 81 Va. 787 (1886).

Washington.—Dean v. Oregon R. & Nav. Co., 44 Wash. 564, 87 Pac. 824 (1906); State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902 (1901).

West Virginia.—Beckwith v. Molohan, 2 W. Va. 477 (1868).

Wisconsin.—State v. Dickenson, 41 Wis. 299 (1877).

United States.—Connecticut M. L. Ins. Co. v. Hillmon, 188 U. S. 208, 23 Sup. Ct. 294, 47 L. ed. 446 (1903).

England.—Sugden v. St. Leonards, 1 P. D. 154, 45 L. J. P. 49, 34 L. T.

unsworn statements,³ proof occasionally extending even to facts

Rep. (N. S.) 372, 24 Wkly. Rep. 860 (1876); *Reg. v. Buckley*, 13 Cox C. C. 293 (1873); *Shilling v. Accidental Death Co.*, 4 Jur. (N. S.) 244 (1858); *Doe v. Palmer*, 16 Q. B. 747, 15 Jur. 836, 20 L. J. Q. B. 367, 71 E. C. L. 747 (1851); *Smith v. Cramer*, 1 Bing. N. Cas. 585, 1 Hodges 124, 1 Scott 541, 27 E. C. L. 774 (1835); *Ridley v. Gyde*, 9 Bing. 349, 23 E. C. L. 611 (1832); *Rawson v. Haigh*, 2 Bing. 99, 9 E. C. L. 499, 1 C. & P. 77, 12 E. C. L. 55, 9 Moore C. P. 217 (1824); *Gale v. Half Knight*, 3 Stark. 56, 3 E. C. L. 592 (1821); *Bateman v. Bailey*, 5 T. R. 512 (1794).

One's intention to do an act is a fact admissible in evidence to explain the act, and may be proved by his words or inferred from his conduct. *Sallies v. Johnson*, 85 Conn. 77, 81 Atl. 974 (1911).

"Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice. . . . The right to choose implies the right to declare one's choice, formally or informally, as he prefers and even for the sole purpose of making evidence to prove what his choice was. Such declarations are not self-serving in an improper sense unless they are made with intent to deceive. If they are false and made for a sinister purpose, they will meet the fate that falsehood always meets in courts of justice when discovered by the trier of fact." *Matter of Newcomb*, 192 N. Y. 238, 251, 84 N. E. 950, per Vann, J., *affg.* 122 App. Div. 920, 107 N. Y. Suppl. 1139 (1908).

"Letters from him to his family and his betrothed were the natural, if not the only attainable evidence of his intention. . . . A man's state of mind or feeling can only be manifested to others by countenance, at-

titude, or gesture, or by sounds or words, spoken or written. . . . The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony, that he then had that intention would be. After his death, there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation." *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 295, 12 Sup. Ct. 909, 36 L. ed. 706 (1892), per Gray, J.

Acts and declarations.—Where the acts and declarations regarding his intentions are conflicting in case of an interested witness the court will usually regard the conduct as establishing the actual intention of the witness rather than his declarations regarding it. *Lewis v. McDonald*, 83 Neb. 694, 120 N. W. 207 (1909).

3. *Northwestern Redwood Co. v. Dickson*, 13 Cal. App. 689, 110 Pac. 591 (1910), per Hart, J.

Grantee's declarations.—Declarations of a grantee to be admissible upon the question of intention "should be such as characterize his possession and must be made when pertinent and important and upon the question of the actual ownership. They must rise higher than casual and conversational remarks; they must be made when the person was called upon to make them and when the truth was required to be spoken." *Hamlin v. Hamlin*, 192 N. Y. 164, 171, 84 N. E. 805 (1908), per Gray,

incidentally asserted.⁴

An ambiguity in a contract may be so explained.⁵

As proof of the facts stated, the unsworn declaration indicative of intent or intention, though properly to be regarded as irrelevant, is also said to be excluded as hearsay, a double rejection which is apparently unnecessary, irrelevancy constituting an entirely satisfactory ground for exclusion. Thus, the declarations of an insured person that he contemplated suicide⁶ or the assertions of one said to have been killed that he meant to make way with himself⁷ have been rejected as evidence of that fact. On the

J., revg. 117 App. Div. 493, 102 N. Y. Suppl. 571 (1907), which *affd.* 51 Misc. R. 111, 100 N. Y. Suppl. 701 (1906).

Intentions of an interested witness are not to be ascertained by his declarations or testimony as to what his intentions were. *Lewis v. McDonald*, 83 Neb. 694, 120 N. W. 207 (1909).

Strangers to a deed.—Declarations of a grantor at the time of the execution of a deed or subsequently as to his intention are not admissible to affect the rights of strangers to the deed who purchased the property upon the faith of the records. *Kensington Ry. Co. v. Moore*, 115 Md. 36, 80 Atl. 614 (1911).

4. *Inness v. R. Co.*, 168 Mass. 433, 47 N. E. 193 (1897); *Matthews v. Great Northern R. Co.*, 81 Minn. 363, 84 N. W. 101, 83 Am. St. Rep. 383 (1900); *Lake Shore, etc., R. Co. v. Herrick*, 49 Ohio St. 25, 29 N. E. 1052 (1892). But compare *Chicago, etc., R. Co. v. Chancellor*, 165 Ill. 438, 46 N. E. 269 (1897).

5. **Ambiguity.** — “Undoubtedly, where the intention of the parties to a written contract is rendered obscure by the ambiguity of the language in which its terms are expressed, evidence of declarations of the parties to said contract, or either of them, made contemporaneously with the ne-

gotiation and execution of the agreement, if explanatory of the purpose or intent of the same, would be admissible as part of the transaction or *res gestae*.” *State v. Dickinson*, 41 Wis. 299 (1877).

“In the ordinary course of things, it was the usual information that a man about leaving home would communicate, for the convenience of his family, the information of his friends, or the regulation of his business. At the time it was given, such declarations could, in the nature of things, mean harm to no one; he who uttered them was bent on no expedition of mischief or wrong; and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed. . . . If it was in the ordinary train of events for this man to leave word or to state where he was going, it seems to me it was equally so for him to say with whom he was going.” *Hunter v. State*, 40 N. J. L. 495, 538 (1878), per Beasley, C. J.

6. *Jenkin v. Pacific Mut. L. Ins. Co.*, 131 Cal. 121, 63 Pac. 180 (1900).

7. *Howard v. People*, 185 Ill. 552, 57 N. E. 441 (1900); *Siebert v. People*, 143 Ill. 571, 32 N. E. 431 (1892) (poisoning); *State v. Punshon*, 124 Mo. 448, 457, 27 S. W. 1111 (1894).

other hand, the question being as to whether A committed suicide or was killed, his extrajudicial declarations that he intended to commit suicide,⁸ or, on the contrary, to return at a given time,⁹ or do some other relevant act, have been held properly receivable. In this connection, as in certain others, the line between independent relevancy and proof of the facts asserted is one difficult to draw, in fact is one which often cannot be drawn. Perhaps the most which can fairly be said is that a certain admixture of the element of spontaneity may make the unsworn independently relevant statement properly probative as proof of the facts asserted. It has even been held generally, i. e., irrespective of any particular connection, that where this element of spontaneity is lacking, the declaration of intention is to be rejected as not being part of the *res gestae*.¹⁰ Except so far as it bears upon the existence of spontaneousness whether the declaration of

8. *People v. Gehmele*, Sheld. (N. Y.) 251 (1871); *Rens v. Relief Assn.*, 100 Wis. 266, 75 N. W. 991 (1898); *Sharland v. Ins. Co.*, 101 Fed. 206, 41 C. C. A. 307 (1900).

9. *Bradley v. Modern Woodmen of America* (Mo. App. 1910), 124 S. W. 69.

10. *Illinois*.—*Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438, 46 N. E. 269 (1897).

Indiana.—*Hauk v. State*, 148 Ind. 238, 46 N. E. 127 (1897).

Kentucky.—*Com. v. Gray*, 17 Ky. L. Rep. 354, 30 S. W. 1015 (1895).

Massachusetts.—*Com. v. Felch*, 132 Mass. 22 (1882).

Michigan.—*Schultz v. Schultz*, 113 Mich. 502, 71 N. W. 854 (1897).

New Hampshire.—*State v. Wood*, 53 N. H. 484 (1873).

Oregon.—*State v. Anderson*, 10 Oreg. 448 (1882).

Pennsylvania.—*Hartman v. Ins. Co.*, 21 Pa. St. 466 (1853).

Virginia.—*McBride v. Com.*, 95 Va. 818, 30 S. E. 454 (1898).

England.—*R. v. Wainwright*, 13 Cox Cr. 171 (1875).

The proper judicial attitude to-

ward independently relevant statements of intention, as contrasted with spontaneous utterances which prove the facts which they assert, is taken in the following extract: "The evidence . . . was not admissible, in my opinion, on the ground that it tended to 'characterize her subsequent acts and her departure on the fatal ride soon after she made the statement,'—that is, that it was a part of the *res gestae*,—for the reason that her statement neither accompanied nor characterized any act relevant to the issue. But it was relevant to the issue to show that she did meet the defendant, and evidence of her declarations of an intention and purpose to meet him was admissible as original evidence to prove that she did in fact intend to meet him. . . . To sustain it on the ground that the statement of the deceased was a part of the *res gestae* is, in my judgment, to assign a wrong reason for a correct conclusion, which may lead to complications in future cases." *State v. Hayward*, 62 Minn. 474, 65 N. W. 63 (1895), per Start, C. J.

the intention accompanies an act¹¹ or does not would seem to be a detail of no importance.

Intention to return.—In case of an absent party or witness in another jurisdiction,¹² as well as in other connections,¹³ intention to return may be a material fact. Whenever relevant, it may be proved by the use of appropriate extrajudicial statements fairly indicative of the state of mind.

Statements of a testator.—A particular application of the rule under consideration appears in the statements of a testator as to his intention to make a will or a will to a particular effect. Here the circumstantially relevant quality of the utterance becomes obvious. As proof of the facts asserted, the declaration is clearly incompetent as being hearsay. To know, however, what a man has done, it is clearly relevant to know what he has intended to do.¹⁴ Declarations by a testator that he has or has not made a testamentary disposition of his property¹⁵ or regarding the contents¹⁶ or

11. *R. v. Petcherini*, 7 Cox Cr. 81 (1856).

12. *Jacobi v. State*, 133 Ala. 1, 32 So. 158 (1902); *King v. McCarthy*, 54 Minn. 190, 55 N. W. 960 (1893).

13. *Timmons v. Timmons*, 3 Ind. 251 (1851).

14. "The declarations which are made before the will are not, I apprehend, to be taken as evidence of the contents of the will which is subsequently made—they obviously do not prove it; and wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were." *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 251 (1876), per Mellish, L. J. See, however, *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. ed. 663 (1901).

15. *Alabama*.—*Henry v. Hall*, 106 Ala. 84, 17 So. 187, 54 Am. St. Rep. 22 (1895).

Illinois.—*Schofield v. Thomas*, 236 Ill. 417, 86 N. E. 122 (1903).

Kentucky.—*Mercer v. Mackin*, 14 Bush 434 (1879).

Maryland.—*Collins v. Elliott*, 1 H. & J. 1 (1800).

Michigan.—*In re Kennedy's Will*, 159 Mich. 548, 124 N. W. 516, 16 Det. Leg. N. 982, 134 Am. St. Rep. 743, 28 L. R. A. (N. S.) 417 n. (1910).

Mississippi.—*Miller v. Miller*, 96 Miss. 526, 51 So. 210 (1910).

Missouri.—*Wells v. Wells*, 144 Mo. 198, 45 S. W. 1094 (1898).

New Jersey.—*Gordon's Will*, 50 N. J. Eq. 397, 424, 26 Atl. 268 (1892); *Boylan v. Meeker*, 28 N. J. L. 274 (1860).

New York.—*Jackson v. Betts*, 6 Cow. 382 (1826); *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 395 (1825).

Tennessee.—*Earp v. Edgington*, 107 Tenn. 23, 64 S. W. 40 (1901).

Statements inconsistent with a contract to will property to another and made subsequent to the time of entering into such contract are not admissible. *Dalby v. Maxfield*, 244 Ill. 214, 91 N. E. 420, 135 Am. St. Rep. 312 (1910).

16. *Floto v. Floto*, 233 Ill. 605. 84

execution¹⁷ of his will, or that he has or has not revoked it,¹⁸ are, in most instances, to be rejected under the rule against hearsay.

Will of Lord St. Leonards.—The doctrine of the foregoing cases, that extrajudicial statements prior or subsequent to the making of a will, must, when offered as proof of its execution or contents, be rejected as hearsay, has been repudiated in England, although by a divided court, in the celebrated case relating to the will of Lord St. Leonards.¹⁹ As the result of the numerous hearings in the matter, an exception to the hearsay rule was established by that case by the majority opinion²⁰ in favor of extrajudicial state-

N. E. 712 (1908); *Cheney v. Goldy*, 225 Ill. 394, 80 N. E. 289, 116 Am. St. Rep. 145 (1907); *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 62 L. R. A. 383, 110 Am. St. Rep. 431 n. (1903); *Hunter v. Hunter*, 229 Pa. 349, 78 Atl. 849 (1911); *Kennedy v. Upshaw*, 64 Tex. 411, 417 (1885).

"A declaration after he has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time, but it is simply a statement of a fact which took place no doubt within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule, that hearsay evidence is not admissible to prove a fact which is stated in the declaration. It does not come within any of the rules which have hitherto been established, and I doubt whether it is an advisable thing to establish new exceptions in a case which has never happened before." *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 251 (1876), per Mellish, L. J. (minority opinion).

"It is familiar practice enough to receive the unsworn declarations of the testator in evidence, for the purpose of arriving at his general intentions where his competency is in dispute, or where there is any imputation of fraud in the making of his will. For in such cases the state of his mind and affections is in itself a

material fact, of which such statements are the fair exponents. But where those declarations are vouched to prove not only the testator's intentions but the fact that he had declared and embodied those intentions in a certain will, they have no other title to confidence than the statements of any other person who had seen the will and could speak to its contents. In this aspect they become mere hearsay." *Quick v. Quick*, 3 Sw. & Tr. 442 (1864), per Wilde, J.

Instructions as to his will written by the testator contemporaneously with the execution of the will have been admitted in evidence, their purpose being limited to explain the sense in which certain ambiguous words are used, not for the purpose of proving any intention inconsistent with the language of the will. *Re Ofner*; *Samuel v. Ofner*, 99 L. T. R. 813, 1 Ch. 60, 78 L. J. Ch. 50, C. A. (1908).

17. *Grant v. Grant*, 1 Sandf. Ch. (N. Y.) 235, 237 (1844).

"Declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires." *Doe v. Palmer*, 16 Q. B. (N. S.) 747, 757 (1851), per Lord Campbell, C. J.

18. See § 2622.

19. See also § 2766.

20. "Declarations of deceased per-

ments of this kind,²¹ oral or in writing. Though its reasoning has been somewhat questioned, the exception may be regarded as firmly established in the United Kingdom.²² Certain American authorities adopt the same view.²³ The English rule on this point seems

sons are in several instances admitted as exceptions to the general rule; where such persons have had peculiar means of knowledge and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands pre-eminently in that position. He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree. . . . I am at a loss to see why, when such evidence is held to be admissible for the two purposes just referred to, it should not be equally receivable as proving the contents of the will. If the exception to the general rule of law which excludes hearsay evidence is admitted, on account of the exceptional position of a testator, for one purpose, why should it not be for another, where there is an equal degree of knowledge, and an equal absence of motive to speak untruly?" *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 224, 225 (1876), per Cockburn, C. J. "Now, all these reasons existing," in respect to the exceptions to the hearsay rule "exist in the case of a testator declaring the contents of his will. . . . I must say it appears to me that, having regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases to which

I have referred, we should be equally justified and equally bound to admit it in this case. When I say equally, perhaps I state the case a little too low, because if there is any case in the world in which it is incumbent upon a tribunal not to grant a premium for fraud or wrong . . . it is the case of a lost will. The Court should be anxious, not narrowly to restrict the rules of evidence, which were made for the purpose of furthering truth and justice, but, guided by those great principles which have guided other tribunals in other countries, in admitting this kind of evidence generally, to admit it at all events in the special case which we have under consideration." *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 241, 242 (1876). per Jessel, M. R.

21. See *Sykes' Goods*, L. R. 3 P. & D. 27 (1873).

22. *Harris v. Knight*, L. R. 15 P. & D. 174 (1890); *Flood v. Russell*, 29 L. R. Ire. 97 (1891); *Re Ball*, 25 L. R. Ire. 557 (1890).

23. *Alabama*.—*Conoly v. Gayle*, 61 Ala. 116 (1878).

Georgia.—*Patterson v. Hickey*, 32 Ga. 156 (1861).

Indiana.—*McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336 (1895).

Iowa.—*Scott v. Hawk*, 105 Iowa 467, 75 N. W. 368 (1898).

Kansas.—*Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738 (1900).

Kentucky.—*Muller v. Muller*, 108 Ky. 511, 56 S. W. 802, 22 Ky. Law Rep. 207 (1900).

Michigan.—*Lambie's Estate*, 97 Mich. 49, 56 N. W. 223 (1893).

New Hampshire.—*Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591 (1895).

Tennessee.—*Beadles v. Alexander*, 9

to embody the correct principle, that wherever an unsworn statement is relevant as evidence of the facts asserted in it and its use is bound to be reasonably necessary to proof of the proponent's case, it should be received as secondary evidence for the purpose. Except the obnoxious application of the doctrine of *stare decisis* to the administration of the rule of evidence,²⁴ no legitimate reason could probably be assigned why the rule against hearsay should not be modified to the extent of permitting its general reception as secondary evidence under the customary conditions of necessity and relevancy. In the meantime, until it should be deemed advisable to take such a step, the creation of further "exceptions" to the operation of the rule is by no means to be deprecated.

§ 2655. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Intent and Intention*); When Statements Are Received.—

When a question arises so delicate, in an administrative sense, as the admission of direct, specific statements of intent or intention, where the mind of the tribunal finds it difficult to resist the operation of the inference that the declaration is true,¹ much may be found to depend upon the subjective relevancy of the declarant's

Baxt. 604, 606 (1877); *Smiley v. Gambill*, 2 Head 164 (1858),

Texas.—*McElroy v. Phink*, 97 Tex. 147, 74 S. W. 61, *reversed* 97 Tex. 147 76 S. W. 753, 77 S. W. 1,025 (1903); *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619 (1863).

"Such statements of the testator should be received as evidence with great caution; for the reason that they are sometimes made by him for the express purpose of misleading or satisfying curious friends or expectant relatives. But the declarations in the case at bar are not open to this objection; they were voluntarily made to a confidential friend, one who apparently had no interest in the estate of the testator, and not in response to any inquiry by him made. Considering the circumstances under which they were made by the testator at a time when sick, but in the

full control of his mental faculties, and when he seemingly recognized that his death was a near probability, and they appear to us to bear upon their face the very impress of sincerity." *McDonald v. McDonald*, 142 Ind. 55, 84, 41 N. E. 336 (1895), per Jordan, J.

"That the deceased, upon examination of the instrument and the signatures thereto, declared it his will, is convincing evidence of its execution by him." *Scott v. Hawk*, 105 Iowa 467, 75 N. W. 368 (1898), per Ladd, J.

This was "the declaration of the only party having a vested interest to declare the whole truth." *Beadles v. Alexander*, 9 Baxt. (Tenn.) 604, 606 (1877), per McFarland, J.

24. § 1618, n. 2.

§ 2655-1. § 2580.

assertion. Did the latter at the time of making it experience any motive to misrepresent the truth which might reasonably be regarded as controlling? If not, the extrajudicial statements, e. g., of letters,² may properly be received.³ It is occasionally said that such declarations are to be received only when part of the *res gestae*.⁴ This broad use of the term, practically co-extensive with relevancy, will not be confused with the phrase in the more restricted meaning in which it seems more properly employed.⁵ It follows that mere contemporaneity with a principal act does not suffice, as it is not required to admit an extrajudicial statement indicative of intent or intention, or indeed any other mental state. The relevancy of the unsworn statement is dependent on and conditioned by that of the psychological fact itself. In other words, the existence of a mental state being a relevant fact at a particular time, the extrajudicial statement is accepted because it logically tends to establish that fact.⁶ The relation of the statement in point of time to the period at which

2. *Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (1903); *Thorndike v. Boston*, 1 Metc. (Mass.) 242 (1840); *Hunter v. State*, 40 N. J. L. 495 (1878); *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706 (1892).

3. *Collateral facts*.—Facts incidentally stated may be rejected while the declaration may be received as proof of the existence of that which is directly asserted. Thus, while a parents' declarations are admissible to show whether property given to a child was intended as an advancement, they are not admissible to prove the fact that money was given. This must be shown, like other facts, by the ordinary rules of evidence. *Dilley v. Love*, 61 Md. 603 (1883). Where the declarations of a testator are relied upon to show the testamentary character of a paper which does not show such character upon its face, they must have been made at the time the paper was written, or, at least, must be shown to relate to the identical paper. *Smith v.*

Smith, 112 Va. 205, 70 S. E. 491, 33 L. R. A. (N. S.) 1018 n. (1911).

4. *California*.—*Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791 (1899).

Maine.—*Church v. Rowell*, 49 Me. 367 (1861); *Gorham v. Canton*, 5 Me. 266, 17 Am. Dec. 231 (1828).

Massachusetts.—*Wright v. Boston*, 126 Mass. 161 (1879) *Salem v. Lynn*, 13 Metc. 544 (1847); *Kilburn v. Bennett*, 3 Metc. 199 (1841).

New Jersey.—*Hunter v. State*, 40 N. J. L. 495 (1878).

Ohio.—*Lake Shore, etc., R. Co. v. Herrick*, 49 Ohio St. 25, 29 N. E. 1052 (1892).

United States.—*Doyle v. Clark*, 7 Fed. Cas. No. 4,053, 1 Flipp. 536 (1876).

See, however, *People v. Williams*, 3 Park. Cr. (N. Y.) 84 (1855).

5. *In re Olmstead*, 122 Cal. 224, 54 Pac. 745 (1898); *McDonald v. McDonald*, 86 Mo. App. 122 (1900); *Smith v. McElyea*, 68 Tex. 70, 3 S. W. 258 (1887).

6. *Brand v. Abbott*, 42 Ala. 499 (1868).

the mental state must be shown to exist is comparatively unimportant. Contemporaneousness is an important consideration only in connection with spontaneity, which, in turn, is of principal importance in connection with the unsworn statement when used as hearsay, i. e., as proof of the facts asserted. Under the present rule, within the time limits of irrelevancy through remoteness,⁷ the extrajudicial declaration may precede⁸ or follow⁹ the time at which the mental state may be shown to exist as well as be contemporaneous¹⁰ with it.

§ 2656. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Intent and Intention*); Wide Scope Conceded.—As in case of the proof of mental condition¹ a wide range of inquiry is permitted in establishing intent or intention or any other mental state. Such psychological facts, not being the subject of direct sense-perception, are evidently established in main by proof of their manifestations. The latter being frequently ambiguous and of slight individual conclusiveness, administrative indulgence is frequently asked and conceded, probative force residing not so much in the aggregation of separate bits of probative force as in the

7. *Thistlewaite v. Thistlewaite*, 132 Ind. 355, 31 N. E. 946 (1892); *McKinnon v. Meston*, 104 Mich. 642, 62 N. W. 1014 (1895).

8. *Alabama*.—*Harris v. State*, 96 Ala. 24, 11 So. 255 (1892); *Martin v. State*, 77 Ala. 1 (1884).

District of Columbia.—*U. S. v. Nardello*, 4 Mackey 503 (1886).

Kentucky.—*State v. Hayden*, 1 Ky. L. Rep. 71 (1880).

New York.—*Tuttle v. People*, 36 N. Y. 431 (1867).

Tennessee.—*Garber v. State*, 4 Coldw. 161 (1867).

Texas.—*Merritt v. State*, 39 Tex. Cr. 70, 45 S. W. 21 (1898); *Williams v. State*, 4 Tex. App. 5 (1878).

Wisconsin.—*State v. Dickinson*, 41 Wis. 299 (1877).

But see *Com. v. Felch*, 132 Mass. 22 (1882).

9. *P. Cox Shoe Mfg. Co. v. Garsline*,

63 N. Y. App. Div. 517, 71 N. Y. Suppl. 619 (1901); *Smith v. McElyea*, 68 Tex. 70, 3 S. W. 258 (1887).

Change.—Upon ordinary principles, declarations made subsequent to the time rendered important by the evidence may be received to show that there has or has not been a change in the intent or intention of the person whose mental state is in question. *Towne v. Towne*, 191 Ill. 478, 61 N. E. 426 (1901); *Bell v. Fothergill*, L. R. 2 P. 148, 23 L. T. Rep. (N. S.) 323, 18 Wkly. Rep. 1040 (1870). No conclusive effect in this regard can be accorded to the unsworn statement. It may be entirely controlled by unequivocal conduct. *Bell v. Fothergill*, L. R. 2 P. 148, 23 L. T. Rep. (N. S.) 323, 18 Wkly. Rep. 1040 (1870).

10. *Koller v. State*, 36 Tex. Cr. 496, 38 S. W. 44 (1896).

§ 2656-1. § 1741d.

corroboration which is gained by the elimination of infirmative hypotheses.² This indulgence may well apply to the use of extrajudicial statements in this connection.³ For example, as is elsewhere noticed, as the relevancy of the extrajudicial statement is dependent upon that of the mental state, the probative utterance may precede, accompany⁴ or follow the principal fact, if any, which the mental state assists to characterize or explain. So long as the time of the declaration is not too remote to be relevant, a considerable interval will not be treated as fatal to admissibility.

2. § 1768, n 5.

3. *Georgia*.—*Small v. Williams*, 87 Ga. 681, 13 S. E. 589 (1891).

Louisiana.—*Marigny v. Union Bank*, 5 Rob. 354 (1843).

Mississippi.—*Fulton v. Fulton*, 36 Miss. 517 (1858).

Pennsylvania.—*Louden v. Blythe*, 16 Pa. St. 532, 55 Am. Dec. 527 (1851).

Wisconsin.—*Taylor v. Collins*, 51 Wis. 123, 8 N. W. 22 (1881).

United States.—*Miller v. Clark*, 40 Fed. 15, appeal dismissed 131 U. S. 223, 11 S. Ct. 300, 34 L. ed. 966 (1889).

4. *Walker v. State*, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17 (1887); *Duling v. Johnson*, 32 Ind. 155 (1869); *Jones v. Brownfield*, 2 Pa. St. 55 (1845); *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085 (1891).

Spontaneity distinguished.—Where the relevancy of an unsworn statement is not,—as in the present chapter, objective but rather due to the spontaneous character of the utterance it must, of course, stand within such a relation of time to the exciting cause that the latter shall continue to exert a controlling force upon the mind of the declarant. Under such circumstances, practical contemporaneity may properly be required by judicial administration. Even in case of the independently relevant statement, its probative force may be greatly enhanced where the utterance appears to be spontaneous or accom-

panies the act to which it gives significance. *Koller v. State*, 36 Tex. Cr. R. 496, 38 S. W. 44 (1896). As a matter of admissibility, however, no such requirement of contemporaneity is made. A subsequent statement is equally admissible. *P. Cox Shoe Mfg. Co. v. Gorsline*, 63 N. Y. App. Div. 517, 71 N. Y. Suppl. 619 (1901); *Smith v. McElyea*, 68 Tex. 70, 3 S. W. 258 (1887). In fact, the existence of a fixed and settled mental condition or state may well be established by extrajudicial declarations extending over a considerable period, before or after the happening of any particular event.

Connecticut.—*Bartram v. Stone*, 31 Conn. 159 (1862).

Georgia.—*Meeks v. State*, 51 Ga. 429 (1874).

Massachusetts.—*Scott v. Berkshire County Sav. Bank*, 140 Mass. 157, 2 N. E. 925 (1885).

Missouri.—*State v. Smith*, 125 Mo. 2, 28 S. W. 181 (1894).

New York.—*People v. Sherry*, 2 Edm. Sel. Cas. 52 (1849).

Ohio.—*Moore v. State*, 2 Ohio St. 500 (1853).

Pennsylvania.—*Kutz's Appeal*, 100 Pa. St. 75 (1882).

Texas.—*Weathersby v. State*, 29 Tex. App. 278, 15 S. W. 823 (1890).

England.—*Sugden v. St. Leonards*, 1 P. D. 154, 45 L. L. P. 49, 34 L. T. Rep. (N. S.) 372, 24 Wkly. Rep. 860 (1876).

§ 2657. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Intent and Intention*); Conditions of Admissibility.—That an extrajudicial declaration indicative of a particular intent or intention should be received, it is essential that the existence of such a mental state at the time to which the declaration refers¹ should itself be constitutently or probatively relevant.²

Necessity.—The extrajudicial declaration, not being offered as evidence of the facts asserted, is in no way controlled by the administrative considerations which apply to hearsay when used as secondary evidence.³ The statements, therefore, are not rendered competent, if otherwise irrelevant, by the fact that the declarant is dead, nor, if otherwise competent, are they rejected because the declarant has deceased.⁴

§ 2658. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States;*

§ 2657-1. Iowa.—Mallow v. Walker, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158 (1901).

Maryland.—Adams Express Co. v. Trego, 35 Md. 47 (1871).

Minnesota.—Finch v. Green, 16 Minn. 355 (1871).

Oregon.—State v. Anderson, 10 Ore. 448 (1882).

Texas.—Johnson v. State, 22 Tex. App. 206, 2 S. W. 609 (1886).

England.—Hyde v. Palmer, 3 B. & S. 657, 32 L. J. Q. B. 126, 7 L. T. Rep. (N. S.) 823, 11 Wkly. Rep. 433, 113 E. C. L. 657 (1863).

Canada.—Basterach v. Atkinson, 7 N. Brunsw. 439 (1852).

2. Alabama.—Cowan v. State, 136 Ala. 101, 34 So. 193 (1903); Domingus v. State, 94 Ala. 9, 11 So. 190 (1892).

California.—Rice v. Cunningham, 29 Cal. 492 (1866); People v. Henderson, 28 Cal. 465 (1865); People v. Wyman, 15 Cal. 70 (1860).

Georgia.—Sanders v. State, 113 Ga. 267, 38 S. E. 841 (1901).

Iowa.—West v. Beck, 95 Iowa 520,

64 N. W. 599 (1895). See, also, Moss v. Dearing, 45 Iowa 530 (1877).

Maryland.—Cross v. Black, 9 Gill & J. 198 (1837).

Massachusetts.—Com. v. Felch, 132 Mass. 22 (1882); Shrewsbury v. Smith, 12 Cush. 177 (1853); Bridge v. Eggleston, 14 Mass. 245, 7 Am. Dec. 209 (1817).

Michigan.—Stockton v. Williams, 1 Dougl. 546 (1845).

Missouri.—State v. Gabriel, 88 Mo. 631 (1886).

New Hampshire.—Tenney v. Evans, 14 N. H. 343, 40 Am. Dec. 194 (1843).

Oregon.—State v. Ching Ling, 16 Ore. 419, 18 Pac. 844 (1888).

Tennessee.—Irvine v. State, 104 Tenn. 132, 56 S. W. 845 (1900).

Texas.—Young v. State, 41 Tex. Cr. 442, 55 S. W. 331 (1900); Rector v. Hudson, 20 Tex. 234 (1857).

3. §§ 2762 et seq.

4. Evans v. Lipcomb, 31 Ga. 71 (1860); Riggs v. Powell, 142 Ill. 453, 32 N. E. 482 (1892), affirming 46 Ill. App. 75 (1890); Howell v. Taylor, 11 Hun (N. Y.) 214 (1877).

Intent and Intention); Criminal Cases.— Intent and intention, being phrases of the mind, particular states of its contents, are of especial consequence in connection with criminal cases, moral qualities being here particularly considered. A further consideration is, at the same time, to be observed, that the inertia of the court is particularly strong against the reception of doubtful evidence which the jury might misuse against the prisoner. For example, while a subsequent statement will ordinarily be received as tending to establish, whenever relevant, the existence of a prior mental state¹ threats against the victim of a homicide made subsequent to the injuries to which the latter afterwards succumbed, will not be received against his assailant, when put upon trial, as evidence of his *animus* against the deceased entertained at the time of the fatal occurrence.²

More specifically, the design or intention of an alleged criminal not so much to do the act charged as not to do it or to do something else,³ may be established by showing his extrajudicial declarations.

§ 2659. (Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Intent and Intention); Declaration May Be Self-serving.— So long as the unsworn statement of intent or intention is offered as being circumstantially probative of a mental state and not as proof of the facts asserted, its subjective relevancy is not involved. The relevancy of the extrajudicial declarations resides, as it were, in that of the mental state itself. It by no means arises as in a spontaneous utterance from the fact that we perceive that the declarant has no controlling motive to misrepresent the truth. In the present case, therefore, the declaration is received, in its independently

§ 2658-1. § 2656.

2. *Caw v. People*, 3 Nebr. 357 (1874). The same practice has been adopted to a limited extent in civil cases. *Newman v. Goddard*, 3 Hun 70, 48 How. Prac. 363, 5 Thomps. & C. (N. Y.) 299 (1875).

3. *Indiana*.— *Grimes v. State*, 68 Ind. 193 (1879).

Tennessee.— *Garber v. State*, 4 Coldw. 161 (1867).

United States.— *U. S. v. Craig*, Fed. Cas. No. 14,883, 4 Wash. C. C. 729 (1827).

England.— *Spencer Cowper's Trial*, 13 How. St. Tr. 1106, 1170 (1699).

Canada.— *R. v. Chasson*, 16 N. Br. 546 (1876).

See, however, *State v. Sorenson*, (Iowa, 1912) 138 N. W. 411. There is authority to the contrary, extrajudicial statements of intention to do an act different from the one charged being rejected. *Com. v. Kent*, 6 Mete. (Mass.) 221 (1843); *R. v. Petcherini*, 7 Cox Cr. 79, 82 (1855).

relevant capacity, although distinctly self-serving.¹ Administrative considerations as to the necessity of the proponent for using such treacherous evidence and the danger that it may tend to mislead the jury,² may operate to affect the ruling in any particular instance.

§ 2660. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Intent and Intention*); Narrative Excluded.—The declarations indicative of intent may precede the act which it is proposed to do.¹ Narrations, however, asserting the existence of a past intention are not receivable under the present rule.² In other words, extrajudicial statements as to the existence of a past mental state will not be received as proof of the fact.³ Should the subsequent assertion be made under such circumstances as logically to give rise to an inference as to the existence of the past mental state, it may be admitted for the purpose. As an administrative matter, the judge will be cautious in admitting such declarations where they

§ 2659-1. *Wilson v. State*, 33 Ark. 557, 34 Am. Rep. 52 (1878); *State v. Abbott*, 8 W. Va. 741 (1875).

2. § 1745.

§ 2660-1. "Declarations made contemporaneously with, or immediately preparatory to, a particular litigated act, and which tend to illustrate and give character to the act in question, are admissible as part of the *res gestae*." *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49 (1868); *Garrison v. Goodale*, 23 Oreg. 307, 31 Pac. 709 (1892).

2. *Baker v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274 (1868).

3. *Alabama*.—*McPherson v. Foust*, 81 Ala. 295, 8 So. 193 (1886).

Arkansas.—*Martin v. Tucker*, 35 Ark. 279 (1880).

California.—*Estate of Snowball*, 157 Cal. 301, 107 Pac. 598 (1910).

Connecticut.—*State v. Bradnack*, 69 Conn. 212, 37 Atl. 492, 43 L. R. A. 620 (1897).

Illinois.—See *Steurer v. Ried*, 56 Ill. App. 245 (1894).

Indiana.—*New York Home Ins.*

Co. v. Marple, 1 Ind. App. 411, 27 N. E. 633 (1890).

Kentucky.—*Gano v. McCarthy's Admr.*, 79 Ky. 409, 3 Ky. L. Rep. 32 (1881).

Maine.—*Battles v. Batchelder*, 39 Me. 19 (1854).

Maryland.—*Groff v. Rohrer*, 35 Md. 327 (1872).

Massachusetts.—*Fiske v. Cole*, 152 Mass. 335, 25 N. E. 608 (1890).

Missouri.—*Merchants' Bank v. Berthold*, 45 Mo. 527 (1870).

New York.—*Flannery v. Van Tassel*, 127 N. Y. 631, 27 N. E. 393, 3 Silvernail 456 (1891).

Pennsylvania.—*Oller v. Bonebrake*, 65 Pa. St. 338 (1870).

Tennessee.—*Mayfield v. State*, 101 Tenn. 673, 49 S. W. 742 (1899).

Texas.—*Gulf, etc., R. Co. v. Southwick*, (Civ. App. 1895) 30 S. W. 592.

Vermont.—*Kidder v. Bacon*, 74 Vt. 263, 52 Atl. 322 (1902).

Virginia.—*Wright v. Rambo*, 21 Gratt. 158 (1871).

United States.—*Fidelity, etc., Co. v. Haines*, 111 Fed. 337, 49 C. C. A. 379 (1901).

are self-serving⁴ or made *post litem motam*.⁵ Where the narrator is a party to the action, the matter stands in a somewhat different position, his antagonist being at liberty to use any portion of the statement as an admission.⁶

§ 2661. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Intent and Intention*); Hearsay Rule as to Res Gestae.—

Clearly to emphasize the important procedural distinction to which attention has already been called it is essential that the true meaning of the term *res gestae* be held firmly in mind. Extrajudicial statements used in their assertive capacity, as proof of the facts stated, should not be confused with the rule at present under consideration regarding the judicial use of such statements when employed as circumstantially or independently relevant. In the broad or American use of the phrase a *res gestae* fact, practically equivalent to a relevant or admissible one, any distinction between these entirely separable uses of the extrajudicial statement is obliterated. Whether the declaration *in pais* be used as a hearsay one or as a circumstantially probative fact, it clearly must, in order to be evidence at all, be relevant or admissible. Hence it is, under the loose nomenclature too frequently in vogue, a part of the *res gestae*. In its assertive capacity, as hearsay, the unsworn statement may well be a proper part of the true *res gestae*¹ as employed in the English or limited meaning. From its correlation with the more physical facts of the *res gestae*, properly so-called, it may derive the element of *spontaneity* from which its subjective relevancy and consequent evidentiary force necessarily arises.² In the meantime, the judicial use of the unsworn statement in its constituent or probative capacity presents in reality no exception to the ordinary rules of evidence, including that against hearsay. It is either a fact in itself because constitutively relevant or is a logical and proper way of proving a relevant physical or psycholog-

4. Colquitt v. Thomas, 8 Ga. 258 (1850); Pinner v. Pinner, 47 N. C. 398 (1855); Corder v. Talbott, 14 W. Va. 277 (1878); Blakeslee v. Rossman, 44 Wis. 553 (1878).

5. Eldredge v. Sherman, 79 Mich. 484, 44 N. W. 948 (1890); Lewis v. Rice, 61 Mich. 97, 27 N. W. 867

(1886); Tucker v. Tucker, 32 Mo. 464 (1862).

6. Kershner v. Kershner, 36 Md. 309 (1872); Proprietary's Lessee v. Ralston, 1 Dall. (Pa.) 18, 1 L. ed. 18 (1773).

§ 2661-1. §§ 6, 47, 2582.

2. §§ 2982 *et seq.*

ical fact, more often the latter. In few connections is it so important, for reasons which are elsewhere intimated,³ to bear this fundamental distinction firmly in mind as in that of direct statements of intent or intention.

§ 2662. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Intent and Intention*); Illustrative Instances.—The mental state of intent or intention, being relevant in many connections to determine the nature, purpose or quality of an act,¹ only occasional instances, illustrative of the rule now under consideration, can well be given. Wherever the psychological fact is admissible, the extrajudicial statement fairly indicative of its existence may be received as a legitimate means of proving it. But on the contrary, should the mental state itself be immaterial, as where the law affixes consequences regardless of the intent or intention with which the act was done, the unsworn declaration is rejected,² not because the extrajudicial statement is not a proper method of proving the fact but because the latter itself cannot be proved. For admissibility, it is of course essential that the unsworn statement, oral³ or in writing⁴ should constitute a relevant manifestation of the particular intent or intention. Otherwise, the utterance is irrelevant, i. e., is not evidence at all.

3. § 2580.

§ 2662-1. *Fossion v. Landry*, 123 Ind. 136, 24 N. E. 96 (1890); *State v. Cross*, 68 Iowa 180, 26 N. W. 62 (1885); *State v. Shelledy*, 8 Iowa 477 (1859).

2. *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 So. 500 (1901); *Germain v. Central Lumber Co.*, 116 Mich. 245, 74 N. W. 644, (1898); *Phoenix Mills v. Miller*, 42 Hun 654, 4 N. Y. St. Rep. 787 (1886); *Phillips v. Higgins*, 7 Lans. (N. Y.) 314 *affirmed* 55 N. Y. 663 (1873); *Patterson v. Smith*, 73 Vt. 360, 50 Atl. 1106 (1901).

3. *Zimmerman v. Brannon*, 103 Iowa 144, 72 N. W. 439 (1897); *Haywood v. Foster*, 16 Ohio 88

(1847); *Cullmans v. Lindsay*, 114 Pa. St. 166, 6 Atl. 332 (1886).

4. *Georgia*.—*Willingham v. Sterling Cycle Works*, 113 Ga. 953, 39 S. E. 314 (1901).

Illinois.—*Sutter v. Rose*, 169 Ill. 66, 48 N. E. 411 (1897).

Indian Territory.—*Swofford Bros.' Dry Goods Co. v. Smith-McCord Dry Goods Co.*, 1 Indian Terr. 314, 37 S. W. 103 (1896).

Massachusetts.—*Kingsford v. Hood*, 105 Mass. 495 (1870).

New York.—*Raymond v. Richmond*, 88 N. Y. 671 (1882).

Pennsylvania.—*Allen v. McMasters*, 3 Watts 181 (1834).

United States.—*Young v. Mahoning County*, 51 Fed. 585, *reversed* 59 Fed. 96, 8 C. C. A. 27 (1892).

§ 2663. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Intent and Intention*); Abandonment.—Abandonment is a question of intention. Such a mental feeling or phase of the mind may properly be established where an issue is raised as to the abandonment of property or persons. The intention, therefore, to abandon¹ or not to abandon² may be shown by the existence of extrajudicial statements.

§ 2663a. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Intent and Intention*); Act of Bankruptcy.—Proving, by means of his extrajudicial statements, the intent or intention of an alleged bankrupt in doing certain acts presents, as a matter of principle, nothing exceptional under the present rule. In itself, it would seem simply to be the employment of a very obvious method of establishing a very ordinary psychological fact.¹ Historically, however, the influence which this line of cases has had in moulding the form of the rule now under consideration has been marked. The early English bankruptcy law provided that certain acts, if done with a definite intent, should warrant an adjudication that the doer of them was in fact a bankrupt, and thereby brought within the other provisions of the act. In establishing the existence of the designated mental state, an appropriate, perhaps, as has been said, the most appropriate mode was by the extrajudicial statements of the alleged bankrupt himself. Thus, with a correct-

§ 2663-1. *California*.—Union Oil Co. v. Stewart, 159 Cal. 149, 110 Pac. 313 (1910); Sweasey v. Sweasey, 126 Cal. 123, 58 Pac. 456 (1899).

Illinois.—Welch v. Louis, 31 Ill. 446 (1863).

Kentucky.—Thompson v. Stewart, 5 Litt. 5 (1824).

Missouri.—State v. Mertz, 14 Mo. App. 55 (1883).

Texas.—McMillan v. Warner, 38 Tex. 410 (1873).

Vermont.—Kimball v. Ladd, 42 Vt. 747 (1870); Noble v. Slyvester, 42 Vt. 146 (1869).

Abandonment of residence or domicile, see § 2665 herein.

2. Thigpen v. Russell, 55 Tex. Civ. App. 211, 118 S. W. 1080 (1909).

§ 2663a-1. "In the case of the bankrupt, the declaration which he makes, at the time of leaving his house, of his intention of so doing, is founded not upon his character for veracity, but on the presumption arising from experience that where a man does an act, his cotemporary declaration accords with his real intention, unless there be some reason for misrepresenting his real intention." Cornelius v. State, 12 Ark. 782, 806 (1852), per Johnson, C. J.

ness of administrative result, but upon a confused and baffling line of reasoning, in which the phrase *res gestae* played, even in England, a multiform role,² the important element of mental state was established by the declarations of the bankrupt made *in pais*. In this way, for example, it might be shown that the individual in question was secreting himself,³ had made a fraudulent preference,⁴

2. "I adhere therefore to what I said in *Rawson v. Haigh*. It is not necessary to lay down the precise time within which such declarations shall be admissible or excluded; but . . . it must always be considered whether there are any and what connecting circumstances between the declaration and the act. Here . . . those circumstances are all connected together as part of the same transaction." *Ridley v. Gyde*, 9 Bing. 349, 354 (1832), per Park, J.

"It is impossible to tie down to time the rule as to the declarations. . . . If, as in the present case, there are connecting circumstances, it may, even at that time form part of the whole *res gestae*." *Rawson v. Haigh*, 2 Bing. 99, 104 (1824), per Park, J.

"Where the declaration of the bankrupt is part of the *res gestae*, though it may show the intention of the act and thereby constitute an act of bankruptcy, it may be evidence." *Robson v. Kemp*, 4 Esp. 233, 234 (1802), per Lord Ellenborough.

"What a bankrupt declares at the time of committing an act of bankruptcy is always received in evidence, when proved by another person. . . . But these declarations have been greatly, I conceive, misunderstood or misrepresented. They must accompany the act; for where words and actions are contemporaneous, they constitute one transaction, they are together one *res gestae*, and the words are evidence of the reason of the act or the intention of the actor. . . . What Lord Kenyon and the court said in the case of *Bateman v. Bailey* has, I conceive, led many into

error on this subject. . . . If the court intended to say that what he declared after his return was complete, and when he was doing no act connected with it (is admissible), it is presumed the decision cannot be supported. Whilst he is preparing to go, or in the act of going, and during his absence from home, and whilst he is returning or unpacking his portmanteau, etc., what he says is part of the act of bankruptcy; but when he is only meditating a future act, or speaking of a past one completely finished, his words surely can have no more legal operation than those of any other man." 1 Christian on Bankruptcy (1812).

3. "The act and intention were both necessary to be proved. . . . The substantive act proved *aliunde* is the departure from home; that is equivocal; the declaration made during the continuance of that act shows the intention with which it was done." *Rouch v. R. Co.*, 1 Q. B. (N. S.) 51, 60, 63 (1841), per Denman, L. C. J.

"When a bankrupt has done an equivocal act, his declarations accompanying that act are admissible to explain his intentions; as, where he has left his dwelling-house, which he may have done either in furtherance of his business or to avoid payment of a debt." *Ridley v. Gyde*, 9 Bing. 349, 352 (1832), per Tindal, C. J.

4. "The question here is, whether the security in question was given by way of fraudulent preference. . . . To establish this, the declarations of the bankrupt must be admitted, not so much as declarations, but as a part

or had fled the country,⁵ with intent to avoid his creditors.⁶ Although, in strictness, the extrajudicial statement of intent or intention is merely a fact circumstantially establishing a relevant psychological state, it is evident that, under certain circumstances, e. g., the incorporation with a fact in the *res gestae*, properly so called, an element of spontaneity may also appear.⁷ If so, a new element of probative force is added, the inference of truth is also permissible and the declaration may properly be treated as evidence of the facts which it asserts. It being practically impossible whenever the inference of truth logically arises, especially in this class of cases, to refuse to draw it, sound administration may well require that extrajudicial statements should only be used where the circumstances seem to guarantee a spontaneous utterance.⁸

§ 2664. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Intent and Intention*); Delivery.—The act of delivery or receipt may be in itself entirely ambiguous, if not meaningless. To make the act intelligible, to give it point and certainty, to indicate with clearness its legal consequences, it is quite necessary to know with what *animus* the act is done. Where, therefore, chattels,¹

of his conduct from which the inference is to be drawn that the security was given without pressure.” *Ridley v. Gyde*, 9 Bing. 349 (1832), per Bosanquet, J.

5. “Wilkinson’s going abroad was of itself an equivocal act, and requiring explanation, and, if so, we must endeavor to discover the motive with which it was accompanied, and this is generally, if not always, affected by the declarations of the party himself.” *Rawson v. Haigh*, 9 Moore 217, 224 (1824), per Best, C. J.

6. “The exception to this rule (hearsay rule) is that when declarations accompany an act and have a tendency to show the motive and intention of the act, they are sometimes admissible. Such was the case cited of the bankrupt, who having committed an act equivocal in its nature, his declaration made at the time showing his intention was admitted.”

Carter v. Gregory, 8 Pick. (Mass.) 165, 169 (1829), per Parker, C. J.

7. § 2984.

8. “In order to render such declarations or letters admissible, they must be made or written at the time, or during the continuance of the act or urgency of the circumstances under which they are elicited, or sent; and here, as the act of bankruptcy was a continuous act from the time of Wilkinson’s departure from this country for France, . . . they may be considered as forming part of one and the same continuing act.” *Rawson v. Haigh*, 9 Moore 217, 224, 2 Bing. 99 (1824), per Best, C. J.

§ 2664-1. *Alabama*. — *Bragg v. Massie*, 38 Ala. 89, 79 Am. Dec. 82 (1861); *Jennings v. Blocker’s Admr.*, 25 Ala. 415 (1854); *Hale v. Stone*, 14 Ala. 803 (1848); *Rembert v. Brown*, 14 Ala. 360 (1848).

money,² negotiable³ or written⁴ instruments, or the like, are shown

Illinois.—McIntosh v. Fisher, 125 Ill. App. 511 (1906).

Kentucky.—Smith v. Montgomery's Admr., 5 T. B. Monr. 502 (1827), (slave).

Maine.—Whittemore v. Wentworth, 76 Me. 20 (1884).

Massachusetts.—Milford v. Belingham, 16 Mass. 108 (1819).

South Carolina.—Hatton v. Banks, 1 Nott & M. 221 (1818).

Wisconsin.—Wambold v. Vick, 50 Wis. 456, 7 N. W. 438 (1880).

2. *Alabama*.—Hart v. Freeman, 42 Ala. 567 (1868); Dillard v. Scruggs, 36 Ala. 670 (1860).

Florida.—Hood v. French, 37 Fla. 117, 19 So. 165 (1896).

Illinois.—Medley v. People, 49 Ill. App. 218 (1892); Thorp v. Goewey, 85 Ill. 611 (1877); Richerson v. Sternburg, 65 Ill. 272 (1872); Rigg v. Cook, 9 Ill. 336, 46 Am. Dec. 462 (1847).

New York.—Holcomb v. Campbell, 42 Hun 398, 4 N. Y. St. Rep. 799, affirmed 118 N. Y. 46, 22 N. E. 1107 (1886).

North Carolina.—Harper v. Dail & Bro., 92 N. C. 394 (1885).

Tennessee.—Planters' Bank v. Massey, 2 Heisk. 360 (1871).

Payment.—In this, as in other connections, narrative statements are excluded. To be admissible as controlling the effect of payment, the extrajudicial statement should not be an account of a past mental state but a relevant manifestation of a present one. Tabor v. Hardin, 9 Ky. L. Rep. 491 (1887); Grier v. Latimer, 47 S. C. 176, 25 S. E. 136 (1896). Where the latter situation is presented the intention disclosed will determine the application of the payment. Gay v. Gay, 5 Allen (Mass.) 157 (1862); Blood v. Rideout, 13 Metc. (Mass.) 237 (1847); Shelley v. Lash, 14 Minn. 498 (1869).

A declaration to an agent in this connection must be shown to have been made to one duly authorized or to have been communicated to the principal. Slevin v. Wallace, 64 Hun (N. Y.) 288, 19 N. Y. Suppl. 87, 46 N. Y. St. Rep. 629, affirmed 144 N. Y. 635, 39 N. E. 494 (1892); Woodstock Bank v. Clark, 25 Vt. 308 (1853). Everything said at the interview with regard to the subject of payment is not, however, competent. The utterance must relate to some mental state relevant to an issue raised in the case. Mueller's Estate, 159 Pa. St. 590, 28 Atl. 491 (1894). A contrary view has at times been held to the effect that the statements made by a creditor at the time of making payment are evidence of the facts asserted. Thus, it has been said that the extrajudicial statement as to the identity of the person actually making payment is admissible. Harrison v. Harrison, 9 Ala. 73 (1846). By a parity of reasoning, the unsworn statement will be received to negative the fact of payment. Kelly v. Forty-Second St., etc., R. Co., 48 N. Y. App. Div. 627, 62 N. Y. Suppl. 650 (1900).

3. Higby v. New York, etc., R. Co., 3 Bosw. (N. Y.) 497 (1858).

4. *Alabama*.—Guntersville Bank v. Webb, 108 Ala. 132, 19 So. 14 (1896).

California.—Kyle v. Craig, 125 Cal. 107, 57 Pac. 791 (1899) (deed).

Massachusetts.—Stewart v. Stewart, 177 Mass. 493, 59 N. E. 116 (1901). Akers v. Demond, 103 Mass. 318 (1869).

New York.—Bouck v. Gleason, 43 Hun 637, 6 N. Y. St. Rep. 382 (1887).

Ohio.—Oldham v. Broom, 28 Ohio St. 41 (1875).

Vermont.—Lawrence v. Graves' Estate, 60 Vt. 637, 15 Atl. 342 (1888).

Filing of instrument for registra-

to have been delivered or received an extrajudicial statement showing the intent or intention with which the act is done is also regarded as admissible. A like use of the unsworn declaration may designate the person on whose account money is thus delivered⁵ or received.⁶ Should it appear that no change of actual possession has occurred, the declaration of intention may have still another use. It may show the changed character of a subsequent holding.⁷ The existence of a previous mental state to an effect different from that with which it is claimed a given delivery was made may be an independently relevant fact.⁸ In the same way, the fact that a conveyance was intended as an advancement⁹ may be shown by the extrajudicial declarations of the grantor.

Gift.—The making or delivery of a gift may be proved by the declarations of the donor.¹⁰ Such utterances may be used to corroborate other evidence to the same effect,¹¹ though made subsequent to the time of the alleged gift.¹² Admissibility is, however, determined in many instances by the objectives prescribed

tion.—For the purpose of showing whether the filing of an instrument for registration was intended to be conditioned or to operate as a delivery declarations of the party at the time of filing are admissible. *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606, 53 So. 812 (1910). Addenda made nearly two months after registration was, however, held to be inadmissible to show that the deed was not delivered. *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606, 53 So. 812 (1910).

5. *Carter v. Beals*, 44 N. H. 408 (1862); *Lee v. Kennedy*, 25 Misc. (N. Y.) 140, 54 N. Y. Suppl. 155 (1898).

Directions by a depositor as to how a certain deposit shall be credited, when a part of the transaction or accompanying it, may be shown by the banker after the decease of the depositor. *Washbon v. State Bank*, 86 Kan. 468, 121 Pac. 515 (1912).

6. *Hall v. Young*, 37 N. H. 134 (1858).

7. *Shaw & Shaw v. Cleveland*, (Ala. App. 1912) 59 South. 534; *Jones v. Chenault*, 124 Ala. 610, 27 So. 515, 82

Am. St. Rep. 211 (1900); *Clark v. Rush*, 19 Cal. 393 (1861).

8. *Whitney v. Wheeler*, 116 Mass. 490 (1875).

"When there is any ground for doubt as to the intent with which a delivery of property was made, . . . evidence tending to show a continuous and apparently fixed state of mind and purpose, inconsistent with such alleged gift, existing previously thereto, may have a legitimate bearing upon the case." *Whitney v. Wheeler*, 116 Mass. 490, 492 (1875), per Wells, J.

9. *Bland v. Beasley*, (Ga. 1912) 76 S. E. 50.

10. *Leitch v. Diamond Nat. Bank of Pittsburgh*, (Pa. 1912) 83 Atl. 416; *Schauer v. Von Schauer*, Tex. Civ. App. 1910) 138 S. W. 145.

11. *Garrison v. Union Trust Co.*, 164 Mich. 345, 17 Detroit Leg. N. 1131, 129 N. W. 691, 32 L. R. A. (N. S.) 219 n (1911).

12. *McIntosh v. Fisher*, 125 Ill. App. 511 (1906); *McElveen v. King*, 88 S. C. 346, 70 S. E. 801 (1911).

by substantive law. Oral declarations of a decedent made subsequent to a gift inconsistent therewith, are not ordinarily competent to prove fraud or undue influence.¹³ In general, the declarations of a grantor or donor in his own favor are incompetent.¹⁴

§ 2665. (Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Intent and Intention); Domicile.—Change of domicile is partly a question of intent. Wherever this psychological fact of an intended change of residence is relevant, the extrajudicial statement of the person in question will be received,¹ occasionally with the imposition of certain administrative restrictions designed to prevent misleading the jury,² as a logical means of establishing it. Thus, the intent or intention to abandon³ or, on the other hand, not

13. *Gick v. Stumpf*, 204 N. Y. 413, 97 N. E. 865 (1912).

14. *Albright v. Albright*, (Iowa 1911) 133 N. W. 737.

§ 2665. *Matter of Newcomb*, 192 N. Y. 238, 84 N. E. 950 (1908), affirming order 107 N. Y. Suppl. 1139, 122 App. Div. 920 (1907).

"The change in his place of abode might be temporary or permanent. It might indicate a change of domicile or not, according to the circumstances attending it. Declarations of a person accompanying a change of his abiding-place have always been held competent to explain the change as a part of the *res gestae*; but declarations in such cases are often admissible on a broader ground than as a part of the act of removing from one place to another. The intention of the person removing is competent to be proved as an independent fact, and anything which tends to show his intention in making the change may be introduced if it is free from objection in other particulars. . . . Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show the intention. The danger that declarations may have been made for a purpose . . . has led to the exclusion

of them . . . unless they are made under such circumstances as to give them some corroboration. In general, such corroboration is found in the fact that they accompany and explain acts which of themselves would be competent evidence on the issue involved." *Viles v. Waltham*, 157 Mass. 542, 543, 32 N. E. 901, 34 Am. St. Rep. 311 (1893), per Knowlton, J.; *Cherry v. Slade*, 2 Hawks (N. C.) 400 (1823).

2. *Viles v. Waltham*, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311 (1893).

"They are to be credited as the index of his intention, when not unreasonable in themselves, not inconsistent with other facts in the case, and not under circumstances creating suspicion of insincerity." *Ex parte Blumer*, 27 Tex. 734, 743 (1865), per Roberts, J.

3. *Connecticut*.—*New Milford v. Sherman*, 21 Conn. 101 (1851).

Illinois.—*Matzenbaugh v. People*, 194 Ill. 108, 62 N. E. 546, 88 Am. St. Rep. 134 (1901); *Dorr v. Seneca*, 74 Ill. 101 (1874).

Indiana.—*Austin v. Swank*, 9 Ind. 109 (1857); *Burgess v. Clark*, 3 Ind. 250 (1851).

to abandon⁴ a present residence or to acquire a new one⁵ may be shown in this manner. Such declarations may be in writing.⁶ As evidence of the facts asserted in them, the utterances are not admissible. Thus, the declarations of a pauper as to his then place of residence, are not receivable in evidence in an action to which he is not a party, for the purpose of proving the *fact* of his resi-

Kansas.—Bigelow v. Bear, 64 Kan. 887, 68 Pac. 73 (1902).

Louisiana.—Offutt v. Edwards, 9 Rob. 90 (1844).

Maine.—Church v. Rowell, 49 Me. 367 (1861); Cornville v. Brighton, 39 Me. 333 (1855).

Massachusetts.—Reeder v. Holcomb, 105 Mass. 93 (1870); Salem v. Lynn, 13 Metc. 544 (1847); Kilburn v. Bennett, 3 Metc. 199 (1841).

United States.—Doyle v. Clark, 7 Fed. Cas. No. 4,053, 1 Flip. 536 (1876).

"They were made in the ordinary course of business, and in relation to the defendant's removal; and they were made to the owner of the house in which he was at the time residing. This giving notice of his intended removal is to be considered an act, which he might prove in any case in which it became material; and, if so, all that he said explanatory of his intention in relation to his removal, seems to us to be admissible in evidence." Kilburn v. Bennett, 3 Metc. (Mass.) 199, 201 (1841), per Wilde, J.

Letters written to friends stating an intention to make a change of domicile may be received, the good faith of the declarant and the weight to be given to the declarations being for the trial court. Matter of Newcomb, 192 N. Y. 238, 84 N. E. 950, *affirming* 122 App. Div. 920, 107 N. Y. Suppl. 1139 (1908).

4. Fette v. Lane, 104 Cal. xvii, 37 Pac. 914 (1894); Bigelow v. Bear, 64 Kan. 887, 68 Pac. 73 (1902); Holliday v. McMillan, 83 N. C. 270 (1880).

"It was not difficult to prove that he was in Lanesborough before the first of May, that he came there with his horse and trunks, and made a contract for board and lodging. But the effect of these acts depended upon the intent and purpose with which they were done. * * * Qualified by such intent and purpose, they were perfectly consistent with the intention of retaining his domicile in Cheshire. * * * That intent is manifested by what he does and by what he says when doing, and sometimes as significantly by what he omits to do or to say." Cole v. Cheshire, 1 Gray (Mass.) 441, 444 (1854), per Thomas, J.

5. *Connecticut*.—New Milford v. Sherman, 21 Conn. 101 (1851).

Georgia.—Jackson v. DuBose, 87 Ga. 761, 13 S. E. 916 (1891).

Louisiana.—Routh v. Routh, 9 Rob. 224, 41 Am. Dec. 326 (1844).

Maine.—Gorham v. Canton, 5 Greenl. 266, 17 Am. Dec. 231 (1828).

Massachusetts.—Wilson v. Terry, 9 Allen 214 (1864); Kilburn v. Bennett, 3 Metc. 199 (1841); Thorndike v. City of Boston, 1 Metc. 242 (1840).

New York.—Plant v. Harrison, 36 Misc. Rep. 649, 74 N. Y. Suppl. 411 (1902).

North Carolina.—Cherry v. Slade, 2 Hawks 400 (1823).

United States.—Rucker v. Bolles, 80 Fed. 504, 25 C. C. A. 600 (1897); Doyle v. Clark, 1 Flip. 536, 7 Fed. Cas. No. 4,053 (1876).

6. Matter of Newcomb, 192 N. Y. 238, 84 N. E. 950 (1908), *affirming* 107 N. Y. Suppl. 1139, 122 App. Div. 920 (1907).

dence at that place.⁷ In several jurisdictions, however,⁸ a customary confusion with the rule relating to unsworn statements rendered spontaneous by means of their position in the *res gestae*, properly so-called,⁹ is to be observed. There is apparent ground for such a confusion. In case of direct statements of intent or intention, the declaration is often being used, almost of necessity,¹⁰ in its assertive capacity, in proof of the fact which it alleges. It has, therefore, seemed wise judicial administration to allow the extrajudicial declaration as to domicile to be placed before the jury only upon proof of the fulfilment of conditions which would make the utterance a spontaneous one.¹¹

Probative force.—The probative weight of such utterances is a question for the trial court.¹²

§ 2666. (Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States); Knowledge; Statements to A.—Few mental states are of greater importance in the view of the law than that of knowledge.

7. *Derby v. Salem*, 30 Vt. 722 (1858).

8. A pauper's intention as to residence is a question of fact, to which he may testify himself; but his declarations to others can only be received in evidence when accompanied by acts which they explain. *Inhabitants of Knox v. Inhabitants of Moulville*, 98 Me. 493, 57 Atl. 792 (1904).

"To make the declarations of a party who is competent to be a witness, admissible as 'verbal acts,' those declarations must accompany, and be explanatory of, some act which of itself has a tendency to establish the issue to be determined. Declarations made at such times, and under such circumstances, become a part of the *res gestae*, and as such are admissible. When a person changes his actual residence, or domicile, or is upon a journey, leaves home, or returns thither, or remains abroad, or secrets himself; or, in fine, does any other act, material to be under-

stood; his declarations, made at the time of the transaction, and expressive of its character, motive, or object, are regarded as 'verbal acts, indicating a present purpose and intention,' and are therefore admitted in proof like any other material facts." *Cornville v. Brighton*, 39 Me. 333, 335 (1855), per Rice, J.

9. §§ 2984 *et seq.*

10. § 2580.

11. "Declarations cannot with propriety be received as evidence, unless the act which the declarations accompany, has itself a material bearing upon the issue presented; for the act is the principal fact, and the declarations are received, as tending to exhibit the purpose of the agent, which prompted it, and was productive of the act done." *Inhab. of Corinth v. Inhab. of Lincoln*, 34 Me. 310, 312 (1850), per Tenney, J.

12. *Matter of Newcomb*, 192 N. Y. 238, 84 N. E. 950 (1908), affirming 107 N. Y. Suppl. 1139, 122 App. Div. 920 (1907).

The significance and legal consequences of conduct are determined, in large manner, by consideration of what the person in question knew. In this connection, as in so many others, a glimpse at the contents of the person's mind may be gained by a consideration of the relevant judicial statements which have been made to or by him. In other words, in judging as to what A knew at a given time, it may be helpful to consider (1) what statements were made to A and, (2) what statements were made by A which tend to throw light upon the subject. The two classes of extrajudicial declarations will be examined in this order.

Statement to A.—Extrajudicial statements containing relevant information, or capable of conveying it, which have been made to one, say A, who subsequently acts in the matter, may be received for the purpose of showing the extent of his knowledge at a given time.¹ That the statement should have been made directly to A himself is by no means required. The rule is satisfied if it is shown that an unsworn declaration covering the fact in question was in some way brought to his attention.² The form in which

§ 2666-1. *State v. Grote*, 109 Mo. 345, 19 S. W. 93 (1891); *State v. Estis*, 70 Mo. 427 (1879); *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242 (1871); *Darling v. Klock*, 165 N. Y. 623, 59 N. E. 1121 (1900); *Titus v. Gage*, 70 Vt. 13, 39 Atl. 246 (1896).

2. *Alabama.*—*Pace v. Louisville & N. R. Co.*, 166 Ala. 519, 52 So. 52 (1910); *Naugher v. State*, 116 Ala. 463, 23 So. 26 (1898); *Abbett v. Page*, 92 Ala. 571, 9 So. 332 (1891).

California.—*Kneeland v. Wilson*, 12 Cal. 241 (1859).

Colorado.—*Denver, etc., Rapid Transit Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106 (1894).

Connecticut.—*Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255 (1862); *Ely v. Tweedy*, 18 Conn. 458 (1847).

Georgia.—*Chattanooga, etc., R. Co. v. Clowdis*, 90 Ga. 258, 17 S. E. 88 (1892); *Black v. Thornton*, 31 Ga. 641 (1860).

Illinois.—*Allin v. Millison*, 72 Ill. 201 (1874); *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353 (1857).

Indiana.—*Pape v. Hartwig*, 23 Ind. App. 333, 55 N. E. 271 (1899).

Maine.—*Walker v. Thompson*, 61 Me. 347 (1873).

Massachusetts.—*Boston Woven Hose, etc., Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478 (1901); *Beach v. Bemis*, 107 Mass. 498 (1871); *Simmons v. New Bedford, etc., Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99 (1867); *Stiles v. Allen*, 5 Allen 320 (1862).

Michigan.—*Robinson v. Worden*, 33 Mich. 316 (1876); *Sleight v. Henning*, 12 Mich. 371 (1864).

Minnesota.—*Riggs v. Thorpe*, 67 Minn. 217, 69 N. W. 891 (1897).

Missouri.—*State v. Loehr*, 93 Mo. 103, 5 S. W. 696 (1887); *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399 (1880); *Conover v. Berdine*, 69 Mo. 125, 33 Am. Rep. 496 (1878).

New Hampshire.—*Sumner v. Dalton*, 58 N. H. 295 (1878).

New York.—*Cassidy v. Uhlmann*, 54 N. Y. App. Div. 205, 66 N. Y. Suppl. 670, affirmed 170 N. Y. 505,

this is done is not material. It may be done directly as where advice is offered or,³ information is furnished.⁴ The giving of instruc-

63 N. E. 554 (1900); *People v. Wood*, 126 N. Y. 249, 27 N. E. 362 (1891); *New York v. Exchange F. Ins. Co.*, 3 Abb. Dec. 261, 3 Keyes 436, 3 Transcr. App. 206, 34 How. Pr. 103 (1867); *Seckel v. Frauenthal*, 9 Bosw. 350 (1862); *Goodrich v. People*, 3 Park. Cr. 622, *affirmed* 19 N. Y. 574 (1858).

Pennsylvania.—*Huntzinger v. Jones*, 60 Pa. St. 170 (1869); *Wissler v. Hershey*, 23 Pa. St. 333 (1854).

South Carolina.—*Girardeau v. Southern Express Co.*, 48 S. C. 421, 26 S. E. 711 (1896).

Texas.—*Hornberger v. Giddings*, 31 Tex. Civ. App. 283, 71 S. W. 989 (1903); *Rodriguez v. Espinosa*, (Civ. App. 1894) 25 S. W. 669; *Mexican Nat. R. Co. v. Musette*, 7 Tex. Civ. App. 169, 24 S. W. 520 (1893).

Vermont.—*Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253 (1891).

Wisconsin.—*Cadden v. American Steel Barge Co.*, 88 Wis. 409, 60 N. W. 800 (1894).

United States.—*St. Louis, etc., R. Co. v. Greenthal*, 77 Fed. 150, 23 C. A. 100 (1896); *Young v. Mahoning County*, 51 Fed. 585, *reversed* 59 Fed. 96, 8 C. C. A. 27 (1892); *Emma Silver Mining Co. v. Park*, 8 Fed. Cas. No. 4,467, 14 Blatchf. 411 (1878).

Official railroad telegrams by conductors and train despatchers are admissible as to the reckless running of trains and as to company's knowledge on the subject. *Mexican Nat. R. Co. v. Musette*, 7 Tex. Civ. App. 169, 24 S. W. 520 (1893).

3. *Fisher v. State*, 77 Ind. 42 (1881); *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547 (1858).

4. *Alabama.*—*Inman v. Schloss*, 122 Ala. 461, 25 So. 739 (1898); *Sanford v. Howard*, 29 Ala. 684, 68 Am. Dec. 101 (1857); *Edy v. McCoy*, 20 Ala. 403 (1852).

California.—*Dennie v. Clark*, 3 Cal. App. 760, 87 Pac. 59 (1906); *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380 (1899); *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529 (1892); *People v. Shea*, 8 Cal. 538 (1857).

Connecticut.—*Phelps v. Foot*, 1 Conn. 387 (1815).

Florida.—*Jones v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676 (1885).

Georgia.—*O'Connell v. State*, 55 Ga. 296 (1875); *Parsons v. State*, 43 Ga. 197 (1871).

Illinois.—*Merwin v. Arbuckle*, 81 Ill. 501 (1876).

Indiana.—*Jones v. State*, 71 Ind. 66 (1880); *Knowlton v. Clark*, 25 Ind. 395 (1865).

Iowa.—*State v. Gainor*, 84 Iowa 209, 50 N. W. 947 (1892); *Van Tuyl v. Quinton*, 45 Iowa 459 (1877).

Kansas.—*State v. Earnest*, 56 Kan. 31, 42 Pac. 359 (1895).

Kentucky.—*Johnson v. Com.*, 61 S. W. 1005, 22 Ky. L. Rep. 1885 (1901); *Louisville, etc., Packet Co. v. Samuels' Admx.*, 59 S. W. 3, 22 Ky. L. Rep. 979 (1900); *Com. v. Stout*, 14 Ky. L. Rep. 576 (1893); *Kearns v. Caldwell*, 7 Ky. L. Rep. 450 (1885); *Werner v. Com.*, 80 Ky. 387, 4 Ky. L. Rep. 203 (1882).

Louisiana.—*State v. West*, 43 La. Ann. 1006, 10 So. 364 (1891); *Sanders v. Huey*, 4 La. Ann. 518 (1849).

Maine.—*Thompson v. Thompson*, 79 Me. 286, 9 Atl. 888 (1887).

Massachusetts.—*Mange v. Holmes*, 7 Allen 136 (1863); *Com. v. Moulton*, 4 Gray 39 (1855); *Bacon v. Towne*, 4 Cush. 217 (1849); *Robinson v. Wadsworth*, 8 Metc. 67 (1844).

Michigan.—*People v. Palmer*, 105 Mich. 568, 63 N. W. 656 (1895); *Gordon v. Grand Rapids, etc., R. Co.*, 103 Mich. 379, 61 N. W. 549 (1894); *McCreery v. Green*, 38 Mich. 172 (1878).

tions may often be the means by which knowledge may be con-

Mississippi.—Penn v. State, 62 Miss. 450 (1884).

Missouri.—Edge v. Southwest Missouri Electric Ry. Co., 206 Mo. 471, 104 S. W. 90 (1907); Spohn v. Missouri Pac. R. Co., 122 Mo. 1, 26 S. W. 663 (1894); Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431 (1866).

New Hampshire.—Carter v. Beals, 44 N. H. 408 (1862). See, also, Badger v. Story, 16 N. H. 168 (1844).

New York.—People v. De Graff, 44 Hun 622, 5 N. Y. Cr. Rep. 561, 6 N. Y. St. Rep. 412 (1887); McNair v. U. S. National L. Ins. Co., 13 Hun 144 (1878); Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492 (1873); Robbins v. Richardson, 2 Bosw. 248 (1857).

North Carolina.—Green v. Cawthorn, 15 N. C. 409 (1834).

Ohio.—Lake Shore, etc., R. Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052 (1892).

Pennsylvania.—Trexler v. Africa, 42 Pa. Super. Ct. 542 (1910); Perry v. Jensen, 142 Pa. St. 125, 21 Atl. 866, 12 L. R. A. 393 (1891).

South Carolina.—Parris v. Jenkins, 2 Rich. Law 106 (1845).

South Dakota.—State v. Mulch, 17 S. D. 321, 96 N. W. 101 (1903).

Texas.—Reeves v. State, 34 Tex. Cr. R. 483, 31 S. W. 382 (1895); Miller v. State, 32 Tex. Cr. R. 319, 20 S. W. 1103, writ of error dismissed 153 U. S. 535, 14 S. Ct. 874, 38 L. ed. 812 (1893).

Vermont.—Miller v. Wood, 44 Vt. 378 (1872).

Virginia.—O'Boyle v. Com., 100 Va. 785, 40 S. E. 121 (1901).

Wisconsin.—Hall v. Stevens, 89 Wis. 447, 62 N. W. 81 (1895); Hemmingway v. Chicago, etc., R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823 (1888); Tuckwood v. Hawthorn, 67 Wis. 326, 30 N. W. 705 (1886).

United States.—Norwich, etc., Transp. Co. v. Flint, 13 Wall. 3, 20 L. ed. 556 (1871), affirming 9 Fed. Cas. No. 4,874, 7 Blatchf. 536 (1870).

England.—In re Metropolitan Coal Consumers' Assoc., [1892] 3 Ch. 1, 61 L. J. Ch. 741, 66 L. T. Rep. (N. S.) 700.

Canada.—Deveber v. Roop, 16 N. Brunsw. 295 (1876).

The fact of an inquiry having been made may be received as evidence, the details of the conversation being inadmissible as hearsay. *Louisville & N. R. Co. v. Dilburn*, (Ala. 1912) 59 South. 438; *State ex rel. Bressman v. Theisen*, (Mo. App. 1912) 142 S. W. 1088.

"Whenever the knowledge or information of the party charged to have been negligent is a factor in determining such question, it is proper, for the purpose of showing such knowledge or information, to show that notice was given him, and that he was informed of the facts which would constitute negligence." *Smith v. Whittier*, 95 Cal. 279, 293, 30 Pac. 529 (1892), per Harrison, J.

"Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence, and not hearsay." *Friend v. Hamill*, 34 Md. 298, 308 (1870), per Miller, J.

Where a portion of the information claimed to have been possessed by a declarant consisted of the reports of the secretary of a company, it has been required that the officer making them should have been sworn. *Diel v. Kellogg*, 163 Mich. 162, 128 N. W. 420, 17 Detroit Leg. N. 891 (1910).

Replies to inquiries may be relevant for the purpose of indicating whether reasonable search has been made, e. g., for a witness, original document, or the like. *Sanborn v.*

veyed⁵ as may also extrajudicial statements in other ways, such

Cunningham, 19 Cal. XIX, 33 Pac. 894 (1893). In the same way the different steps by which any other search is prosecuted may be detailed. "Half the transactions of life are done by means of words. There is a distinction, which it appears to me is not sufficiently attended to, between mere statements made by and to witnesses, that are not receivable in evidence, and direction given and acts done by words, which are evidence. The witness, in this case, may say that he made inquiries, and, in consequence of directions given to him in answer to those inquiries, he followed the prisoners from place to place until he apprehended them." R. v. Wilkins, 4 Cox Cr. 92 (1849), per Erle, J.

Reliance upon statements.—An independently relevant extrajudicial statement may be given in evidence as being the information upon which one whose conduct is in question relied in acting as he did. Mills v. Riggle, 83 Kan. 703, 112 Pac. 617, 22 Am. & Eng. Ann. Cas. 616 (1911); Diel v. Kellogg, 163 Mich. 162, 128 N. W. 420, 17 Detroit Leg. N. 891 (1910).

Warning.—The information furnished may properly take the form of a warning. Payne v. Waterloo, C. F. & N. Ry. Co., 153 Iowa 445, 133 N. W. 781 (1911).

5. *Alabama.*—Ward v. Winston & Co., 20 Ala. 167 (1852).

Florida.—Parter v. Ferguson, 4 Fla. 102 (1851).

Georgia.—Columbus, etc., R. Co. v. Kennedy, 78 Ga. 646, 3 S. E. 267 (1887).

Illinois.—Nelson v. Smith, 28 Ill. 495 (1862).

Iowa.—Zenor v. Smith, 150 Iowa 424, 130 N. W. 382 (1911); Welch v. Spies, 103 Iowa 389, 72 N. W. 548 (1897).

Massachusetts.—Corcoran v.

Batchelder, 147 Mass. 541, 18 N. E. 420 (1888).

Michigan.—Bellows v. Crane Lumber Co., 129 Mich. 560, 89 N. W. 367 (1902); Ribble v. Starrat, 79 Mich. 204, 44 N. W. 594 (1890).

Mississippi.—McCleary v. Anthony, 54 Miss. 708 (1877).

Rhode Island.—Anthony v. Wheatons, 7 R. I. 490 (1863).

South Dakota.—Iverson v. Soo Elevator Co., 119 N. W. 1006 (1909).

Texas.—Gulf, etc., R. Co. v. Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699 (1896).

6. *Alabama.*—Pace v. Louisville & N. R. Co., 166 Ala. 519, 52 So. 52 (1910); Louisville, etc., R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710 (1889); Black v. Hightower, 30 Ala. 317 (1857); Stringfellow v. Mariatt & Hobson, 1 Ala. 573 (1840).

Arkansas.—Blagg v. Hunter, 15 Ark. 246 (1854).

California.—Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (1892); Malone v. Hawley, 46 Cal. 409 (1873); McKinney v. Smith, 21 Cal. 374 (1863).

Colorado.—Denver, etc., Rapid Transit Co. v. Dwyer, 20 Colo. 132, 36 Pac. 1106 (1894).

Georgia.—Kuglar v. Garner, 74 Ga. 765 (1885).

Louisiana.—Benton v. Roberts, 1 Rob. 101 (1841); Grayson v. Wooldridge, 2 La. 94 (1830).

Maine.—Palmer v. Penobscot Lumbering Assoc., 90 Me. 193, 38 Atl. 108 (1897).

Massachusetts.—Brady v. Norcross, 174 Mass. 442, 54 N. E. 874 (1899); Kilburn v. Bennett, 3 Mete. 199 (1841).

Oregon.—Ladd v. Hawkes, 41 Oreg. 247, 68 Pac. 422 (1902).

The unsworn statements contained in a letter brought to A's attention may prove or even serve to constitute

as a notice communicated⁶ or a representation made.⁷ Similarly facts may be embodied in a threat,⁸ especially in criminal cases.

the giving of notice to him. When a letter is offered in evidence with this object, judicial administration will not ordinarily require that the proponent prove also the letter to which it is a reply. Where the question is as to the effect, in point of knowledge, of an entire correspondence, all the letters must be produced. *Norris v. Hartford F. Ins. Co.*, 57 S. C. 358, 35 S. E. 572 (1899). Such letters may be those of an agent. "There are certainly some cases where the declarations or letters of an agent are proper evidence; and others where he must be examined and his letters are not evidence, if he be alive. . . . If the object is to prove a fact, the agent is the proper person to prove it; and his evidence is better than his declarations. . . . But if the object is to prove . . . what were the statements made by him, his letters or conversations are proper evidence—not of the facts stated in them, but that such inducements and statements were made. . . . Upon this principle, many letters from Peter Blight to the defendant were read, not as evidence of a single fact mentioned in them, but that they communicated certain information to the defendants; which, however, if important to be established, it would have been incumbent on the plaintiff to establish by other evidence." *Blight v. Ashley*, 3 Fed. Cas. No. 1541, 1 Pet. C. C. 15, 21 (1808), per Washington, J.

7. *Illinois*.—*Black v. Wabash, etc.*, R. Co., 111 Ill. 351, 53 Am. Rep. 628 (1884).

Iowa.—*Hannawalt v. U. S. Equitable L. Assur. Soc.*, 102 Iowa 667, 72 N. W. 284 (1897).

Maine.—*Shaw v. Emery*, 42 Me. 59 (1856).

Maryland.—*Frederick Cent. Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597 (1862).

Massachusetts.—*Baxter v. Abbott*, 7 Gray 71 (1856).

New Hampshire.—*Whitehouse v. Hansom*, 42 N. H. 9 (1860).

New York.—*Jones v. Jones*, 6 N. Y. St. 736 (1887); *Higby v. New York, etc., R. Co.*, 3 Bosw. 497, 7 Abb. Pr. 259 (1858).

North Carolina.—*Ware v. Nesbit*, 94 N. C. 664 (1886).

Pennsylvania.—*Wanner v. Landis*, 137 Pa. St. 61, 20 Atl. 950 (1890); *Detwiler v. Graham*, 17 Phila. 300 (1884).

Tennessee.—*Mitchell v. Planters' Bank*, 8 Humphr. 216 (1847).

Texas.—*Austin, etc., R. Co. v. Duty*, (Civ. App. 1894) 28 S. W. 463.

England.—*Fabrigas v. Mostyn*, 20 How. St. Tr. 82, 137 (1773) (warning).

8. *Georgia*.—*Cox v. State*, 64 Ga. 374, 37 Am. Rep. 76 (1879).

Indiana.—*Wood v. State*, 92 Ind. 269 (1883).

Kentucky.—*Sparks v. Com.*, 89 Ky. 644, 20 S. W. 167, 12 Ky. L. Rep. 402 (1885); *Rapp v. Com.*, 14 B. Mon. 614 (1854).

Maine.—*State v. Reed*, 62 Me. 129 (1874).

Massachusetts.—*Com. v. Wilson*, 1 Gray 337 (1854).

Mississippi.—*Gibson v. State*, 16 So. 298 (1894).

Missouri.—*State v. Evans*, 65 Mo. 574 (1877); *State v. Sloan*, 47 Mo. 604 (1871).

Texas.—*Gerick v. State*, (Cr. App. 1898) 45 S. W. 717; *Levy v. State*, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826 (1889).

United States.—*Alexander v. U. S.*, 138 U. S. 353, 11 S. Ct. 350, 34 L. ed. 954 (1891).

Not hearsay.—As proof of the facts asserted, the unsworn statements made to or by⁹ A are incompetent, being excluded by the rule against hearsay. The only effect of the extrajudicial statements employed under the present rule is to show the mental state of the declarant.¹⁰ The admissibility of the statement is in no way dependent upon the fact that it is true.¹¹

§ 2667. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Knowledge*); Statements by A.—Where the existence of the psycholological fact of knowledge on the part of A is relevant it may be established not only, as has just been seen,¹ by the extra-

9. § 2667.

10. "Whether in fact such information was or was not correct is immaterial for the purpose of determining its admissibility; and hence it is no objection to its admission that it was not given under the sanction of an oath or that the opposite party had no opportunity of cross-examining the informant. The truth of the information is a distinct issue, and must be established by competent evidence; but, upon the theory that the information was correct, the plaintiff, in the present instance had the right to show that the defendant had received such information." *Smith v. Whittier*, 95 Cal. 279, 293, 30 Pac. 529 (1892), per Harrison, J.

11. "A daughter of the Hutchinsons testified that she overheard the conversation between her father and mother, in which the former disclosed to the latter the threats which Morris had made. Counsel for plaintiff in error also contend against the admissibility of this testimony, upon the ground that it was hearsay in character. . . . Neither of these contentions is sound. There were three substantive litigated questions in the case: (1) were threats made? (2) if so, were they communicated to Mrs. Hutchinson? (3) if so, did they produce the claimed

effect? As to the second of these, as well as the first, the meritorious question was: had a verbal act been done? It was one of the three principal litigated matters in the case, and being such, the performance of the act was provable by the testimony of anyone who, if competent, was a witness to it. The question was not whether Hutchinson's communication to his wife was truthful, but it was whether the communication had been in fact made. The rule is general that, where a substantive litigated fact is the speech of a person, one who heard the utterance is admitted to testify to it, and the testimony so received is not hearsay." *State Bank v. Hutchinson*, 62 Kan. 9, 17, 61 Pac. 443 (1900), per Doster, J. C.

"If a man called another a liar, and was knocked down, the plaintiff would not be allowed to prove, on the trial of the assault, that the defendant was really and in point of fact a liar, because evidence of provocation is admitted for the purpose of showing that the feelings of the party were excited, and a man is not stung the less by a libel because it happened to be true." *Fraser v. Berkeley*, 7 C. & P. 621, 625 (1836), per Abinger, L. C. B.

§ 2667-1. § 2666.

judicial statements made to him by others but by the unsworn declarations which he himself may make. In this way, not only may A's knowledge² but his lack of it³ be shown. The statement is equally competent, though shown to be false. A's assertion,

2. Alabama.—Carter v. Fulgham, 134 Ala. 238, 32 So. 684 (1901); Jones v. State, 103 Ala. 1, 15 So. 891 (1894); Louisville, etc., R. Co. v. Mothershed, 97 Ala. 261, 12 So. 714 (1893); Bell v. Troy, 35 Ala. 184 (1859).

California.—Elledge v. National City, etc., R. Co., 100 Cal. 282, 34 Pac. 720, 852, 38 Am. St. Rep. 290 (1893).

Connecticut.—Jordan v. Patterson, 67 Conn. 473, 35 Atl. 521 (1896).

Georgia.—Sanders v. State, 113 Ga. 267, 38 S. E. 841 (1901); Jones v. State, 63 Ga. 395 (1879); Turnlin v. Crawford, 61 Ga. 128 (1878).

Kentucky.—McLeod v. Ginther's Admx., 80 Ky. 399, 4 Ky. L. Rep. 276 (1882).

Maine.—Robinson v. Swett, 3 Me. 316 (1825).

Massachusetts.—Roberts v. Spencer, 123 Mass. 397 (1877); Com. v. Roberts, 108 Mass. 296 (1871).

Nebraska.—Seyfer v. Otoe County, 66 Nebr. 566, 92 N. W. 756 (1902).

New Jersey.—Harrison v. Axtell, (N. J. L. 1910) 75 Atl. 1100.

New York.—Lake Shore, etc., Southern R. Co. v. Erie County, 41 Hun 637, 2 N. Y. St. Rep. 317, *affirmed* 116 N. Y. 665, 22 N. E. 1135 (1886); Swift v. Massachusetts Mut. L. Ins. Co., 63 N. Y. 186, 20 Am. Rep. 522 (1875); Chapman v. Erie R. Co., 55 N. Y. 579 (1874); Merrill v. Grinnell, 30 N. Y. 594 (1864).

Ohio.—Baird v. Howard, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846 (1894); Corbett v. State, 5 Ohio Cir. Ct. 155, 3 Ohio Cir. Dec. 79 (1890).

Pennsylvania.—Kruter v. Bomberger, 82 Pa. St. 59, 22 Am. Rep. 750 (1876).

Tennessee.—Maxwell v. Hill, 89 Tenn. 584, 15 S. W. 253 (1891).

Texas.—Davis v. Davis, 44 Tex. Civ. App. 238, 98 S. W. 198 (1906); Cortez v. State, 43 Tex. Cr. 375, 66 S. W. 453 (1902); Clay v. State, 40 Tex. Cr. 556, 51 S. W. 212 (1899); Rodriguez v. Espinasa, (Civ. App. 1894) 25 S. W. 669.

Vermont.—State v. Marsh, 70 Vt. 288, 40 Atl. 836 (1898); Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253 (1891).

Virginia.—Union Cent. L. Ins. Co. v. Pallard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896).

Wisconsin.—McGowan v. Supreme Court of Independent Order of Foresters, 104 Wis. 173, 80 N. W. 603 (1899) (health).

United States.—Slavens v. Northern Pac. R. Co., 97 Fed. 255, 38 C. C. A. 151 (1899); Gibbs v. Johnson, 10 Fed. Cas. No. 5,384 (1860); Tobin v. Walkinshaw, 23 Fed. Cas. No. 14,070, McAll. 186 (1856); Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. 448, 10 L. ed. 535 (1840).

England.—Thomas v. Connell, 1 H. & H. 189, 7 L. J. Exch. 306, 4 M. & W. 267 (1838).

3. Taylor v. Crowninshield, 5 N. Y. Leg. Obs. 209 (1847).

Where a will has been duly executed evidence of subsequent declarations by the testator tending to show ignorance of its existence will not be received to question the validity of such will. La Rue v. Lee, 63 W. Va. 380, 60 S. E. 388 (1908).

Unless there is some other evidence tending to show want of capacity to make a will evidence is not admissible of declarations made by the testator as to the contents of a will for

for example, that a certain gun was not loaded, is relevant upon a question as to whether the declarant intended to inflict a wound with it, it being, as a matter of fact, loaded.⁴ The truth or falsity of the assertion is not involved. So regarded, the statement is hearsay. The question as to the actual contents of the declarant's mind at the time he acted is the sole matter of importance. Provided the time of the declaration is not too remote from that involved in the inquiry to be relevant, a considerable interval may separate the two.⁵

§ 2668. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Knowledge*); General Knowledge.—Not only may the existence of knowledge on the part of A be shown by statements made to or by him, but the attempt to prove such mental state may also be made by showing circumstances from which it may be inferred that this knowledge was acquired by A. General knowledge through the community may, for example, support an inference that a fact was known to A who resided there.¹ The circulation of a newspaper² or other similar publication³ containing a particular item through a given locality may furnish a reasonable ground for believing that it is known to those among whom the paper is read and who are therefore likely to see it.⁴ It has, however, been held that where actual personal knowledge on the part of an individual is to be proved it will not be sufficient to show that the fact was "generally known" in the community.⁵ Mere conversation between neighbors, not in the presence of the individual whose mental

the purpose of showing a lack of knowledge of the same. *Lipphard v. Humphrey*, 209 U. S. 264, 28 Sup. Ct. 561, 52 L. ed. 783 (1908), affirming 28 App. D. C. 355 (1906).

4. *Jones v. State*, 103 Ala. 1. 15 So. 891 (1894).

5. *Dauids v. People*, 192 Ill. 176, 61 N. E. 537 (1901); *Schwartz v. Berkshire L. Ins. Co.*, 91 Ill. App. 494 (1900); *Kidd v. American Pill, etc., Co.*, 91 Iowa 261, 59 N. W. 41 (1894); *Armitage v. Snowden*, 41 Md. 119 (1874). Compare *Cyborowski v. Kinsman Transit Co.*, 179 Fed. 440, 102 C. C. A. 586 (1910).

§ 2668-1. *Crane v. Missouri Pac. R.*

Co., 87 Mo. 588 (1885); *Benoist v. Darby*, 12 Mo. 196 (1848).

The evidence has been rejected in a criminal case. *Tucker v. Constable*, 16 Oreg. 407, 19 Pac. 13 (1888).

2. *Roberts v. Spencer*, 123 Mass. 397 (1877); *Com. v. Robinson*, 1 Gray (Mass.) 555 (1854).

3. *Putnam v. Gunning*, 162 Mass. 552, 39 N. E. 347 (1895).

4. *Clark v. Ricker*, 14 N. H. 44 (1843); *Milbank v. Dennistown*, 10 Bosw. (N. Y.) 382 (1863); *Gaskell v. Morris*, 7 Watts & S. (Pa.) 32 (1844).

5. *Tucker v. Constable*, 16 Oreg. 407, 19 Pac. 13 (1888).

state is in question, cannot be shown to prove that the latter knew of the facts covered by it.⁶ In all cases, the evidence offered must have some logical tendency to establish the fact of the communication of knowledge,⁷ i. e., it must be probatively relevant for that purpose.⁸

§ 2669. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Knowledge*); Knowledge by Others.—It cannot be assumed that because certain members of A's family knew a given fact that A himself knew it. This is true even where the relation is an intimate one, as that of husband and wife.¹ The presence of other circumstances may, however, unite with the inference from close intimacy and relationship to constitute a set of facts upon which a jury may reasonably act.²

§ 2670. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States; Knowledge*); Reputation.—Knowledge of a given fact may be established not only by the existence of extrajudicial statements made to or by the person whose mental state is in question but by unsworn declarations in the composite form of *reputation*. Here, the individual voices are so blended that they cannot separately be recognized. To furnish circumstantial evidence of knowledge, however, more must be shown than that a reputation to the effect stated actually exists. To establish knowledge of the fact covered by the reputation the latter must be shown to have existed in such quarters, at such times and with so great univer-

6. *Clark v. Ricker*, 14 N. H. 44 (1843).

7. *Briggs v. Briggs*, 135 Mass. 306 (1883); *Fenno v. Chapin*, 27 Minn. 519, 8 N. W. 762 (1881); *Bowne v. Mt. Holly Nat. Bank*, 45 N. J. L. 360 (1883); *Woods v. Buffalo R. Co.*, 35 N. Y. App. Div. 203, 54 N. Y. Suppl. 735 (1898).

The existence of entries upon the books of a bank by no means shows that the officers of the bank actually

knew the state of the account as it there appears. *Bowne v. Mt. Holly Nat. Bank*, 45 N. J. L. 360 (1883).

8. *Carpenter v. Leonard*, 3 Allen (Mass.) 32 (1861); *Dunbar v. Mulry*, 8 Gray (Mass.) 163 (1857); *Finch v. Green*, 16 Minn. 355 (1871).

§ 2669-1. *Oden v. Stubblefield*, 4 Ala. 40 (1842).

2. *Covington v. Geyler*, 12 Ky. L. Rep. 466 (1890); *Hart v. Newland*, 10 N. C. 122 (1824).

salinity as to render it probable that the person in question had learned of it.¹ Under these conditions, general notoriety² or reputation³ throughout the community may be a relevant fact tending to show the possession of knowledge. The reputation is not viewed as evidence of the facts which it directly asserts. Leaving this to

§ 2670-1. *Sowden v. Idaho Quariz* Min. Co., 55 Cal. 443 (1880).

2. *Woods v. Montevallo Coal, etc.*, Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393 (1888); *Stallings v. State*, 33 Ala. 425 (1859); *Ward v. Herndon*, 5 Port. (Ala.) 382 (1837); *Chase v. Lowell*, 151 Mass. 422, 24 N. E. 212 (1890); *Browning v. Skillman*, 24 N. J. L. 351 (1854); *Adams v. State*, 25 Ohio St. 584 (1874).

3. *Alabama*.—*Hays v. State*, 110 Ala. 60, 20 So. 322 (1895); *Schlaff v. Louisville, etc.*, R. Co., 100 Ala. 377, 14 So. 105 (1893); *Humes v. O'Bryan & Washington*, 74 Ala. 64 (1883); *Jones v. Hatchett & Bro.*, 14 Ala. 743 (1848); *Ward v. Herndon*, 5 Port. 382 (1837) (solvency).

Florida.—*Watrous v. Morrison*, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139 (1894).

Georgia.—*Kuglar v. Garner*, 74 Ga. 765 (1885).

Louisiana.—*Brander v. Ferriday*, 16 La. 296 (1840).

Maryland.—*Brooks v. Thomas*, 8 Md. 367 (1855); *Bernard v. Torrance*, 5 Gill & J. 383 (1833).

Massachusetts.—*Monahan v. Worcester*, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226 (1890); *Whitcher v. Shattuck*, 3 Allen 319 (1862); *Dunbar v. Mulry*, 8 Gray 163 (1857); *Heywood v. Reed*, 4 Gray, 574 (1855) (solvency); *Bartlett v. Decreet*, 4 Gray 111 (1855); *Lee v. Kilburn*, 3 Gray 594 (1854).

Minnesota.—*Hahn v. Penney*, 62 Minn. 116, 63 N. W. 843 (1895).

Missouri.—*Crane v. Missouri Pac. R. Co.*, 87 Mo. 588 (1885); *Gordon v. Ritenour*, 87 Mo. 54 (1885), Con-

over *v. Berdine*, 69 Mo. 125, 33 Am. Rep. 496 (1878) (solvency); *Benoist v. Darby*, 12 Mo. 196 (1848).

New Jersey.—*Browning v. Skillman*, 24 N. J. L. 351 (1854).

New York.—*Hoffman v. New York Cent., etc.*, R. Co., 46 N. Y. Super. Ct. 526, affirmed 87 N. Y. 25, 41 Am. Rep. 337 (1880).

Ohio.—*Roberts v. Briscoe*, 44 Ohio St. 596, 10 N. E. 61 (1887).

Oregon.—*Tucker v. Constable*, 16 Oreg. 407, 19 Pac. 13 (1888).

Pennsylvania.—*Watterson v. Fuellhart*, 169 Pa. St. 612, 32 Atl. 597 (1895) (solvency); *Pittfield v. Ewing*, 6 Phila. 455 (1867); *Matter of Contested Election*, 1 Brewst. 140 (1866).

Texas.—*Gulf, etc.*, R. Co. *v. Frost*, (Civ. App. 1896) 34 S. W. 167; *Mexican Nat. R. Co. v. Musette*, 7 Tex. Civ. App. 169, 24 S. W. 520 (1894) (solvency); *New York Mut. L. Ins. Co. v. Tillman*, 84 Tex. 31, 19 S. W. 294 (1892); *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325 (1888). See, also, *Downtain v. Connellee*, 2 Tex. Civ. App. 95, 21 S. W. 56 (1893).

Vermont.—*Bridgman v. Carey*, 62 Vt. 1, 20 Atl. 273 (1889); *Larkin v. Hapgood*, 56 Vt. 597 (1884) (solvency); *Stanton v. Simpson*, 48 Vt. 628 (1876).

Washington.—*Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098 (1894).

Wisconsin.—*Cadden v. American Steel Barge Co.*, 88 Wis. 409, 60 N. W. 800 (1894).

United States.—*Smith v. U. S.*, 161 U. S. 85, 16 S. Ct. 483, L. ed.

be established by other evidence, the reputation is used to show that certain individuals knew of it.⁴ For example, on an issue of self-defense under an indictment for homicide the fact that the deceased had a reputation as a violent and quarrelsome man may be proved in order to show that the defendant knew of it.⁵

§ 2671. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Love and Friendship.—That love or friendship was the animating motive for given conduct may be shown by the extrajudicial statements made by the person in question.¹ In any event, the

626 (1896); *Patrick v. Graham*, 132 U. S. 627, 10 S. Ct. 194, 33 L. ed. 460 (1889).

Permissive user. The reputation in the community that certain land belonged to A. may be evidence as to whether his holding of the land was adverse or permissive. *Watters v. Brown*, (Ala. 1912) 58 South. 291.

Insolvency.—Knowledge that B was insolvent may be proved by showing that this was his general reputation throughout the community. *Larkin v. Hapgood*, 56 Vt. 597 (1884). On the contrary, lack of knowledge of any impairment in solvency on B's part may be shown, by establishing the fact that at the time of the acts in question no reputation as to any financial difficulties on his part were abroad in the community. *Heywood v. Reed*, 4 Gray (Mass.) 574 (1855); *Bartlett v. Decreet*, 4 Gray (Mass.) 111 (1855).

Insanity.—It has been held that the existence of a reputation to the effect that a given individual was insane cannot be proved to show that A knew of it. *Greenslade v. Dare*, 20 Beav. 284 (1855).

4. *Woods v. Montevallo Coal, etc., Co.*, 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393 (1887).

5. *Smith v. U. S.*, 161 U. S. 85, 16 S. Ct. 483, 40 L. ed. 626 (1895).

§ 2671-1. Alabama.—*Long v. Booe*, 106 Ala. 570, 17 So. 716 (1895).

Arkansas.—*Casat v. State*, 40 Ark. 511 (1883).

California.—*Estate of Lairnburg*, 161 Cal. 536, 119 Pac. 915 (1911).

Illinois.—*Lawrence v. Lawrence*, 164 Ill. 367, 45 N. E. 1071 (1896).

Indiana.—*Driver v. Driver*, 153 Ind. 88, 54 N. E. 389 (1898); *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118 (1893).

Iowa.—*Home v. Richards*, 112 Iowa 220, 83 N. W. 909 (1900); *State v. Butts*, 107 Iowa 653, 78 N. W. 687 (1899); *Puth v. Zimbleman*, 99 Iowa 641, 68 N. W. 895 (1896); *Kennedy v. Hensley*, 94 Iowa 629, 63 N. W. 343 (1895).

Kansas.—*Roesner v. Darrah*, 65 Kan. 599, 70 Pac. 597 (1902).

Kentucky.—*McConnell's Exr. v. McConnell*, 138 Ky. 783, 129 S. W. 106 (1910).

Maine.—*Callagan v. Burns*, 57 Me. 449 (1870).

Massachusetts.—*Jacobs v. Whitcomb*, 10 Cush. 255 (1852).

Michigan.—*McKenzie v. Lautenschlager*, 113 Mich. 171, 71 N. W. 489 (1897); *Edgell v. Francis*, 66 Mich. 303, 33 N. W. 501 (1887); *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485 (1883).

Missouri.—*Allen v. Forsythe*, 160

existence of this particular mental state must be shown to be relevant² to some fact or facts in the *res gestae*, properly so-

Mo. App. 262, 142 S. W. 820 (1912); *State v. Leabo*, 84 Mo. 163, 54 Am. Rep. 91 (1884).

North Carolina.—*State v. Hargrave*, 97 N. C. 457, 1 S. E. 774 (1887).

North Dakota.—*Luick v. Arends*, 21 No. Dak. 614, 132 N. W. 353 (1911).

Ohio.—*Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430 (1861).

Rhode Island.—*Rose v. Mitchell*, 21 R. I. 270, 43 Atl. 67 (1899).

Washington.—*Beach v. Brown*, 20 Wash. 266, 55 Pac. 46 (1898).

Wisconsin.—*Horner v. Yancey*, 93 Wis. 352, 67 N. W. 720 (1896).

United States.—*Ash v. Prunier*, 44 C. C. A. 675, 105 Fed. 722 (1901); *Gaines v. Relf*, 12 How. 472, 13 L. ed. 1071 (1851).

England.—*Jones v. Thompson*, 6 C. & P. 415 (1834); *Willis v. Bernard*, 8 Bing. 376, 21 E. C. L. 584, 5 C. & P. 342, 24 E. C. L. 597, 1 L. J. C. P. 118, 1 Moore & S. 584 (1832) (wife's letter to husband); *Trelawney v. Colman*, 1 B. & Ald. 90, 2 Stark 191, 18 Rev. Rep. 438, 3 E. C. L. 372 (1817).

These declarations have been rejected as hearsay, apparently under a misapprehension. *State v. Punshon*, 124 Mo. 448, 27 S. W. 111 (1894). On the contrary, direct statements extrajudicially made that the speaker is in love have been received as evidence of the facts asserted. *Spencer Cowper's Trial*, 13 How. St. Tr. 1106, 1165 ff. (1699).

In an action for alienation of the affections of a wife, the existence of affection between the husband and wife is in issue and her declarations to third persons not in the presence of her husband, when made at a time when there exists no motive to deceive and before the commencement of

the alienating influences complained of are admissible. *Luick v. Arends*, 21 N. Dak. 614, 132 N. W. 353 (1911).

See, also, *Allen v. Forsythe*, 160 Mo. App. 262, 142 S. W. 820 (1912).

"We think the letter of D. . . . is competent to prove the state of feeling, affection, and sympathy of D. towards his wife when he wrote the letter. . . . There is no ground to suppose that the letter was written collusively. It appears to have been ingenuous and honestly intended." *Gaines v. Relf*, 12 How. (U. S.) 472, 534, 13 L. ed. 1071 (1851), per Catron, J.

"The letters of a wife written to her husband before the time of an alleged adultery are admitted. . . . Why? Because credit is given to her for having acted with sincerity at the time; and her letters are receivable to show the state of her affections before her elopement, being written at a moment when she had no purpose to answer in writing them." *Wright v. Tatham*, 5 Cl. & F. 670, 683 (1838), per Sir F. Pollock.

2. *White v. Ross*, 47 Mich. 172, 10 N. W. 188 (1881); *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108 (1891); *Wilkins v. Metcalf*, 71 Vt. 103, 41 Atl. 1035 (1898).

Misleading the jury.—Even where the fact of love or affection is a relevant one, the judge may not, as a matter of administration, receive an extrajudicial statement fairly indicative of its existence, should there be reason to believe that the statement was not made in good faith. *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843 (1894). See also *Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187 (1902); *Wilton v. Webster*, 7 C. & P. 198 (1835). Thus in an action for alienation of the affections

called.³ Viewed as assertions, the statements are seldom relevant and still less often admissible as evidence in proof that they are true.⁴ Thus, in a criminal case, the extrajudicial statement of the defendant, not shown to be spontaneous, made before the fatal affray, that he "had no harm against [the deceased], and would not hurt a hair of his head," has been rejected⁵ as receiving it would be "to allow a party to make evidence for himself."

Absence of love and affection may be shown in the same way, i. e., by proof of extrajudicial statements. For example, on an action by a husband for the estrangement of his wife's affections the result of the defendant's alleged acts in creating antipathy against him may be established by proof of the wife's unsworn statements.⁶

§ 2672. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Malice.—A constituent psychological fact of great importance in many connections is malice. Not being subject to direct observation, it may be established circumstantially either by inferences from other evidence in the case or by the use of probative facts introduced directly for the purpose. Prominent among such facts may be extrajudicial statements, those made *in pais*, fairly is-

evidence of conversations which took place at a time to create suspicion, will not be received. *Townshend v. Townshend*, 84 Vt. 315, 79 Atl. 388 (1911).

For like reasons, expressions of hostility on the part of a wife to her husband on account of his abusive treatment of her, if made after the influence of the seducer had become paramount, are not admissible. *Higham v. Vanosdol*, 101 Ind. 160 (1884).

See also § 2652a.

3. No independently relevant fact can be probatively relevant, unless the ultimate principal fact which it tends to establish is constitutently so. Where, therefore, the fact of love or affection does not tend to prove any fact in the *res gestae*, the extra-

judicial statement tending to prove it is itself inadmissible. Thus, where a defendant accused of homicide of an infant son offered to show his love and affection for the deceased, the evidence was rejected. *State v. Speyer*, 194 Mo. 459, 91 S. W. 1075 (1906).

See also *State v. Yanz*, 74 Conn. 177, 50 Atl. 37, 92 Am. St. Rep. 205, 54 L. R. A. 780 (1901).

4. *State v. Swift*, 57 Conn. 496, 18 Atl. 664 (1888); *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430 (1861).

See, however, *State v. Punshon*, 124 Mo. 448, 27 S. W. 1111 (1894).

5. *Newcomb v. State*, 37 Miss. 383, 399, (1859), per Handy, J.

6. *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492 (1904).

dicative of the existence of the mental state in question.¹ In all cases, the existence of malice must be relevant to some issue raised in the case; otherwise, the extrajudicial declaration cannot be received. Thus, the existence of malice being in no way relevant on an issue of *manslaughter*, an unsworn statement indicating it is properly rejected as irrelevant.²

Threats, though uncommunicated to their object,³ may be received to establish the fact of malice on the part of the declarant.⁴

Absence of malice may equally well be shown by an extrajudicial declaration.⁵

§ 2673. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Motive or Purpose.—The motive of an individual¹ and in like

§ 2672-1. *Alabama*.—Maddox v. Newton, (App. 1912) 58 So. 934.

Arkansas.—Carr v. State, 43 Ark. 99 (1884).

Georgia.—Davis v. State, (App. 1912) 76 S. E. 391; Perry v. State, 110 Ga. 234, 36 S. E. 781 (1900); Meek v. State, 51 Ga. 429 (1874).

Missouri.—State v. Smith, 125 Mo. 2, 28 S. W. 181 (1894).

Texas.—Jennings v. State, 42 Tex. Cr. 78, 57 S. W. 642 (1900); Black v. State, 9 Tex. App. 328 (1880).

Vermont.—Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075 (1900).

2. *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505 (1889).

3. *Arkansas*.—Pitman v. State, 22 Ark. 354 (1860).

California.—People v. Scoggins, 37 Cal. 676 (1869).

Florida.—Garner v. State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232 (1891).

Missouri.—State v. Brotzer, 150 S. W. 1078 (1912) (malicious injury).

New York.—Stokes v. State, 53 N. Y. 164, 13 Am. Rep. 492 (1873).

Ohio.—Dickson v. State, 39 Ohio St. 73 (1883).

Texas.—Johnson v. State, (Civ. App. 1912) 149 S. W. 165.

United States.—Wiggins v. Utah, 93 U. S. 465, 23 L. ed. 941 (1876).

A contrary view has been held, the requirement being made that the threats of a deceased person against the accused should, in order to be admissible, have been communicated to the latter. *State v. Gregor*, 21 La. Ann. 473 (1869).

4. **Express malice** is to be proved or disproved in this way. Where, as in actions for malicious prosecution, actual malice is immaterial, the declaration will not be received. *Moore v. Sauborin*, 42 Mo. 490 (1869).

5. *Leach v. Wilbur*, 9 Allen (Mass.) 212 (1864).

§ 2673-1. *Alabama*.—Hudson v. State, 61 Ala. 333 (1878).

California.—People v. Brown, 130 Cal. 591, 62 Pac. 1072 (1900); Kyle v. Craig, 125 Cal. 107, 57 Pac. 791 (1899); Eppinger v. Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220 (1895); People v. Roach, 17 Cal. 297 (1861).

Georgia.—White v. East Lake Land Co., 96 Ga. 415, 23 S. E. 393, 51 Am. St. Rep. 141 (1895); Rives v. Lamar, 94 Ga. 186, 21 S. E. 294 (1894) (gift of land); Odom v. Odom, 36 Ga. 286 (1867).

Illinois.—Croff v. Ballinger, 18 Ill. 200, 65 Am. Dec. 735 (1856).

manner his purpose² may be established whenever either of these

Indiana.—O'Connor Co. v. Gil-laspy, 170 Ind. 428, 83 N. E. 738 (1908); Strange v. Donohue, 4 Ind. 327 (1853).

Kentucky.—Louisville Gas Co. v. Kentucky Heating Co., 142 Ky. 253, 134 S. W. 205 (1911); Watson v. Kentucky & I. Bridge & R. Co., 137 Ky. 619, 129 S. W. 341 (1910) modifying opinion, 137 Ky. 619, 126 S. W. 146.

Maine.—State v. Walker, 77 Me. 488, 1 Atl. 357 (1885).

Maryland.—Cook v. Carr, 20 Md. 403 (1863).

Massachusetts.—Collins v. Steph-enson, 8 Gray 438 (1857).

Missouri.—Leggett v. Louisiana Purchase Exp. Co., 157 Mo. App. 108, 137 S. W. 893 (1911); State v. Gabriel, 88 Mo. 631 (1886).

South Dakota.—Comeau v. Hurley, 22 S. D. 310, 117 N. W. 371 (1908).

Tennessee.—Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085 (1890); Planters' Bank v. Massey, 2 Heisk. 360 (1871).

England.—R. v. Dixon, 11 Cox Cr. C. 341 (1869).

"It frequently becomes ma-terial as in the present case, to as-certain with what motive an act is done. In such cases the declarations made by the party himself, while do-ing the act, and explanatory of it, are admitted as being a part of the transaction and as serving to ex-plain its real character." *Strange v. Donohue*, 4 Ind. 327. 329 (1853), per Roache, J.

"If, as may be assumed, the ex-cluded testimony would have shown that the workmen, when they left, gave as their reason to the superin-tendent that the defendant had told them that the board of health re-ported arsenic in the silk, the evi-dence was admissible to show that their belief in the presence of poison

was their reason in fact. We can-not follow the ruling at *nisi prius* in *Filk v. Parsons*, 2 C. & P. 201, that the testimony of the persons con-cerned is the only evidence to prove their motives. We rather agree with Mr. Starkie, that such declarations, made with no apparent motive for misstatement, may be better evi-dence of the maker's state of mind at the time than the subsequent testi-mony of the same persons." *Elmer v. Fessenden*, 151 Mass. 359, 361, 24 N. E. 208, 5 L. R. A. 724 (1890), per Holmes, J.

Where a wife leaves her husband "the motives . . . in most cases can-not be shown except by her declara-tions made at the time to her rela-tions and friends." *Gilchrist v. Bale*, 8 Watts. (Pa.) 355, 357, 34 Am. Dec. 469 (1839), per Rogers, J.

An extrajudicial statement in the nature of a promise not to engage in a certain business may be given as constituting the motive for a subse-quent sale. *Parrish v. Adwell*, (Tex. Civ. App. 1910) 124 S. W. 441.

See, also, § 2675.

Declaration by a president of a company is admissible to show mo-tive on the part of the company. *Louisville Gas Co. v. Kentucky Heat-ing Co.*, 142 Ky. 253, 134 S. W. 205 (1911).

A declaration of a testator which tends to show his attitude towards his estate and the object for which it was being accumulated is admissible. *Grill v. O'Dell*, 113 Md. 625, 77 Atl. 784 (1910).

2. Alabama.—*Harris v. State*, 96 Ala. 24, 11 So. 255 (1892); *Myers v. State*, 62 Ala. 599 (1878).

California.—*Tait v. Hall*, 71 Cal. 149, 12 Pac. 391 (1886); *People v. Roach*, 17 Cal. 297 (1861).

Illinois.—*Souleyret v. O'Gara Coal Co.*, 161 Ill. App. 60 (1911).

is relevant³ by the unsworn declarations of the individual whose mental state is in question. The extrajudicial declaration may, as in other connections, be oral or written.⁴ Whether the extrajudicial statement accompanies⁵ or does not accompany a relevant

Indiana.—Traylor v. Holhis, 45 Ind. App. 680, 91 N. E. 567 (1910).

Iowa.—Sheldon v. Bigelow, 118 Iowa 586, 92 N. W. 701 (1902).

Kansas.—State v. Pearce, 124 Pac. 814 (1912); Plowman v. Nicholson, 81 Kan. 210, 106 Pac. 279 (1909), *judgment affirmed on rehearing*, Hughes v. Nicholson, 105 Pac. 692 (1909).

Kentucky.—Lewis' Admr. v. Bowling Green G. Co., 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169 (1909).

Massachusetts.—Wiley v. Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 206 (1890); Heyward v. Reed, 4 Gray 574 (1855).

Mississippi.—Archer v. Helm, 70 Miss. 874, 12 So. 702 (1893).

Missouri.—Bradley v. Modern Woodmen of America, (App. 1910) 124 S. W. 69.

Nebraska.—Painter v. Ives, 4 Nebr. 122 (1875).

South Dakota.—First Nat. Bank v. Harney, 137 N. W. 365 (1912).

Tennessee.—Carroll v. State, 3 Humphr. 315 (1842); Kirby v. State, 9 Yerg. 383, 30 Am. Dec. 420 (1836).

Texas.—Dunlap v. Broyles, (Civ. App. 1912) 146 S. W. 578; Burns v. State, 23 Tex. App. 641, 5 S. W. 140 (1887).

Vermont.—State v. Daley, 53 Vt. 442, 38 Am. Rep. 694 (1881); State v. Howard, 32 Vt. 380, 78 Am. Dec. 609 (1859).

Wisconsin.—State v. Dickinson, 41 Wis. 299 (1877).

England.—Redford v. Birley, 1 State Tr. (N. S.) 1071 (1822) (seditious mob).

See, also, § 2654.

Suicide.—Declarations of a deceased person may be shown to prove

that it was his purpose to commit suicide, should the existence of such a mental state be relevant to the issue. People v. Gehmele, Sheld. (N. Y.) 251 (1871).

Res Gestae.—It has been required, on the so-called principle of the *res gestae* that in order to be admissible a declaration of purpose must accompany and characterize some act in itself relevant and that therefore the statement of a debtor upon leaving his house that he was going for the purpose of paying his creditor will not be received. The court, speaking by Brucker, J., say: "The wife of defendant said at the time he took the money (the \$208) and left the house. The evident purpose was to show a declaration that he was going to pay the money to his mother. It is contended that it is part of the *res gestae*. But it was no more than the declaration of a purpose. It did not characterize an act shown to have been performed, but was an assertion of a purpose to perform an act. *Res gestae* are circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate it. We think the testimony was not admissible." Schulz v. Schulz, 113 Mich. 502, 507, 71 N. W. 854 (1897), per Montgomery, J.

3. Williams v. Fletcher, 30 Ill. App. 219 (1888) *affirmed* in 129 Ill. 356, 21 N. E. 783 (1889) (motive).

4. Leggett v. Louisiana Purchase Exp. Co., 157 Mo. App. 108, 137 S. W. 893 (1911); Weston v. Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612 (1900) (letters).

5. Cornelius v. State, 12 Ark. 782 (1852).

act would seem to be immaterial except so far as it bears upon the spontaneousness of the declaration.

Other Modes of Proof.—The operation of a particular motive may also be shown in other ways, e. g., by the testimony of him who experiences the force of its promptings.⁶ Purpose may be established in the same way. One who is conscious of his purpose in signing his name⁷ or doing any other act,⁸ may testify in regard to it.⁹ The existence of an extrajudicial statement in the form of a promise,¹⁰ representation,¹¹ or other inducement,¹² or threat,¹³ may constitute, or at least establish, a motive.

The statement has been made that the extrajudicial declaration as to motive is admissible as part of the *res gestae*.¹⁴ Where no idea of spontaneity is involved, this can only mean, under the broad or American definition of *res gestae*,¹⁵ that the fact of motive is a relevant one.

§ 2674. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Provocation.—The influence of provocation may be shown by

6. *Alabama.*—Linnehan v. State, 120 Ala. 293, 25 So. 6 (1898).

California.—Kyle v. Craig, 125 Cal. 107, 57 Pac. 791 (1899).

Connecticut.—Peck v. Bacon, 18 Conn. 377 (1847).

Kentucky.—Eve v. Saylor, 44 S. W. 355, 19 Ky. L. Rep. 1697 (1898).

Maine.—Wheelden v. Wilson, 44 Me. 11 (1859).

Minnesota.—Berkey v. Judd, 22 Minn. 287 (1875).

Ohio.—Grever v. Taylor, 53 Ohio St. 621, 42 N. E. 829 (1895).

Texas.—International, etc., R. Co. v. Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236 (1893).

Utah.—Conway v. Clinton, 1 Utah, 215 (1875).

7. Moore v. May, 117 Wis. 192, 94 N. W. 45 (1903).

8. State v. Lee, 69 Conn. 186, 37 Atl. 75 (1897).

9. Edwards v. Currier, 43 Me. 474 (1857); State v. Ames, 90 Minn. 183, 96 N. W. 330 (1890); Vawter v. Hultz, 112 Mo. 633, 20 S. W. 689

(1892); Moore v. May, 117 Wis. 192, 94 N. W. 45 (1903).

10. Parrish v. Adwell (Tex. Civ. App. 1910), 124 S. W. 441.

11. Fellowes v. Williamson, Moo. & M. 307 (1829).

12. Mobile R. Co. v. Ashcroft, 48 Ala. 15 (1872) (reason); Webb v. Drake, 52 La. Ann. 290, 26 So. 791 (1899) (boycott).

13. Helms v. State (Ga. 1912), 76 S. E. 353; Watson v. Kentucky & I. B. & R. Co., 137 Ky. 619, 129 S. W. 341, *modifying* 137 Ky. 619, 126 S. W. 146 (1910); Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085 (1890); Skinner v. Shew, 2 Ch. 581 (1894).

A mere statement by a defendant that he has heard that deceased intends to kill him is not admissible, in the absence of a specific threat. Ware v. State (Ga. 1912), 76 S. E. 857.

14. Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085 (1890).

15. § 2583.

the extrajudicial declaration of a person whose mental state is in question.¹ In the same way, such statements made to a given individual by anyone may be shown for the purpose of establishing the provocation under which he acted. For example, on a criminal proceeding for assault with intent to kill, the wife of the defendant may properly testify that she told her husband, prior to the encounter, that the injured person had offered her a serious insult.² The statement must be reasonably adapted to constitute provocation. The suggestion has been made that to have this effect, the statement should, in some cases, be false or believed to be so by the person whose conduct it is said to have influenced.³

§ 2675. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Reasons Assigned.—Even in criminal cases,¹ the grounds or reasons for conduct as assigned by the person acting are provable, whenever relevant,² by showing extrajudicial declarations uttered

§ 2674-1. *People v. Lewis*, 3 Abb. Dec. (N. Y.) 535, 3 Transcr. App. (N. Y.) 1, 6 Abb. Pr. N. S. (N. Y.) 190, 41 How Prac. 508 (1867); *Green v. Cawthorn*, 15 N. C. 409 (1834).

2. *Harrall v. State* (Tex. Cr. App. 1906), 97 S. W. 1857.

3. *Redman v. State* (Tex. Cr. App. 1912), 149 S. W. 670. Thus where on an indictment for murder, defendant relied upon insulting language by decedent to one of the defendant's female relations as constituting a provocation, although the accused was shown to have been well aware of the truth of the language used, the defense was regarded by the court as untenable. The court observed: "To our mind it is absurd to say that one can claim that he killed a party for insult concerning a female relative when said party knows the language used about said female is true. It is not slander or insult to a female relative in contemplation of the statute that authorizes the reduction of homicide to manslaughter where the appellant knows the statement upon which he acts to be true." *Redman v. State* (Tex. Cr. App. 1912), 149 S. W. 670.

§ 2675-1. *State v. Abbott*, 8 W. Va. 741 (1875).

2. *Alabama*.—*Rich v. McInerney*, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32 (1893); *Nixon v. State*, 55 Ala. 120 (1876); *Wood v. Barker*, 37 Ala. 60, 76 Am. Dec. 346 (1860).

Arkansas.—*Martin v. Tucker*, 35 Ark. 279 (1880); *Gracie v. Robinson*, 14 Ark. 438 (1854).

California.—*Draper v. Douglass*, 23 Cal. 347 (1863).

Colorado.—*Denver & C. I. Co. v. Rudolph*, 47 Colo. 380, 107 Pac. 816 (1910).

Georgia.—*Stewart v. Lanier House Co.*, 75 Ga. 582 (1885); *McNabb v. Lockhart*, 18 Ga. 495 (1855).

Illinois.—*Wilkinson v. Service*, 249 Ill. 146, 94 N. E. 50, 22 Am. & Eng. Ann. Cas. 41 (1911); *Caldwell v. Evans*, 85 Ill. 170 (1877).

Indiana.—*Higham v. Vanosdol*, 101 Ind. 160 (1884).

Louisiana.—*State v. Gessner*, 44 La. Ann. 93, 10 So. 404 (1892); *Marcy v. Merchants Mut. Ins. Co.*, 19 La. Ann. 388 (1867).

Maine.—*Segars v. Segars*, 71 Me. 530 (1880).

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by him.³ But complaints, not distinctly amounting to an assign-

Maryland.—*Robinson v. State*, 57 Md. 14 (1881).

Massachusetts.—*Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724 (1890). But see *Wesson v. Washburn Iron Co.*, 13 Allen 95, 90 Am. Dec. 181 (1866).

Michigan.—*Steketee v. Kimm*, 48 Mich. 322, 12 N. W. 177 (1882) (reasons given by customers for returning goods).

Mississippi.—*Lampley v. Scott*, 24 Miss. 528 (1852).

Missouri.—*Webster v. Canmann*, 40 Mo. 156 (1867).

New Hampshire.—*Hadley v. Carter*, 8 N. H. 40 (1835); *Downs v. Lyman*, 3 N. H. 486 (1826).

New York.—*Tibbits v. Phipps*, 30 N. Y. App. Div. 274, 51 N. Y. Suppl. 954; *affirmed* 163 N. Y. 580, 57 N. E. 1126 (1898); *Hine v. New York El. R. Co.*, 149 N. Y. 154, 43 N. E. 414 (1896); *Baker v. Baker*, 16 Abb. N. C. 293 (1885); *Wilcox v. Green*, 23 Barb. 639 (1854).

Ohio.—*Moores v. Bricklayers' Union*, 10 Ohio Dec. (Reprint) 665, 23 Cinc. L. Bul. 48 (1889).

Pennsylvania.—*Cattison v. Cattison*, 22 Pa. St. 275 (1853); *Gilechrist v. Bale*, 8 Watts 355, 34 Am. Dec. 469 (1839); *Tompkins v. Saltmarsh*, 14 Serg. & R. 275 (1826).

Tennessee.—*Glass v. Bennett*, 89 Tenn. 487, 14 S. W. 1085 (1890).

Texas.—*Hanna v. Hanna*, 3 Tex. Civ. App. 51, 21 S. W. 720 (1893); *Stockman v. State*, 24 Tex. App. 387, 6 S. W. 298, 5 Am. St. Rep. 894 (1887); *McGowin v. McGowin*, 52 Tex. 657 (1880).

Vermont.—*Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438 (1892); *Ross v. White*, 60 Vt. 558, 15 Atl. 184 (1888).

Virginia.—*Cluverius v. Cem.*, 81 Va. 787 (1886).

Wisconsin.—*Charley v. Potthof*, 95 N. W. 124 (1903); *Academy of M.*

Co. v. Davidson, 85 Wis. 129, 55 N. W. 172 (1893).

See also *Ellis v. Thompson*, 1 App. Div. 606, 37 N. Y. Suppl. 468, 73 N. Y. St. Rep. 180 (1896); *Ikland v. Ikland* (Tex. Cr. App. 1911), 139 S. W. 925.

§ 2673.

There is authority to the contrary. *Walker v. Meetze*, 2 Rich. Law 570 (1846); *Tilk v. Parsons*, 2 C. & P. 202 (1825).

Feigning, a question for the jury.—Whether the extrajudicial statements assign the true reasons for the conduct of the declarant, or constitute feigned and untrue explanations for it, presents a question for the jury, necessarily passed on by them in determining the probative force of the utterances. "The jury are to consider them in connection with all the other evidence in the cause. The jury must judge from all the facts and circumstances shown in evidence whether the mature purpose or intention of the accused as declared by him at the time were feigned or were a mere pretence or pretext assumed to cover up his real purpose, object, or intention in shooting." *State v. Abbott*, 8 W. Va. 741, 756 (1875), per Haymond, P.

3. *Illinois*.—*Mackie v. Heywood, etc., Rattan Co.*, 88 Ill. App. 119 (1899).

Kansas.—*Missouri Pac. R. v. Nevin*, 31 Kan. 385, 2 Pac. 795 (1884).

Massachusetts.—*Greene v. Washburn*, 7 Allen, 390 (1863).

New York.—*Matter of Swade*, 65 N. Y. App. Div. 592, 72 N. Y. Suppl. 1030 (1901).

South Carolina.—*Murdock v. Courtenay Mfg. Co.*, 52 S. C. 428, 29 S. E. 856, 30 S. E. 142 (1897).

United States.—*Gaines v. Relf*, 12 How. 472, 3 L. ed. 1071 (1851).

The evidence, however, has been re-

ment of reasons for conduct or the occurrence of an event will not be received.⁴ Under the very common confusion with the rules applicable to spontaneous utterances, part of the facts in the *res gestae* properly so-called⁵ when used as hearsay, i. e., as evidence of the facts asserted, it has been held that the statements assigning reasons for doing certain acts should accompany the latter⁶ and that when this fact is shown the utterances become evidence of the truth of the facts which they state.⁷ Little doubt exists but that where the relevancy of an unsworn statement is based upon its spontaneity, it must be accompanied by the present operation of the exciting cause which renders it spontaneous. Where, however, a mental state, intellectual or emotional, is itself a relevant fact, the unsworn declarations which tend to establish it may be placed in any order in relation to a principal event which does not involve a time too remote to be relevant.

A narrative account of alleged facts which, so far as relevant at all, is evidentiary only as furnishing proof of the facts asserted, is inadmissible as hearsay and is not rendered competent by being made part of an assignment of reasons for doing a definite act.⁸

jected as hearsay. *Willner v. Silverman*, 109 Md. 341, 24 L. R. A. (N. S.) 895, 71 Atl. 962 (1909).

Causes for the happening of a particular event may be shown in the same way. *Cross Lake Logging Co. v. Joyce*, 83 Fed. 939, 28 C. C. A. 250 (1897); *People v. O'Neil*, 112 N. Y. 355, 19 N. E. 796, 6 N. Y. Cr. 274 (1889).

4. *Saxton v. New York El. R. Co.*, 60 N. Y. Super. Ct. 421, 18 N. Y. Suppl. 188, 44 N. Y. St. Rep. 832 (1892).

5. §§ 2984 *et seq.*

6. *Snover v. Blair*, 25 N. J. L. 94 (1855); *Weil v. Stewart*, 19 Hun (N. Y.) 272 (1879); *Cattison v. Cattison*, 22 Pa. St. 275 (1853).

7. *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614 (1894); *Anderson v. New York, etc., Steamship Co.*, 47 Fed. 38 (1891), *affirmed* in 50 Fed. 462, 1 C. C. A. 529, 530 (1892).

In an action by a husband for enticement of a wife brought against

her father and brother, her declarations on leaving home and on arriving at her father's house and while the separation continued "explanatory of her troubled mental condition and of her reasons for going to her father's house" have been received "as parts of the *res gestae*." *Glass v. Bennett*, 89 Tenn. 478, 482, 14 S. W. 1085 (1891), per Turvey, C. J.

8. *State v. Moore*, 156 Mo. 204, 56 S. W. 883 (1900); *Walrod v. Ball*, 9 Barb. (N. Y.) 271 (1850); *State v. Howard*, 82 N. C. 623 (1880); *State v. Davis*, 104 Tenn. 501, 58 S. W. 122 (1900) (he didn't go to kill him).

"We understand the rule to be that a party charged with a crime can never put in evidence in his own behalf any declarations of his after its commission . . . unless as a part of the *res gestae* to some act which is admitted in evidence." *State v. Vann*, 82 N. C. 631, 633 (1880), per Dillard, J.

Should the circumstances under which the extrajudicial statements are made be such as to suggest to the presiding judge that the evidence may have been manufactured and, consequently, that the jury may be misled⁹ he may reject the evidence of the extrajudicial declaration.¹⁰

§ 2676. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Undue Influence.—The operation of a degree of influence exerted by another in excess of that which the law regards as reasonable may be shown by means of extrajudicial statements by the person affected. The extent of a given person's capacity for *resisting* such influence may be shown in the same way.¹ In this latter connection, both the capacity for resistance and the power of the influence applied may be exhibited in terms of the situation which has been changed. In other words, in attempting to prove the operation of undue influence on the mind of the testator it may be shown that he had formed shortly before a fixed determination to make by his will provisions quite different from those which he has actually made. The former determination² as well as the latter³ may be shown by his extrajudicial declarations made at or about the time.⁴ Constraint may be shown by the extrajudicial statements of the person affected.⁵ Declarations of a third

9. § 1745.

10. Johnston v. Spoonheim, 19 N. D. 191, 41 L. R. A. (N. S.) 1 n., 123 N. W. 830 (1909).

§ 2676-1. § 2640.

2. Cawthorn v. Haynes, 24 Mo. 236 (1857); Cudney v. Cudney, 68 N. Y. 148 (1877); Stubb v. Marshall, 54 Tex. Civ. App. 526, 117 S. W. 1030 (1909) (admissible in support of other evidence). "It was a will on paper but it was not his intention; it was not his heart's desire by any means." Davidson v. Davidson, 2 Neb. (Unof.) 90, 95, 96 N. W. 409 (1901), per Hastings, C.

Declarations of a testator prior to the execution of his will as to where he obtained the money with which he purchased the property are not admissible upon the issue of undue in-

fluence, since the title of the property would have no bearing on such question. Winston v. Elliott, 169 Ala. 416, 53 So. 750 (1910).

3. Hagar v. Norton, 188 Mass. 47, 73 N. E. 1073 (1905).

4. **Declarations of a beneficiary** which are so connected with the making of the will in point of time and circumstance as to give color thereto will be received in evidence as part of the *res gestae* upon the issue of fraud and undue influence. James v. Fairall, (Iowa 1912) 134 N. W. 608.

5. Bennett v. Smith, 21 Barb. (N. Y.) 439 (1856).

Constraint to disinherit.—Statements by a testatrix that she was constrained by her other daughters to disinherit one and that they were exerting an undue influence upon her

person by whose undue influence it is alleged the execution of the will was procured have also been received in this connection.⁶

Narrative excluded.—An extrajudicial statement by a testator that he has been forced by fraud or undue influence to make a will is clearly objectionable as hearsay and is accordingly rejected.⁷

to that end have been held inadmissible for the purpose of establishing undue influence and defeating the will. *Techenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46 (1908).

6. *Bradford v. Risdon*, 28 T. L. R. 342, 56 S. J. 416 (1913).

7. *California.*—*Estate of Ricks*, 160 Cal. 450, 117 Pac. 532 (1911); *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598 (1910); *Donovan's Estate*, 140 Cal. 390, 73 Pac. 1081 (1903); *Kaufman's Estate*, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179 (1897); *Calkin's Estate v. Calkins*, 112 Cal. 296, 44 Pac. 577 (1896).

Connecticut.—*Comstock v. Hadlyme*, 8 Conn. 263 (1830).

District of Columbia.—*Kultz v. Jaeger*, 29 App. D. C. 300 (1907); *Manogne v. Herrell*, 13 App. D. C. 455 (1898); *Towson v. Moore*, 11 App. D. C. 377 (1897).

Georgia.—*Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788 (1900); *Mallery v. Young*, 94 Ga. 804, 22 S. E. 142 (1894).

Idaho.—*Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295 (1897).

Illinois.—*Beemer v. Beemer*, 100 N. E. 135 (1912); *Crumbaugh v. Owen*, 238 Ill. 497, 87 N. E. 312 (1909); *Cheney v. Goldy*, 225 Ill. 394, 80 N. E. 289, 116 Am. St. Rep. 145 (1907); *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150 (1893); *Reynolds v. Adams*, 90 Ill. 134, 32 Am. Rep. 15 (1878).

Indiana.—*Ditton v. Hart*, 175 Ind. 181, 93 N. E. 961 (1911); *Hayes v. West*, 35 Ind. 21, 24 (1871); *Runkle v. Gates*, 11 Ind. 95 (1858).

Iowa.—*Johnson v. Johnson*, 134 Iowa, 33, 111 N. W. 430 (1907).

Michigan.—*Leffingwell v. Betting-*

house, 151 Mich. 513, 115 N. W. 731, 15 Det. Leg. N. 40 (1908).

Missouri.—*Techenhock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46 (1908); *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604 (1900); *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127 (1896); *Bush v. Bush*, 87 Mo. 480 (1885); *Gibson v. Gibson*, 24 Mo. 227 (1857).

Nebraska.—*Davidson v. Davidson*, 2 Neb. (Unof.) 96 N. W. 409 (1901).

New Jersey.—*Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738 (1889); *Pemberton's Case*, 40 N. J. Eq. 520, 4 Atl. 770 (1885); *Rushing v. Rushing*, 36 N. J. Eq. 603, 607 (1883); *Kitchell v. Beach*, 35 N. J. Eq. 446 (1882); *Lynch v. Clements*, 24 N. J. Eq. 431 (1874).

New York.—*Gick v. Stumpf*, 204 N. Y. 413, 97 N. E. 865, *rev'g* 134 App. Div. 910, 118 N. Y. Suppl. 1108 (1912); *Marx v. McGlynn*, 88 N. Y. 357 (1882); *Cudney v. Cudney*, 68 N. Y. 148 (1877); *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71 (1854); *Jackson v. Kniffen*, 2 John. 33 (1806).

Pennsylvania.—*Hoshauer v. Hoshauer*, 26 Pa. 404 (1856); *Moritz v. Brough*, 16 S. & R. 403 (1827).

South Carolina.—*Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808 (1897).

Tennessee.—*Kirkpatrick v. Jenkins' Ex'rs*, 96 Tenn. 85, 33 S. W. 819 (1896).

Texas.—*Kennedy v. Upshaw*, 64 Tex. 411 (1885). See *Simon v. Middleton*, 51 Tex. Civ. App. 531, 112 S. W. 441 (1908).

Vermont.—*Crocker v. Chase's Es-*

§ 2677. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts; Mental States*); Willingness, Readiness, etc.—The willingness¹ or unwillingness² of a given individual to do a particular act may be shown by his unsworn statements indicative of this phase of his mind. Readiness, coupled with present ability, to do a particular thing, e. g., pay a month's rent in advance³ or make a given purchase,⁴ may be established in the same way.

§ 2678. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts*); Moral Qualities.—As is more fully seen elsewhere,¹ proof of moral qualities is one attended with administrative and procedural difficulties. Although it is evident that many mental states possess moral attributes,² a rule of substantive or procedural law forbids, in most instances, their proof in the same way as is employed in case of psychological facts, i. e., by circumstantial proof, including the use of extrajudicial statements. Only by the existence of a reputation as to the relevant trait of character involved as this reputation exists in an appropriate community, can proof on the

tate, 57 Vt. 413 (1885); Robinson v. Hutchinson, 26 Vt. 38, 60 Am. Dec. 298 (1853).

Wisconsin.—Loennecker's Will, 112 Wis. 461, 88 N. W. 215 (1901).

Virginia.—Wallen v. Wallen, 107 Va. 131, 57 S. E. 596 (1907).

Compare In re Miller's Estate, 31 Utah, 415, 88 Pac. 338 (1906). "When used for such purpose, they are mere hearsay, which, by reason of the death of the party whose statements are so offered, can never be explained or contradicted by him. Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such purpose would go far to destroy the security which it is essential to preserve." Shailer v. Bumstead, 99 Mass. 112, 122 (1868), per Colt, J.

Conversations between a testator and a beneficiary under the will and subsequent to its execution are not

admissible for the purpose of showing undue influence unless there are other facts and circumstances in connection with which the inference is warranted that similar statements had been made before and that such statements influenced the making of the will. Leffingwell v. Bettinghouse, 151 Mich. 513, 115 N. W. 731, 15 Det. Leg. N. 40 (1908).

§ 2677-1. Long v. Rogers, 17 Ala. 540 (1850); Walter v. Victor G. Bloede Co., 94 Md. 80, 50 Atl. 433 (1901); Evans v. Jones, 8 Yerg. (Tenn.) 461 (1835).

2. Loudon v. Blythe, 27 Pa. St. 22, 67 Am. Dec. 442 (1856).

3. Cronly v. Murphy, 64 N. C. 489 (1870).

4. Good v. Smith, 44 Ore. 578, 78 Pac. 354 (1904) (purchased land).

§ 2678-1. §§ 3310 *et seq.*

2. The line of distinction between mental and moral qualities may often be one difficult to draw. Happily,

subject be made.³ In many connections, on the other hand, the existence of a reputation as to moral qualities may be independently relevant, i. e., irrespective of its truth or falsity. Thus, that one engaged as a servant or employee possessed a particular reputation may have a legitimate bearing as to the negligence of the master in employing him.⁴

§ 2678a. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Probative Facts*); Political Opinions.—The existence of a political opinion as held by a particular person may properly be shown by his extrajudicial declarations.¹ It may thus be made to appear that the declarant was loyal to the government,² or the reverse, a member of a designated party, possessed of a philosophical turn of mind,³ or the like. Naturally, the instances of this particular application of the rule are found in English cases of a political nature relating to sedition or seditious libel. The manufacture of evidence for the purpose of meeting a present or anticipated trial will be prevented, so far as practicable, by a presiding judge⁴ under his general administrative duty of protecting the jury from being misled.⁵

§ 2679. (*Independent Relevancy of Unsworn Statements*); Extrajudicial Statements as Deliberative Facts.—The independ-

little reason usually exists for making the attempt. *Commonwealth v. Abbott*, 130 Mass. 472 (1881).

3. *Boies v. McAllister*, 12 Me. 308 (1835); *Hart v. Reynolds*, 1 Heisk. (Tenn.) 208 (1870). Should evidence of character be irrelevant or otherwise inadmissible, proof of reputation cannot be made. *Baldwin v. Western R. R. Corp.*, 4 Gray (Mass.) 333 (1855) (careless).

Here, however, the reputation may fairly be regarded as a form of composite hearsay used as evidence of the facts which it asserts. §§ 2739 *et seq.*

4. *Cook v. Parham*, 24 Ala. 21 (1853).

§ 2678a-1. *Horne Tooke's Trial*, 25 How. St. Tr. 1, 344 (1794); *Walker's Trial*, 23 How. St. Tr. 1055, 1133 (1794); *Lord Gordon's Trial*, 21 How. St. Tr. 486, 542 (1781); *Maskell's*

Trial, 21 How. St. Tr. 653, 677 (1780); *Dammaree's Trial*, 15 How. St. Tr. 522, 582 (1710).

Sermons.—Extrajudicial statements indicative of political opinions may be contained in a sermon. *Rosewell's Trial*, 10 How. St. Tr. 214 (1864).

2. *Francis Francia's Trial*, 15 How. St. Tr. 898, 975 (1717); *Cook's Trial*, 13 How. St. Tr. 311 (1696).

3. "I have heard him profess solemnly, he thought it would ruin the best cause in the world to take any of these irregular ways for the preserving of it." *Lord Russell's Trial*, 9 How. St. Tr. 577, 622 (1683).

4. *Thomas Hardy's Trial*, 24 How. St. Tr. 199 (1794).

5. §§ 386, 1745. See also *Joseph Hanson's Trial*, 31 How. St. Tr. 43, 81 (1809).

ent relevancy of unsworn statements may, however, be not only constituent¹ or probative² in its nature but also deliberative. In other words, the extrajudicial declaration may not only constitute an element in the right or liability placed in issue by the pleadings or tend to prove the existence of a *res gestae* fact, but its office may be to assist the tribunal in weighing the probative force of more individually significant evidence. Statements or other facts employed in this deliberative way may come to the tribunal within the time or space limit of the *res gestae* or in connection with probative facts. Their relevancy, however, never, on this account becomes constituent or probative but remains at all times simply deliberative.

§ 2680. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Deliberative Facts*); Bias.— Subjective mental states on the part of a witness or other declarant may be important deliberative facts. Prominent among these is *bias*. This, whenever relevant, may be shown by proof of the unsworn statements of the person whose mental attitude is in question.¹ The form of such declarations may be oral or in writing, e. g., letters.² Thus, a party may produce a letter sent to him by

§ 2679-1. §§ 2593 *et seq.*

2. §§ 2624 *et seq.*

§ 2680-1. *Alabama*.—Alabama Great Southern R. Co. v. Yount, 165 Ala. 537, 51 So. 737 (1910).

Arkansas.—Crumpton v. State, 52 Ark. 273, 12 S. W. 563 (1889).

California.—People v. Mack, 14 Cal. App. 12, 110 Pac. 967 (1910); People v. Gregory, 120 Cal. 16, 52 Pac. 41 (1898); People v. Gardner, 98 Cal. 127, 32 Pac. 880 (1893).

Indiana.—Johnson v. Untey, 74 Ind. 233 (1881).

Maryland.—Stockham v. Malcolm, 111 Md. 615, 74 Atl. 569 (1909).

Massachusetts.—Trowbridge v. Tupper, 210 Mass. 378, 96 N. E. 1096 (1912); Carroll v. Boston Elevated Ry. Co., 200 Mass. 527, 86 N. E. 793 (1909); Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468 (1891); O'Neill v. City of Lowell, 6 Allen (88 Mass.), 110 (1863).

New York.—Potter v. Brown, 197 N. Y. 288, 90 N. E. 812, 91 N. E. 1119, reversing 125 App. Div. 640, 109 N. Y. Suppl. 1075 (1910); Hotchkiss v. Germania Fire Ins. Co., 5 Hun (N. Y.) 90 (1875).

Ohio.—Toledo Ry. & Light Co. v. Ward, 25 Ohio Cir. Ct. R. 399 (1903).

Oregon.—State v. McCann, 43 Ore. 155, 72 Pac. 137 (1903).

Texas.—Renn v. State (Cr. App. 1912), 143 S. W. 167; Reddick v. State, (Cr. App. 1898) 47 S. W. 993; Bonnard v. State, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431 (1888); Tow v. State, 22 Tex. App. 175, 2 S. W. 582 (1886).

2. *Alabama*.—Burke v. State, 71 Ala. 377 (1882).

California.—Silvey v. Hodgdon, 48 Cal. 185 (1874).

Indiana.—Litten v. Wright School Tp., 127 Ind. 81, 26 N. E. 567 (1891).

one of his adversary's witnesses, as tending to show his bias against the proponent.³ Undoubtedly, the proponent may introduce sufficient of the correspondence leading up to this letter, show the probative force of the document, explain its allusions, or point out the meaning of its terms.⁴

§ 2681. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Deliberative Facts*); Corroboration.—The independently relevant statement may be used, as a deliberative fact, to corroborate the evidence of a witness. Such a declaration may be oral or in writing, e. g., an entry on a book account.¹

§ 2682. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Deliberative Facts*); Fixing Attention or Refreshing Memory.—An unsworn statement, like any other fact, may be used, in a deliberative way, to arrest, or as is commonly said, to “fix” the attention of a witness or other person.¹ Such an utterance may equally well serve to refresh the memory of any given person.²

New York.—*People v. Fletcher*, 44 App. Div. 199, 60 N. Y. Suppl. 777, 14 N. Y. Cr. R. 328 (1909).

Texas.—*Warren v. State*, 54 Tex. Cr. App. 443, 114 S. W. 380 (1908).

3. *Frischet v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 456 (1860).

4. *Frischett v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 456 (1860).

§ 2681-1. *Georgia.*—*Petit v. Teal*, 57 Ga. 145 (1876).

Illinois.—*Perry St. Bank v. Elledge*, 99 Ill. App. 307 (1901).

Indiana.—*McCullough v. McCullough*, 12 Ind. 487 (1859).

Maryland.—*Gill v. Staylor*, 93 Md. 453, 49 Atl. 650 (1901).

Michigan.—*Wright v. Towle*, 67 Mich. 255, 34 N. W. 578 (1887).

Nevada.—*Cahill v. Hirschman*, 6 Nev. 57 (1870).

New Hampshire.—*Ladd v. Dudley*, 45 N. H. 61 (1863).

New York.—*Scheffel v. Hatch*, 70 Hun 597, 25 N. Y. Suppl. 240, 53 N. Y. St. Rep. 655 (1893).

North Carolina.—*Falls v. Gamble*, 66 N. C. 455 (1872); *Fain v. Edwards*, 33 N. C. 305 (1850).

Pennsylvania.—*Donahue v. Connor*, 93 Pa. St. 356 (1880).

United States.—*Bean v. Lambert*, 77 Fed. 862 (1896).

England.—*Digby v. Stedman*, 1 Esp. 328 (1796).

See, also, *Cornville v. Brighton*, 35 Me. 141 (1853); *Baird v. Fletcher*, 50 Vt. 603 (1878).

§ 2682-1. *Florida.*—*Kirby v. State*, 44 Fla. 81, 32 So. 836 (1902).

Georgia.—*Barrow v. State*, 80 Ga. 191, 5 S. E. 64 (1888).

New Hampshire.—*Wiggin v. Plummer*, 31 N. H. 251 (1855).

New Jersey.—*State v. Fox*, 25 N. J. L. 566 (1856).

Washington.—*State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382 (*affirmed* 164 U. S. 705, 17 S. Ct. 997, 41 L. ed. 1183 (1893)).

2. *Howser v. Com.*, 51 Pa. St. 332 (1865).

§ 2683. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Deliberative Facts*); Good and Bad Faith.—As is observed elsewhere in the present chapter¹ the nature of the issue in any particular case may render good or bad faith constitutently relevant as component parts of the right or liability asserted in the action. If so, not being subject to direct observation, these phases of the mind must, like other psychological facts, be established circumstantially. Among facts which may properly be employed in such a connection are unsworn statements.

Good or bad faith may be regarded by judicial administration in still another capacity. The bona fides with which the respective parties have carried on their several portions of the *res gestae*, properly so-called, or with which they are urging their different contentions upon the court may have an important deliberative effect enabling the jury to judge as to the probative force of such evidence as is submitted on either side.² It by no means follows that a party may not be entitled to the rights which he claims because he has gone about the matter of gaining or enforcing them in a sly, underhanded, treacherous or overreaching manner. The fact of bad faith is not a probative one. But the opposing party is clearly at liberty to ask the jury to weigh with the utmost caution every statement or fact which comes to them from a source which they may well view with suspicion. As a deliberative fact, therefore, a party is entitled to introduce the unsworn statements of his opponent for the purpose of showing his bad faith in the matter.³ On the other hand, the litigant sought to be affected by such an adverse inference is clearly at liberty to seek to establish

§ 2683-1. § 2652.

2. In a criminal prosecution, the motives of the prosecutor are a legitimate subject of inquiry and the fact that the proceedings were instituted and are being conducted in bad faith may be shown by his extrajudicial statements. *McCullough v. State*, (Ga. App. 1912) 76 S. E. 393.

3. *California*.—*Davis v. Drew*, 58 Cal. 152 (1881).

Georgia.—*Pearson v. Forsyth*, 61 Ga. 537 (1878).

Iowa.—*Goldstein v. Morgan*, 122 Iowa, 27, 96 N. W. 897 (1903).

Maine.—*Smith v. Tarbox*, 70 Me. 127 (1879).

Maryland.—*Sanborn v. Lang*, 41 Md. 107 (1874).

Missouri.—*Potter v. McDowell*, 31 Mo. 62 (1860).

New Hampshire.—*Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194 (1843).

New Jersey.—*Cowen v. Bloomberg*, 69 N. J. L. 462, 55 Atl. 36 (1903).

North Carolina.—*Black v. Baylees*, 86 N. C. 527 (1882).

Pennsylvania.—*York County Bank v. Carter*, 38 Pa. St. 446, 80 Am. Dec. 494 (1861).

the spirit of fair dealing which he claims to have shown.⁴ When so employed, these mental or moral states of consciousness may, as in other connections, be proved by the use of unsworn statements relevant for the purpose.⁵

§ 2684. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Deliberative Facts*); Identifying a date.—A date,¹ any fact² or material object rendered important by the evidence in the case³ may be identified by a witness, as bearing a certain definite relation to the making of a given statement. A declaration used for refreshing memory as to this or a similar matter is not objectionable as hearsay.⁴ The latter may be in writing, e. g., an entry upon the books of a corporation.⁵

§ 2685. (*Independent Relevancy of Unsworn Statements; Extrajudicial Statements as Deliberative Facts*); Impeachment.—An unsworn statement may be used, in a deliberative way, in connection with the examination of a witness for other purposes than that of corroboration.¹ Such an utterance may be used, regardless of its truth or falsity, for the purpose

Vermont.—Spaulding v. Albin, 63 Vt. 148, 21 Atl. 530 (1890).

Wisconsin.—Gillet v. Phelps, 12 Wis. 392 (1860).

United States.—Klein v. Hoffheimer, 132 U. S. 367, 10 S. Ct. 130, 33 L. ed. 373 (1889).

4. *Colorado.*—Wilcoxon v. Morgan, 2 Colo. 473 (1875).

Indian Territory.—Dorrance v. McAlester, 1 Indian Terr. 473, 45 S. W. 141 (1898).

New York.—Tompkins County v. Bristol, 99 N. Y. 316, 1 N. E. 878 (1885).

Oregon.—Robson v. Hamilton, 41 Oreg. 239, 69 Pac. 651 (1902).

Pennsylvania.—Kenyon v. Ashbridge, 35 Pa. St. 157 (1860).

Wisconsin.—Bates v. Ableman, 13 Wis. 644 (1861).

United States.—U. S. v. Gentry, 119 Fed. 70, 55 C. C. A. 658 (1902).

See also Tuckwood v. Hawthorn, 67 Wis. 326, 30 N. W. 705 (1886).

5. *Banfield v. Parker*, 36 N. H. 353

(1858); *Smith v. Betty*, 11 Gratt. (Va.) 752 (1854).

§ 2684-1. *Alabama.*—Jordan v. Roney, 23 Ala. 758 (1853).

Georgia.—Harris v. Central R. Co., 78 Ga. 525, 3 S. E. 355 (1887).

Michigan.—McNitt v. Henderson, 155 Mich. 214, 118 N. W. 974, 15 Detroit Leg. N. 987 (1908); Grosvenor v. Ellis, 44 Mich. 452, 7 N. W. 59 (1880).

New Jersey.—Browning v. Skillman, 24 N. J. L. 351 (1854).

Vermont.—State v. Ward, 61 Vt. 153, 17 Atl. 483 (1888).

2. *Birkman v. Fahrenthold*, 52 Tex. Civ. App. 335, 114 S. W. 428 (1908).

3. *Stamps v. Newton County*, 8 Ga. App. 229, 68 S. E. 947 (1910) (bridge).

4. *Rollins v. Wicker*, 154 N. C. 559, 70 S. E. 934 (1911).

5. *Howard v. Strode* (Mo. 1912), 146 S. W. 792, 799.

§ 2685-1. § 2681.

of impeaching him.² The impeaching statement may take a written form,³ such as that of a book entry.⁴ On the other hand, the utterance may be oral. Such is commonly the case where one who is now testifying to a particular effect is shown to have made a statement at another time which is said to be inconsistent with his present position.⁵ This is true even in criminal cases.⁶ The statement, however, is not evidence for any other purpose.⁷

2. Alabama.—Haralson v. State, 82 Ala. 47, 2 So. 765 (1886).

Arizona.—Schaffer v. Territory, 127 Pac. 746 (1912).

California.—Worley v. Spreckels Bros. Com. Co., 124 Pac. 697 (1912).

Connecticut.—McGinnis v. Grant, 42 Conn. 77 (1875) (to discredit).

Illinois.—Souleyret v. O'Gara Coal Co., 161 Ill. App. 60 (1911); Elgin J. & E. R. Co. v. Lawlor, 132 Ill. App. 280, affirmed 229 Ill. 621, 82 N. E. 407 (1907); Chicago Union Traction Co. v. Lowenrosen, 125 Ill. App. 194 (1905), affirmed 222 Ill. 506, 78 N. E. 813 (1906).

Indiana.—Traylor v. Hollis, 45 Ind. App. 680, 91 N. E. 567 (1910).

Kentucky.—Mann's Adm'r v. Reynolds, 150 S. W. 329 (1912); Lewis' Adm'r v. Bowling Green G. Co., 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169 n. (1909); Louisville H. & St. L. R. Co. v. Davis, 32 Ky. L. Rep. 580, 106 S. W. 304 (1908).

Maryland.—Grill v. O'Dell, 113 Md. 625, 77 Atl. 784 (1910).

Montana.—Isman v. Altenbrand, 42 Mont. 188, 111 Pac. 849 (1910).

New York.—Kenney v. South Shore Natural Gas & Fuel Co., 119 N. Y. Suppl. 363, 134 App. Div. 859 (1909).

South Dakota.—First Nat. Bank v. Harney, 137 N. W. 365 (1912).

Texas.—Holmes v. State (Cr. App. 1912), 150 S. W. 926; Dunlap v. Broyles (Civ. App. 1912), 146 S. W. 578; Tucker v. State (Cr. App. 1912), 150 S. W. 190; Sackville v. Story (Civ. App. 1912), 149 S. W. 239.

Declarations showing bias. See § 2680.

3. Warren v. State, 54 Tex. Cr. App. 443, 114 S. W. 380 (1908).

4. Perry State Bank v. Elledge, 99 Ill. App. 307 (1901); Moshier v. Frost, 110 Ill. 206 (1884); Davenport v. Cummings, 15 Iowa 219 (1863); Healey v. Wellesley, etc., R. Co., 176 Mass. 440, 57 N. E. 703 (1903); Moyes v. Brumaux, 3 Yeates (Pa.), 30 (1800).

5. Best on Ev. (Chamberlayne's 3d Amer. Ed.), 603.

Corroboration of Witness.—Where a witness has been impeached by evidence of such declarations it has been held permissible for him to introduce evidence of prior declarations by him, before the trial, in corroboration of his testimony. Allred v. Kirkman, (N. C. 1912) 76 S. E. 244.

Exact words not required.—It is not required, as an administrative matter, that the witness should be able to give the exact language employed in making the statement alleged to be inconsistent. State v. Jennings, 48 Ore. 483, 87 Pac. 524, 89 Pac. 421 (1906). On the other hand, in accordance with a right more fully defined elsewhere, §§ 488, 541, the declarant is at liberty to complete his statement in any relevant particular. Taylor v. State, 50 Tex. Cr. App. 377, 97 S. W. 473 (1906).

6. State v. Jennings, 48 Ore. 483, 87 Pac. 524, 89 Pac. 421 (1906).

7. Robinson v. Duvall, 27 App. D. C. 535 (1906).

§ 2686. (*Independent Relevancy of Unsworn Statements*); Form of Statement; Oral.—The independently relevant statement, i. e., the extrajudicial declaration grounding some other inference than that of its truth may be accepted by judicial administration as is abundantly seen *passim*, either in oral¹ or in written form. Included among these, may be the self-serving declarations of third persons.²

§ 2687. (*Independent Relevancy of Unsworn Statements*); Form of Statement); Written.—Independently relevant statements which are in writing naturally assume a great variety of forms.¹ They may, for example, be found on a record.² The

§ 2686-1. Georgia.—Perry v. State, 110 Ga. 234, 36 S. E. 781 (1899).

Indiana.—Banks v. State, 157 Ind. 190, 60 N. E. 1087 (1901).

Massachusetts.—Jacobs v. Whitcomb, 10 Cush. 255 (1852).

Michigan.—Edgell v. Francis, 66 Mich. 303, 33 N. W. 501 (1887).

New York.—Dodge v. Weill, 158 N. Y. 346, 53 N. E. 33 (1899); Hunt v. People, 3 Park. Cr. (N. Y.) 569 (1857).

Pennsylvania.—Duncan v. McCullough, 4 Serg. & R. 483 (1818).

England.—Du Bost v. Beresford, 2 Campb. 511 (1810).

2. California.—Poorman v. Miller, 44 Cal. 269 (1872).

Massachusetts.—Ware v. Brookhouse, 7 Gray, 454 (1856).

New Hampshire.—South Hampton v. Fowler, 54 N. H. 197 (1874).

New York.—Dewey v. Goodenough, 56 Barb. 54 (1865).

Texas.—Gilbert v. Odum, 69 Tex. 670, 7 S. W. 510 (1888).

Wisconsin.—Lehman v. Sherger, 68 Wis. 145, 31 N. W. 733 (1887).

England.—Stothert v. James, 1 C. & K. 121, 47 E. C. L. 121 (1843).

§ 2687-1. Alabama.—Moses v. Katzenberger, 84 Ala. 95, 4 So. 237 (1888); Manaway v. State, 44 Ala. 375 (1870); Jennings v. Blockers Adm'r, 25 Ala. 415 (1854).

Arkansas.—Ryburn v. Pryor, 14

Ark. 505 (1854).

Iowa.—Kocher v. Palmetier, 112 Iowa, 84, 83 N. W. 816 (1900).

Louisiana.—Swift v. Williams, 1 La. 165 (1830).

Michigan.—Bond v. McMahon, 94 Mich. 557, 54 N. W. 281 (1893); Daniels v. Dayton, 49 Mich. 137, 13 N. W. 392 (1882) (mortgages).

Mississippi.—Baldwin v. Flash, 58 Miss. 593 (1881); Wildy v. Bonney's Lessee, 31 Miss. 644 (1856); Wells v. Shipp, 1 Walk. 353 (1829).

Missouri.—Mann v. Best, 62 Mo. 491 (1876); Salmon's Adm'r v. Davis, 29 Mo. 176 (1859).

New York.—People v. Coombs, 36 N. Y. App. Div. 284, 55 N. Y. Suppl. 276, 13 N. Y. Cr. Rep. 525, *affirmed* 158 N. Y. 532, 53 N. E. 527 (1899); Brooks v. Conner, 10 Daly 183 (1881).

Pennsylvania.—Jordan v. Wilson, 25 Pa. St. 390 (1855) (bill of lading); Sergeant v. Ingersoll, 15 Pa. St. 343 (1850); Evans v. Mengel, 3 Pa. St. 239 (1846); Helser, etc. v. Pott, etc., 3 Pa. St. 179 (1846).

Vermont.—Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253 (1892).

United States.—Marks v. Fox, 18 Fed. 713 (1883); Brown v. Piper, 91 U. S. 37, 23 L. ed. 200 (1875).

England.—Pike v. Crouch, 1 Ld. Raym. 730 (1697).

2. Darmitzer v. German Sav., etc.,

statement, on the other hand, may be less formal in its nature, e. g., a book entry or contained in one.³ It may be less carefully and methodically written as a mere piece of business or social correspondence.⁴ Documents commonly employed in mercantile

Soc., 23 Wash. 132, 62 Pac. 862 affirmed 192 U. S. 125, 24 Sup. Ct. 221, 48 L. ed. 373 (1900).

In its assertive capacity, such a statement is merely hearsay. *Melancon v. Phoenix Ins. Co.*, 116 La. 324, 40 So. 324 (1906) (inventory).

3. *Georgia*.—*Cody v. Gainesville First Nat. Bank*, 103 Ga. 789, 30 S. E. 281 (1898).

Illinois.—*Chicago, etc., R. Co. v. Ingersoll*, 65 Ill. 399 (1872).

Louisiana.—*Doubreire v. Grillier*, 2 Mart. (N. S.) 171 (1824).

Missouri.—*Stephan v. Metzgar*, 95 Mo. App. 609, 69 S. W. 625 (1902).

New Hampshire.—*Newbury Bank v. Sinclair*, 60 N. H. 100, 49 Am. Rep. 307 (1880).

Pennsylvania.—*Crooks v. Bunn*, 136 Pa. St. 368, 20 Atl. 529 (1890); *Coxe v. Deringer*, 78 Pa. St. 271 (1875).

United States.—*Beavar v. Taylor*, 1 Wall. 637, 17 L. ed. 601 (1863). But see *Goff v. Stoughton State Bank*, 78 Wis. 106, 47 N. W. 190, 9 L. R. A. 859 (1890).

Hearsay.—It is to be borne in mind that the entry is not to be received as evidence of the facts asserted. *Matko v. Daley*, 10 Ariz. 175, 85 Pac. 721 (1906) (time-book).

Relevancy, constituent, probative or deliberative is, of course, necessary. *Spellman v. Muehlfeld*, 48 N. Y. App. Div. 262, 62 N. Y. Suppl. 749 reversed 166 N. Y. 245, 59 N. E. 817 (1900).

4. *Alabama*.—*Cleveland Woolen Mills v. Sibert*, 81 Ala. 140, 1 So. 773 (1886).

California.—*Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (1903).

Illinois.—*Carter v. Carter*, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669

(1894), affirming 37 Ill. App. 219 (1889).

Kentucky.—*Murray v. East End Imp. Co.*, 60 S. W. 648, 22 Ky. L. Rep. 1477 (1901).

Maryland.—*Walker v. Pue*, 57 Md. 155 (1881); *Roberts v. Woven Wire Mattress Co.*, 46 Md. 374 (1876); *Oelrichs v. Ford*, 21 Md. 489 (1863); *Burckmyer v. Whiteford*, 6 Gill 1 (1847); *Walsh v. Gilmar*, 3 Harr. & J. 383, 6 Am. Dec. 503 (1813).

Massachusetts.—*New England Mar. Ins. Co. v. De Wolf*, 8 Pick. 56 (1829).

Michigan.—*Schaub v. Welded-Barrel Co.*, 125 Mich. 591, 84 N. W. 1095 (1901).

Mississippi.—*Spivey v. State*, 58 Miss. 858 (1881); *Swann v. West*, 41 Miss. 104 (1866).

New Hampshire.—*Merrill v. Downs*, 41 N. H. 72 (1860); *Newman v. Bean*, 21 N. H. 93 (1850).

New York.—*Conde v. Hall*, 92 Hun 335, 37 N. Y. Suppl. 411, 72 N. Y. St. Rep. 708 (1895); *People v. Lewis*, 62 Hun 622, 16 N. Y. Suppl. 881, 9 N. Y. Cr. Rep. 340, 42 N. Y. St. Rep. 768, affirmed 136 N. Y. 633, 32 N. E. 1014 (1891); *Winters v. Judd*, 59 Hun 32, 12 N. Y. Suppl. 411, 35 N. Y. St. Rep. 182 (1891); *Felter v. Claffy*, 46 Hun 680, 12 N. Y. St. Rep. 625 (1887), affirmed 120 N. Y. 627, 24 N. E. 1096; *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263 (1882); *Scott v. Middletown, etc., R. Co.*, 86 N. Y. 200 (1881); *Foster v. Newbrough*, 66 Barb. 645 (1873).

Pennsylvania.—*Com. v. Gentry*, 5 Pa. Dist. 703 (1895); *Wakeman v. Thomas*, 3 Lack. Leg. N. 377 (1895); *Albrecht v. Breder*, 12 Wkly. Notes Cas. 170 (1882); *Hannis v. Hazlett*, 54 Pa. St. 133 (1867).

transactions, such as promissory notes,⁵ receipts,⁶ or the like⁷ may also be the vehicle through which an extrajudicial statement of independent relevancy is presented to the court. Similarly relevant unsworn statements may be contained in a sermon.⁸ A still more transitory and ephemeral form of statement may be employed, as where a newspaper⁹ or some written notice¹⁰ contains the independently relevant statement. So far as relates to proof of the facts which it asserts, the statement is hearsay.¹¹ It is to be understood that this testimony, like other forms of evidence, is subject to administrative control of the court in its executive function of regulating the course of the trial.¹² Much will depend, as to a particular ruling, upon what we have called "the state of the case."¹³ The judge will not, for example, receive a letter in evi-

South Carolina.—Charleston, etc., R. Co. v. Blake, 12 Rich. L. 66 (1859).

Vermont.—May v. Brownell, 3 Vt. 463 (1831).

Virginia.—Cluverius v. Com., 81 Va. 787 (1886).

United States.—Struthers v. Drexel, 122 U. S. 487, 7 S. Ct. 1293, 30 L. ed. 1216 (1886); Boyden v. Burke, 14 How. 575, 14 L. ed. 548 (1852); Wilkes v. Dinoman, 7 How. 89, 12 L. ed. 618 (1849).

Hearsay.—The extrajudicial statements contained in such letters are inadmissible as evidence of facts asserted. When tendered for this purpose they are merely hearsay and are accordingly rejected. Provident Sav. Life Assur. Soc. v. Whayne's Adm'r, 131 Ky. 84, 29 Ky. Law Rep. 160, 93 S. W. 1049 (1906); Security Trust Co. v. Robb, 142 Fed. 78, 73 C. C. A. 302 (1906). Should the declaration be made by the opposite party, it may be competent upon ordinary principles, as an admission.

§ 1233nn-1 *et seq.*

The letter of a third person presents no such ground for admissibility. Security Trust Co. v. Robb, 142 Fed. 78, 73 C. C. A. 302 (1906).

History of the case.—This may often appear from statements contained in letters. Brown v. Bowe, 7 N. Y. St. 387, 44 Hun 623 (1887).

Relevancy is, however, essential. Southern R. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144 (1901).

Telegrams may be the vehicle for conveying an extrajudicial statement to the tribunal. Chrisman v. Carney, 33 Ark. 316 (1878); Com. v. Gentry, 5 Pa. Dist. 703 (1895).

In its assertive capacity, the declaration is merely hearsay. Western Union Telegraph Co. v. Bradford, 41 Tex. Civ. App. 281, 91 S. W. 818 (1906).

5. McCann v. Preston, 79 Md. 223, 28 Atl. 1102 (1894).

6. Singer Mfg. Co. v. Coon, 9 Misc. (N. Y.) 465, 30 N. Y. Suppl. 232, 61 N. Y. St. Rep. 124 (1894); Sturm v. Atlantic Mut. Ins. Co., 38 N. Y. Super. Ct. 281, *affirmed* 63 N. Y. 77 (1874).

7. Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527 (1906) (bank statement).

8. Rosewell's Trial, 10 How. St. Tr. 214 (1684).

9. Jewell v. Jewell, 1 How. (U. S.) 219, 11 L. ed. 108 (1843).

10. Fox v. Foster, 4 Pa. St. 119 (1846).

11. Ft. Worth & R. G. Ry. Co. v. Cauble, 41 Tex. Civ. App. 348, 91 S. W. 244 (1906) (account of sales).

12. § 181.

13. § 1742.

dence where there is already an abundance of testimony upon the same point.¹⁴

Copy.—The existence of the copy of a document at a particular time may be a relevant fact, in and of itself, entirely independent of whether the facts stated in it are true or false.¹⁵

Invalid instruments.—Where the declaration is not offered as constituting, in whole or in part, a legal result, its relevancy may be in no way dependent upon the validity of the instrument in which it is contained.¹⁶

Memoranda.—The extrajudicial statement, independently relevant may consist of a memorandum.¹⁷ It will scarcely be necessary to emphasize the implied statement that a memorandum of this nature is not evidence of the facts asserted in it.¹⁸

§ 2688. (*Independent Relevancy of Unsworn Statements; Form of Statement*); Reputation.—As reputation—the composite extrajudicial statement in which the individual voices are lost—may be treated as a form of hearsay¹ as evidence of the facts asserted, so equally it may be, in certain connections, regarded as an extrajudicial statement independently relevant. For example, the existence of a given reputation with regard to a certain person's habits of drunkenness may be admissible—as bearing upon the reasonable nature of the conduct of another in employing him or continuing to employ him in a position of responsibility² reposing confidence in him,³ as shown by entrusting him

14. *Livingston's Appeal*, 63 Conn. 68, 26 Atl. 470 (1893).

15. *Williams v. Conger*, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778 (1888).

16. *State v. Behrman*, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449 (1894).

17. *Illinois*.—*Ewing v. Bailey*, 36 Ill. App. 191 (1889).

Indiana.—*St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665, 59 N. E. 995 (1901).

Michigan.—*Bennett v. Smith*, 40 Mich. 211 (1879).

New York.—*Wolf v. Di Lorenzo*, 22 Misc. 323, 49 N. Y. Suppl. 191 (1898); *Bigelow v. Hall*, 91 N. Y. 145 (1883).

Oregon.—*Humphrey v. Chilcat Canning Co.*, 20 Oreg. 209, 25 Pac. 389 (1890).

Pennsylvania.—*Vincent v. Huff's Lessee*, 8 Serg. & R. 381 (1822).

Texas.—*Henry v. Bounds* (Civ. App. 1898), 46 S. W. 120; *Watson v. Winston* (Civ. App. 1897), 43 S. W. 852.

18. *Illinois Cent. Ry. Co. v. Holt*, 29 Ky. L. Rep. 135, 92 S. W. 540 (1906).

§ 2688-1. §§ 2739 *et seq.*

2. *Fitch v. Woodruff, etc.*, Iron Works, 29 Conn. 82 (1860); *Plummer v. Ossipee*, 59 N. H. 55 (1879).

3. *Monahan v. Worcester*, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226 (1890).

with property.⁴ In much the same way, the existence of a reputation may be an independently relevant fact bearing on the question as to whether proper judgment was exercised in the selection of a trustee⁵ or the like. In short, in many connections the existence of a given reputation, while not probative as to its truth, is of evidentiary value in deciding as to whether one who knew of it acted with due and proper care in doing as he actually did.⁶

Inference of conduct.—The existence of a reputation cannot be used as the basis of an inference that the individual whose reputation is in question acted, in a particular instance, in accordance with it.⁷ This is precisely the inference which the rule excluding the use of evidence of character⁸ seeks to remove from the consideration of the jury.

§ 2689. (*Independent Relevancy of Unsworn Statements; Form of Statement; Reputation*); Injuries to Reputation.—The rules relating to the proof of reputation well illustrate the control which substantive law exercises over the law of evidence by prescribing the objectives toward which proof can alone be directed.¹ Speaking generally, the existence of a reputation, though evidently consisting only of the unsworn statements of a number of unidentified persons, may be admissible as an independently relevant fact in any proceeding where damages are claimed for an injury thereto. The substantive law, as is well known, accords a certain protection to the possessor of a favorable reputation. A person so protected may, for example, on an action for libel or slander² recover damages from anyone who has impaired

4. *Ficken v. Jones*, 28 Cal. 618 (1865).

5. *Holmberg v. Dean*, 21 Kan. 73 (1878).

6. *People v. Anderson*, 39 Cal. 703 (1870); *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453 (1889); *Williford v. State*, 36 Tex. Cr. 414, 37 S. W. 761 (1896).

Giving credit.—The question being as to who was the person to whom credit was given, the existence of a particular reputation as to the solvency of one or both may be an independently relevant fact. *Bus-*

well Trimmer Co. v. Case, 144 Mass. 350, 11 N. E. 549 (1887); *Daniels v. Dayton*, 49 Mich. 137, 13 N. W. 392 (1882).

7. *Harding v. Brooks*, 5 Pick. (Mass.) 244 (1827); *Matthews v. Huntley*, 9 N. H. 146 (1838); *Cornwall v. Richardson, Ryan & Moody*, 305, 27 Rev. Rep. 753, 21 E. C. (1825); *Dodd v. Norris*, 3 Campb. 519, 14 Rev. Rep. 832 (1814); *Bamfield v. Massey*, 1 Campb. 460 (1808).

8. §§ 3265 *et seq.*

§ 2689-1. § 1718i.

2. § 2621.

it to the injury of its possessor. In this, and all similar cases, the existence of the reputation, the right to which is said to have been invaded, is an independently relevant fact which may be established by the evidence of any one who knows what it is. The actual character of the plaintiff is not, strictly speaking, involved in the inquiry; it is not affected, in the least, by any slanderous statement or other injurious act.³

§ 2690. (*Independent Relevancy of Unsworn Statements; Form of Statement; Reputation; Injuries to Reputation*); Determination of Damages.—The plaintiff in an action for injuries to his reputation is by no means necessarily obliged to rely upon the administrative assumption¹ that his reputation is to be taken to be good in the absence of evidence to the contrary. Evidently, the injurious effect of an assault upon a given reputation is proportionate to the excellency of the latter. The same declaration or other act might, so far as believed, inflict a serious hardship upon one who is justly enjoying a high reputation, while it might do but comparatively little to a person whose reputation is already tarnished to a serious extent. The effects of a fall is often gauged by the height from which it occurs.

Under a very obvious line of forensic reasoning, the plaintiff, therefore, is at liberty to introduce affirmative evidence to enhance the excellence of his reputation, either by evidence in chief for the purpose of increasing the damages² or on rebuttal to prevent

3. The reputation is the general standing of the person affected in the community devoid of limitations to any particular trait of character. *Leonard v. Allen*, 11 Cush. (Mass.) 241 (1853). Even in view of the established rule that the only competent proof of character is general reputation in the community where the person in question is known (§§ 3310 *et seq.*) it could scarcely be said, with any propriety, that actual character was affected by any assault on reputation. This would seem to be as impossible as for the temperature of a room to be affected by injuring the thermometer by which it is being measured.

§ 2690-1. § 2692.

2. *Stow v. Converse*, 3 Conn. 325, 8 Am. Dec. 189 (1820); *Adams v. Lawson*, 17 Gratt. (Va.) 250, 260, 94 Am. Dec. 455 (1867); *Shroyer v. Miller*, 3 W. Va. 158 (1869). "It being thus important to the decision of the case that the jury should hear evidence as to the character of the plaintiff, either generally or in reference to the particular subject matter of the slander or libel, can any good reason be assigned why it should depend on the option of the defendant whether they shall hear such evidence or not? Such a one-sided rule would not be fair and equal as between the parties, would often defeat the justice of the case, and might operate great hardship upon a

their mitigation.³ His opponent may be led by the same considerations to work for a directly opposite result. In diminution of damages, he is at liberty to show that the plaintiff's reputation, as a matter of fact, was poor,⁴ already damaged in general estimation⁵ or among a majority⁶ of his neighbors.⁷ An administrative problem is presented where the defendant offers to prove by way of mitigation of damages, that the reputation of the plaintiff, *after* the publication by the defendant of the language in question or the doing by him of the other acts alleged to be unlawful, was poor.

plaintiff who is unknown to the jury. The defendant would not open the door by an attack on his character, and he would not be allowed to sustain it by evidence in chief. It does not appear to me to be a satisfactory answer to say, that the plaintiff ought to stand upon the presumption which the law makes, in the absence of evidence to the contrary, that his character is good. Why should the plaintiff be compelled to rely upon such a general presumption, when he offers to prove that the presumption, in his particular case, is in accordance with the fact? And what right has the defendant to complain, since the evidence is only offered to establish with more certainty what the law would presume to be true in the absence of all evidence." *Adams v. Lawson*, 17 Gratt. (Va.) 250, 260, 94 Am. Dec. 455 (1867).

3. *Holley v. Burgess*, 9 Ala. 728 (1846); *Inman v. Foster*, 8 Wend. (N. Y.) 602 (1832).

One who has assaulted the plaintiff's reputation is not entitled to object to the reception of his evidence of good character in rebuttal. *Dame v. Kenney*, 25 N. H. 318 (1852).

4. *Leonard v. Allen*, 11 Cush. (Mass.) 241 (1853).

5. *Alabama*.—*Martin v. Hardesty*, 27 Ala. 458, 62 Am. Dec. 773 (1855).

Illinois.—*Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169 (1885).

Kentucky.—*Campbell v. Bannister*, 79 Ky. 205, 2 Ky. L. Rep. (Abstract 72) (1880).

Maine.—*Fitzgibbon v. Brown*, 43 Me. 169 (1857).

Massachusetts.—*Leonard v. Allen*, 11 Cush. 241 (1853).

Michigan.—*Proctor v. Houghtaling*, 37 Mich. 41 (1877).

Mississippi.—*Powers v. Presgroves*, 38 Miss. 227 (1859).

Missouri.—*Gregory v. Chambers*, 78 Mo. 294 (1883).

New Jersey.—*O'Brien v. Frasier*, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170 (1885).

South Carolina.—*Sawyer v. Eifert*, 2 Nott & M. 511, 10 Am. Dec. 633 (1820).

Vermont.—*Barron v. Mason*, 31 Vt. 189 (1858).

Virginia.—*McNutt v. Young*, 8 Leigh, 542 (1837).

England.—*Bell v. Parke*, 11 Ir. C. L. 413 (1860).

Canada.—*McGregor v. McArthur*, 5 U. C. C. P. 493 (1856). But see also *Myers v. Currie*, 22 U. C. Q. B. 470 (1863).

6. *Powers v. Presgroves*, 38 Miss. 227, 241 (1859).

7. The inquiry should be confined to the plaintiff's general character for integrity and moral worth, or to conduct similar in character to that with which he is charged by the defendant. *Leonard v. Allen*, 11 Cush. (Mass.) 241 (1853).

There is an obvious danger lest the defendant may be permitted to take advantage, in this way, of his own wrong, screening himself from paying damage for the wrong which he has done behind the completeness of his own success. Still, such evidence has been regarded as being within the defendant's rights.⁸

§ 2691. (*Independent Relevancy of Unsworn Statements; Form of Statement; Reputation; Injuries to Reputation*); Similar Rumors.—A rule, as to the administrative propriety of which very grave doubt properly exists, permits a defendant in an action for libel, slander¹ or malicious prosecution to show that the plaintiff's reputation in the respect under investigation was already impaired at the time of the defendant's act by the existence in the community of rumors, stories or reports to the same effect as charged by the defendant. It has been held in such cases, by certain highly respected tribunals, that it is not in accordance with justice to the plaintiff or in the interests of public morality, that such evidence should be received for this purpose.²

8. *Bostick v. Rutherford*, 11 N. C. 83 (1825).

§ 2691-1. *Holley v. Burgess*, 9 Ala. 728 (1846).

2. *Alabama*.—*Jones v. State*, 76 Ala. 8 (1884); *Holley v. Burgess*, 9 Ala. 728 (1846).

Massachusetts.—*Peterson v. Morgan*, 116 Mass. 350 (1874); *Leonard v. Allen*, 11 Cush. 241 (1853); *Bodwell v. Swan*, 3 Pick. 376 (1825).

Michigan.—*Proctor v. Houghtaling*, 37 Mich. 41 (1877).

Texas.—*Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772 (1891).

England.—*Scott v. Sampson*, 8 Q. B. D. 491, 46 J. P. 408, 51 L. J. Q. B. 380, 46 L. T. Rep. (N. S.) 412, 30 Wkly. Rep. 541 (1882); *Bracegirdle v. Bailey*, 1 F. & F. 536 (1859).

It is not material that the rumors are to the same effect as the words alleged to be slanderous. *Proctor v. Houghtaling*, 37 Mich. 41 (1877); *Scott v. Sampson*, 8 Q. B. D. 491, 503, 46 J. P. 408, 51 L. J. Q. B. 380, 46 L. T. Rep. (N. S.) 412, 30 Wkly. Rep. 541 (1882). "As to the second head

of evidence or evidence of rumors and suspicions to the same effect as the defamatory matter complained of, it would seem that on principle such evidence is not admissible, as only indirectly tending to affect the plaintiff's reputations. If these rumors and suspicions have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation; if they have not affected it, they are not relevant to the issue. To admit evidence of rumors and suspicions is to give any one who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading through the means of the publicity attending judicial proceedings what he may have picked from the most disreputable sources, and what no man of sense, who knows the plaintiff's character, would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all that those who

§ 2692. (*Independent Relevancy of Unsworn Statements; Form of Statement; Reputation*); Judicial Assumptions as to Reputation.—It is not necessary, in the first instance, that the plaintiff in an action for injury to his reputation should, in order to make out a *prima facie* case, introduce affirmative evidence that he has a good reputation. He may rely, without special proof, upon the administrative assumption that he has such a reputation. In an action of libel, slander¹ or malicious prosecution² or the like,³ he may content himself, if so disposed, with establishing merely the doing of the tortious act of the defendant together with any special injury which may have resulted from it, leaving the excellence of the reputation said to have been injured without specific proof.⁴ Should the defendant undertake to controvert the truth of the assumption in a particular instance, the plaintiff will be at liberty to introduce affirmative evidence that his reputation in fact was good.⁵

know him best can say is, that they have not heard anything of these rumors. Moreover, it may be that it is the defendant himself who has started them." *Scott v. Sampson*, 8 Q. B. D. 491, 46 J. P. 408, 51 L. J. Q. B. 380, 46 L. T. Rep. (N. S.) 412, 30 Wkly. Rep. 541 (1882), per Cave, J.

§ 2692-1. *Alabama*.—*Jones v. State*, 76 Ala. 8 (1884).

Kentucky.—*Campbell v. Bannister*, 79 Ky. 205, 2 Ky. L. Rep. 72 (1880).

Massachusetts.—*Peterson v. Morgan*, 116 Mass. 350 (1874).

Michigan.—*Proctor v. Houghtaling*, 37 Mich. 41 (1877).

Mississippi.—*Powers v. Presgroves*, 38 Miss. 227 (1859).

Missouri.—*Dudley v. McCluer*, 65 Mo. 241, 27 Am. Rep. 273 (1877).

New York.—*Paddock v. Salisbury*, 2 Cow. 811 (1824).

South Carolina.—*Sawyer v. Eifert*, 2 Nott & M. 511, 10 Am. Dec. 633 (1820).

Virginia.—*M'Nutt v. Young*, 8 Leigh, 542 (1837).

England.—*Scott v. Sampson*, 8 Q. B. D. 491, 46 J. P. 408, 51 L. J. Q.

B. 380, 46 L. T. Rep. (N. S.) 412, 30 Wkly. Rep. 541 (1882).

2. *Alabama*.—*Martin v. Hardesty*, 27 Ala. 458, 62 Am. Dec. 773 (1855).

Illinois.—*Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169 (1885).

Kentucky.—*Gregory v. Thomas*, 2 Bibb 286, 5 Am. Dec. 608 (1811).

Maine.—*Fitzgibbon v. Brown*, 43 Me. 169 (1857).

Massachusetts.—*Bacon v. Towne*, 4 Cush. 217 (1849).

Missouri.—*Gregory v. Chambers*, 78 Mo. 294 (1883).

New Jersey.—*O'Brien v. Frasier*, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170 (1885).

Vermont.—*Barron v. Mason*, 31 Vt. 189 (1858).

3. *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772 (1891) (false imprisonment).

4. On an action for breach of promise of marriage, the same assumption may be made. *Burnett v. Simpkins*, 24 Ill. 264 (1860); *McGregor v. McArthur*, 5 U. C. C. P. 493 (1856).

5. § 2690.

§ 2693. (*Independent Relevancy of Unsworn Statements; Form of Statement*); Reputation as a Probative Fact.—The independent relevancy of unsworn statements embraced in the composite form of reputation may be a probative one. It may assist, not so much in constituting part of a right or liability as in tending to prove, in some degree of remoteness from the ultimate fact, one of the *res gestae*, using that term in its restricted meaning. Thus, on an action for malicious prosecution the existence of a good reputation enjoyed by the plaintiff may be an important fact in determining whether the defendant had probable cause for instituting the criminal proceedings in question.¹ For opposite reasons, it is equally competent for the defendant in such an action to show if he can that the plaintiff's reputation was bad in the respect in question.² In neither case is the truth or falsity, in point of fact, of the plaintiff's reputation a material consideration.³ So, on an issue whether a certain dwelling is a house of ill-fame its reputation is a probative fact.⁴ The rule applies equally well to criminal⁵ as to civil causes.

§ 2693-1. *Illinois*.—Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169 (1885).

Indiana.—Blizzard v. Hayes, 46 Ind. 166, 15 Am. Rep. 291 (1874).

Massachusetts.—McIntire v. Levering, 148 Mass. 546, 20 N. E. 191, 12 Am. St. Rep. 594, 2 L. R. A. 517 (1889).

Missouri.—Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693 (1832).

North Carolina.—Bostick v. Ruth-erford, 11 N. C. 83 (1825).

Wisconsin.—Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135 (1884).

2. *Alabama*.—Martin v. Hardesty, 27 Ala. 458, 62 Am. Dec. 773 (1855).

Illinois.—Mark v. Merz, 53 Ill. App. 458 (1893).

Kentucky.—Gregory v. Thomas, 2 Bibb 286, 5 Am. Dec. 608 (1811).

Missouri.—Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693 (1832).

Vermont.—Barron v. Mason, 31 Vt. 189 (1858).

3. *California*.—People v. Anderson, 39 Cal. 703 (1870).

Connecticut.—Fitch v. Woodruff, etc. Iron Works, 29 Conn. 82 (1860).

Kansas.—Holmberg v. Dean, 21 Kan. 73 (1878).

Massachusetts.—Monahan v. Worcester, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226 (1890).

Michigan.—Daniels v. Dayton, 49 Mich. 137, 13 N. W. 392 (1882).

4. *Connecticut*.—Cadwell v. State, 17 Conn. 467 (1846).

Florida.—King v. State, 17 Fla. 183 (1879).

Georgia.—Hogan v. State, 76 Ga. 82 (1885).

Idaho.—Territory v. Bowen, 2 Idaho 640, 23 Pac. 82 (1890).

Indiana.—Graeter v. State, 105 Ind. 271, 4 N. E. 461 (1885).

Iowa.—State v. Hand, 7 Iowa 411, 71 Am. Dec. 453 (1858).

Louisiana.—State v. Mack, 41 La. Ann. 1079, 6 So. 808 (1889).

Michigan.—O'Brien v. People, 28 Mich. 213 (1873).

Minnesota.—State v. Smith, 29 Minn. 193, 12 N. W. 524 (1882).

Nebraska.—Drake v. State, 14 Nebr. 535, 17 N. W. 117 (1883).

§ 2694. (*Independent Relevancy of Unsworn Statements*); Administrative Details; An Obvious Danger.—Reference is elsewhere made,¹ to the fact that on principle every statement, sworn or unsworn, should be permitted by judicial administration to ground any inference which it logically tends to sustain, however diverse may be the conditions under which the several inferences may rationally arise. The attempt to separate the inference of truth from any other inference which may properly arise from the existence of a statement is to seek to draw a distinction where none exists. Such a rule requires the performance of a task which is practically impossible of accomplishment. A mind of great precision of operation and fully under the control of the will may possess the power of disregarding, when required, a portion of its contents. Most intellects, however, are found to follow the apparent law of their being, mental digestion seeming to be as inevitable as the physical.

In this fact lies the obvious administrative danger, not far from the basis of the rule excluding hearsay, that the jury may accord to the independently relevant statement the force of proof, conferring upon the fact of the declaration having been made the effect of showing that it is true. That the temporary influence of a presiding judge may not suffice to hold the jury to the proper performance of their duty under the hearsay exclusion may reasonably be anticipated in many cases. The procedural rule against hearsay stands in constant danger of being violated by a jury by treating a statement admitted for some purpose of independent relevancy as being, in reality, proof of the facts asserted in it. In order to protect the right of the other party to the observance of the hearsay rule under the paramount canon of administration which requires protection of the litigants in their substantive

South Carolina.—*State v. M'Dowell*, Dudley 346 (1838).

Texas.—*Sylvester v. State*, 42 Tex. 496 (1875).

Wisconsin.—*State v. Brunell*, 29 Wis. 435 (1872).

Where, however, the reputation is used a shade more distinctly in its assertive capacity, the prohibitions of the hearsay rule will be found to attach. Thus, while the reputation of

a house might be a probative fact in drawing an inference as to the purpose for which resort was had to it, the specific fact that the owner is a keeper of a house of ill-fame cannot be proved by reputation. *Allen v. State*, 15 Tex. App. 320 (1884).

5. *U. S. v. Neverson*, 1 Mackey (D. C.) 152 (1880).

§ 2694-1. § 2580.

rights² and to avoid permitting the jury to be misled³ by the use of inferences for which there is no logical basis, a presiding judge may feel it his duty to decline to yield to every request of a proponent for the reception of evidence of an unsworn statement, the use of which threatens this covert injury to the other side, though technically relevant for some purpose independent of its truth. This administrative course seems clearly sound, for obvious reasons, in serious criminal cases.⁴

§ 2695. (*Independent Relevancy of Unsworn Statements; Administrative Details*); Objective Relevancy.—Under his normal administrative duty, the presiding judge, before admitting an extrajudicial statement to the consideration of the jury ascertains, where he cannot provisionally assume, that the declaration is relevant, objectively and subjectively considered.

A characteristic distinction between the use of the extrajudicial utterance in its independently relevant and its assertive capacity, between the statement as a fact and as hearsay, consists of the relative importance attached to objective and subjective relevancy. In case of the independently relevant statement treated in the present chapter, the objective relevancy of the declaration is of prime importance, subjective relevancy being of comparatively little consequence. On an action of slander, for example, the essential point is to establish the making of a declaration by the defendant, e. g., “A (the plaintiff) forged the will,” which, objectively considered, corresponds to the allegations of the pleadings which formulate the issue. The state of the defendant’s mind, whether he possessed knowledge adequate to enable him to make such a statement or whether he was or was not under a motive to misrepresent the truth, however valuable it may be in determining how far the statement is to be believed, is of but little consequence in proving that it was made. Here, objective relevancy, correspondence with reality or actual existence in the physical world, is almost exclusively to be considered.¹ To war-

2. §§ 334 *et seq.*

3. § 1745.

4. *R. v. Bedingfield*, 14 Cox Cr. C. 341 (1879).

§ 2695-1. Should the defendant’s declaration be offered in proof of the proposition that A actually forged the will, belief being asked for the

statement in its assertive capacity, subjective relevancy becomes at once of the highest importance. The declarant’s knowledge, his motive to misrepresent the truth, the entire subjective relevancy of his declaration demand painstaking investigation.

rant incurring the danger, to which reference has just been made,² lest the independently relevant statement may be used as evidence of the facts asserted, a judge may very reasonably insist not only that it should be shown to be necessary for the proponent to use this evidence in pursuance of his fundamental right to prove his claim³ but that there should be shown to be a clear and close objective connection between the extrajudicial statement and the inference in support of which it is offered.

In point of time, for example, the utterance offered in evidence must be as close as can practically be proved to the happening of any principal fact with which it is connected.⁴ The close causal relation required in case of a spontaneous utterance used as proof of the facts asserted is not, indeed, universally insisted on. It is obvious, however, that objective relevancy is increased in proportion as the conditions of spontaneity are approached and that a certain closeness of causal relation may, as an administrative matter, be required to justify a judge in using evidence of this class.

§ 2696. (*Independent Relevancy of Unsworn Statements; Administrative Details*); Subjective Relevancy.— While, as has just been said,¹ the subjective relevancy of an extrajudicial statement is of but comparatively slight importance where the declaration is being used in its independently relevant capacity, this by no means prevents subjective relevancy from receiving careful consideration even in this connection. It being practically impossible² to prevent a jury from drawing the inference of truth from the existence of an unsworn statement which is offered merely in its independently relevant capacity, should the former deduction logically arise, many conservative courts, as has already sufficiently appeared, have deemed it sound administration, in order to secure to the opposing litigant the benefit of the rule against hearsay, to admit the extrajudicial utterance in its independently relevant capacity only when the conditions of spontaneity were also present. In other words, it has seemed to these judges safer to receive the independently relevant statement only when it would be made admissible in its assertive capacity. Not only must the use of the extrajudicial declaration be *necessary* to the proof of

2. § 2694.

3. § 334.

4. *Brannen v. U. S.*, 20 Ct. Cl. 219 (1885).

§ 2696-1. § 2695.

2. § 2580.

the proponent's case; but it must also be both objectively and subjectively relevant, this latter condition requiring that the declarant should be shown to have possessed, at the time of his statement, adequate knowledge³ on the subject and to have been under the influence of no controlling motive to misrepresent.⁴

§ 2697. (*Independent Relevancy of Unsworn Statements; Administrative Details*); Reporting Evidence must be Competent.—The probative force of testimony is largely a matter of subjective relevancy. So clearly is this true that the examination of a witness may fairly be said to present a study in psychology. One of the parties, normally the proponent, claims, expressly or by implication, that the testimony is subjectively true because, in view of the disinterestedness and other mental and moral qualities of the speaker, he never would have made the statement which he has except that he believed it to be true. His further contention is that the testimony is objectively accurate, i. e., in accordance with the actual reality of the physical world, because, in view of the knowledge of the witness, his opportunities for observation, the excellence of his memory and other qualities, he never would have believed the statement which he has made to

3. *Brannen v. U. S.*, 20 Ct. Cl. 219 (1885).

4. *Alabama*.—*Powell v. Henry*, 96 Ala. 412, 11 So. 311 (1892).

Iowa.—*Van Sandt v. Cramer*, 60 Iowa 424, 15 N. W. 259 (1883).

Maryland.—*Baptiste v. De Volunbrun*, 5 Harr. & J. 86 (1820).

Massachusetts.—*Nourse v. Nourse*, 116 Mass. 101 (1874).

Mississippi.—*Baker v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274 (1868).

New York.—*Crounse v. Fitch*, 1 Abb. Dec. 45, 6 Abb. Pr. (N. S.) 185 (1868).

Self-interest. It has not been invariably considered that an independently relevant statement was to be rejected because self-serving, i. e., in the declarant's favor.

Alabama.—*Rogers v. Wilson*, Minor 407, 12 Am. Dec. 61 (1826).

California.—*Fette v. Lane*, 104 Cal. XVII, 37 Pac. 914 (1894).

Indiana.—*Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22 (1871).

Kentucky.—*Thompson v. Stewart*, 5 Litt. 5 (1824).

Louisiana.—*State v. Thomas*, 30 La. Ann. 600 (1878).

Maryland.—*Cross v. Black*, 9 Gill & J. 198 (1837).

Massachusetts.—*Walker v. Worcester*, 6 Gray, 548 (1856).

New York.—*People v. De Graff*, 44 Hun 622, 5 N. Y. Cr. Rep. 561, 6 N. Y. St. 412 (1887).

Pennsylvania.—*Ellis v. Guggenheim*, 20 Pa. St. 287 (1853).

South Carolina.—*Martin v. Simpson*, 4 McCord, 262 (1827).

Texas.—*Phillips v. State*, 19 Tex. App. 158 (1885).

United States.—*Emma Silver Mine Co. v. Park*, 8 Fed. Cas. No. 4,467, 14 Blatchf. 411 (1878).

be the truth if it had not, in point of fact, been so. The opponent seeks to impair the force of the adverse evidence by denying the existence of these qualities and endeavors to substitute others less conducive to probative force. It follows that where the evidence of a witness covers so simple a matter as the report of an extrajudicial statement made by another, his subjective mental condition, the adequacy of his knowledge, his freedom from controlling motive to misrepresent, are necessary subjects of administrative attention.

CHAPTER XXXVIII.

UNSWORN STATEMENTS; HEARSAY.

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§ 2698. Unsworn Statements; Hearsay.— Having considered in the preceding chapter ¹ the use in evidence of the unsworn statement in its independently relevant capacity, we are better

prepared to examine the action of judicial administration in dealing with the Rule against Hearsay, the employment of the extrajudicial declaration as proof of the facts asserted in it. No rule of procedure in connection with the law of evidence is more familiar or more frequently invoked than that which excludes, as evidence of the facts alleged, the reported statement of a person not sworn as a witness. Citation of authority in support of such a proposition seems almost superfluous. Certain sample instances where the rule has been applied may be found at another place.² What may fairly be regarded as constituting the fundamental difference between a verbal act, so called, the independently relevant declaration which is constitutively or probatively relevant by reason of its mere existence, which forms the subject of the immediately preceding chapter and hearsay declarations is fairly illustrated by exclamations of pain on the one hand, and the hearsay statement employed as evidence of the facts asserted, on the other.

Independently relevant statements and hearsay declarations contrasted.—The true distinction between the two seems to lie in the manner in which the subjective relevancy of the extrajudicial statement is viewed in the respective connections. In other words, as to the degree of trust and confidence which we are called upon to repose in the speaker himself, a necessary line of demarcation is presented. In case of the independently relevant statement, this trust in the speaker may be very little. The question, for example, being as to whether A knew a given fact, it may properly be shown that a particular statement was made to him. Whether the declarant knew anything as to the truth of the matter is not material. Reading from a newspaper by one utterly ignorant on the subject would be entirely sufficient. When, however, an effort is made to show that the assertion made to A is true in point of fact, a different situation is at once presented. We are

2. § 2700.

"It is of the essence of hearsay evidence to present to the notice of the judge two distinct persons in the character of witnesses; a supposed percipient and extrajudicially narrating witness, stating, at some antecedent point of time, in the hearing of any person not on that occasion invested with the authority of a judge, some matter of fact as hav-

ing had place; and a deposing or say judicially narrating witness, who hears testimony, not to the truth of that matter of fact, but to its having actually been asserted, on the extrajudicial occasion in question, by the extrajudicially stating or narrating witness." Bentham's *Rationale of Judicial Evidence*, b. vi, c. iv (1827).

asked to believe the declarant, to feel that an assertion is true because the speaker declares it to be so. If this mental reliance is to come into being, we must feel confident on at least two points. (1) The speaker knows what he is talking about. (2) He is truly stating the fact as he understands it to be. That is to say, the proponent of the declaration, if he would secure credence for the statement, must show that the declarant, at the time of his assertion, possessed adequate knowledge and was not under a controlling motive to misrepresent. While no essential difference ought properly to be made in the procedural treatment accorded the several inferences to which the existence of an unsworn statement may logically give rise, much difference may readily exist in respect to the conditions under which the quality of relevancy may come into being. As between the inference of truth and other inferences, subjective relevancy, especially absence of controlling motive to misrepresent the truth, is the characteristic requirement. Unless this form of relevancy be present, no hearsay statement is received in evidence. Even when shown to be present, the statement may still be rejected by virtue of the anomalous rule about to be considered.

§ 2699. (*Unsworn Statements; Hearsay*); Antiquity of Rule.

— Whatever may be felt to be the juridical value of the rule excluding hearsay, it seems fairly to be said, as a preliminary observation, that little may be alleged in its favor because of its antiquity. Until a comparatively recent period, the reception of extrajudicial statements in proof of the facts asserted was a matter of course.¹ This was conspicuously true of the early jurors who customarily used their own knowledge drawn in part from common reputation, rumors, and extrajudicial declarations of all kinds submitted by the parties² or gathered by the jurors themselves.³

§ 2699-1. The judicial opinion that the formation of the rule against hearsay extends "back to Magna Charta, if not beyond it," seems hardly justified by facts. *Anderson v. State*, 89 Ala. 12, 14, 7 So. 429 (1889), per Stone, C. J.

2. "It was regarded as the right of the parties to 'inform' the jury, after they were empanelled and be-

fore the trial." Thayer, *Prelim. Treat. on Ev.*, p. 92.

3. "Some of the verdicts that are given must be founded upon hearsay and floating tradition. Indeed it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must

Even after the bulk of the evidence upon which the jury proceeded was given by witnesses in court, much of the earlier feeling that the jury could properly give a verdict upon the unsworn statements of persons not called as witnesses continued to prevail. The practice up to and during most of the 17th century, though changing toward the rule of exclusion in its final quarter, received such extrajudicial utterances as evidence of the facts asserted, with⁴ or without a judicial comment on the unreliability of this recognized species of evidence.⁵ Lawyers and judges, though reprobating the weakness of hearsay, seemed ignorant of any general rule excluding it, such as that with which later lawyers are familiar. Practically, in its modern form, the rule excluding hearsay dates from the early part of the 18th century⁶ although occasional rulings to the same effect may be found somewhat earlier.⁷

Corroboration.—The true administrative position of hearsay, when relevant as secondary evidence, was early recognized in English practice, not only in connection with the forensic neces-

collect testimony; they must weigh it and state the net result in a verdict." 2 Pollock & M., Hist. of Eng. Law, 622.

The more modern law maintains the same general requirement. Charnock's Trial, 12 How. St. Tr. 1377, 1454 (1696); Bushell's Trial, 6 How. St. Tr. 999, 1003 (1670).

See, also, § 1800.

4. Charnock's Trial, 12 How. St. Tr. 1377 (1696); Plunket's Trial, 8 How. St. Tr. 447 (1681); Gascoigne's Trial, 7 How. St. Tr. 959 (1680).

"Hearsays must condemn no man; what do you know of your own knowledge?" Moders' Trial, 6 How. St. Tr. 273 (1663).

5. Lord Delamere's Trial, 11 How. St. Tr. 509 (1686); Lord Grey's Trial, 9 How. St. Tr. 127 (1682); Earl of Pembroke's Trial, 6 How. St. Tr. 1309 (1678); Hawkins' Trial, 6 How. St. Tr. 921 (1669).

"He adds what Sir Thomas Ailsbury's man said. . . . Why doth he rest upon a hearsay of Sir Thomas Ailsbury's man? Why was

not this man examined to make out the proof?" Archbishop Laud's Trial, 4 How. St. Tr. 315 (1644).

"They prove very little but what they took upon hearsays." Earl of Strafford's Trial, 3 How. St. Tr. 1381 (1640).

6. Canning's Trial, 19 How. St. Tr. 283, 383 (1754); L. C. Macclesfield's Trial, 16 How. St. Tr. 767, (1725); Bishop Atterbury's Trial, 16 How. St. Tr. 323 (1723); Earl of Wintoun's Trial, 15 How. St. Tr. 805 (1716); Captain Kidd's Trial, 14 How. St. Tr. 147 (1701).

Hearsay is excluded "on the principal reason, that hearsay evidence ought not to be admitted, because of adverse party's having no opportunity of cross-examining." Annesley v. Anglesea, 17 How. St. Tr. 1139, 1161 (1743).

7. Busby's Trial, 8 How. St. Tr. 525 (1681); Anderson's Trial, 7 How. St. Tr. 811 (1680); Samson v. Yardly & Tottill, 2 Keb. 223 (1668); Ireland's Trial, 7 How. St. Tr. 79 (1678). "But you know the law;

sity of establishing⁸ where it appears in connection with the so-called "exceptions" to hearsay⁹ but in that of corroboration.¹⁰ When a case had been established by the use of less objectionable evidence, hearsay statements could be received for purposes of corroboration or confirmation.¹¹ Thus, at a somewhat later date, a hearsay statement by a witness might be received to show that his later evidence was not an invention but that his prior statements were consistent with it.¹²

Depositions.—The use, in England, of extrajudicial sworn statements, declarations under oath as to which the person against whom they were offered had had no opportunity of cross-examination, continued, as is seen elsewhere,¹³ principally in the form of depositions, somewhat later than the judicial employment of hearsay statements where neither oath nor cross-examination served as a guaranty for truth.¹⁴ Shortly after the judicial establishment of the hearsay rule in its application to unsworn statements, however, those verified by oath were placed under the same prohibition.¹⁵ All extrajudicial statements, sworn or unsworn, used as evidence of the facts asserted, i. e., as hearsay, were rejected, except so far as they could be brought by their proponents clearly within the terms in which some recognized "exception" to the rule against hearsay had been laid down.

§ 2700. Hearsay Rule stated. The rule against hearsay, though thus seen to be of but comparatively recent origin, is the characteristic anomaly of the English law of evidence. Except

why should you offer any such thing?" *Hampden's Trial*, 9 How. St. Tr. 1053 (1684), per Jefferies, L. C. J.

8. §§ 473, 475.

9. § 2762 *et seq.*

10. §§ 473, 476.

11. *Fenwick's Trial*, 13 How. St. Tr. 537 (1696); *Cole's Trial*, 12 How. St. Tr. 875 (1692); *Lord Russell's Trial*, 9 How. St. Tr. 577 (1683). See, also, *Braddon's Observations on the Earl of Essex's Murder*, 9 How. St. Tr. 1229 (1684).

"The use you make of this is no more, but only to corroborate what he hath said, that he told it him while it was fresh, and that it is no new matter of his invention now."

Knox's Trial, 7 How. St. Tr. 763 (1679), per Scroggs, L. C. J.

12. "Though a hearsay was not to be allowed as a direct evidence, yet it might be made use of to this purpose, viz., to prove that W. M. was constant to himself, whereby his testimony was corroborated." *Luttrell v. Reynell*, 1 Mod. 282 (1672), per Bridgman, L. C. B.

13. § 2758.

14. *Fenwick's Trial*, 13 How. St. Tr. 537 (1696).

15. *Eade v. Lingood*, 1 Atk. 203 (1747); *Breedon v. Gill*, 2 Salk. 555, 1 Ld. Raym. 219, 5 Mod. 269 (1697).

See, however, *Bishop Atterbury's Trial*, 16 How. St. Tr. 323 (1723).

when covered by some recognized exception,¹ no extrajudicial statement can be received as proof of the facts asserted in it.² A

§ 2700-1. §§ 2762 *et seq.*

2. Alabama.—Hooper v. Dorsey, (App. 1912), 58 South. 951; Polytsky v. M. F. Patterson & Son, 3 Ala. App. 302, 57 So. 130 (1911); Merrill v. Sheffield Co., 169 Ala. 242, 53 So. 219 (1910); Dickens v. Murray & Peppers, 163 Ala. 556, 50 So. 1019 (1909); Dooly v. Pinson, 145 Ala. 659, 39 So. 664 (1905).

Arkansas.—Kansas City Southern Ry. Co. v. Morrison, 146 S. W. 853 (1912); Western Coal & M. Co. v. Corkille, 96 Ark. 387, 131 S. W. 963 (1910); Hurley & Ross v. Oliver, 91 Ark. 427, 121 S. W. 920 (1909); Lovell & Co. v. Sneed, 79 Ark. 204, 95 S. W. 157 (1906).

California.—In re Donnellan's Estate, 127 Pac. 166 (1912); Northwestern Redwood Co. v. Dicken, 13 Cal. App. 689, 110 Pac. 591 (1910); Central Pac. Ry. Co. v. Feldman, 152 Cal. 303, 92 Pac. 849 (1907); Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073 (1905); Meyer v. Foster, 147 Cal. 166, 81 Pac. 402 (1905).

Colorado.—Denver City Tramway Co. v. Hills, 50 Colo. 328, 116 Pac. 125, 36 L. R. A. (N. S.) 213 (1911); Uzzell v. Lunney, 46 Colo. 403, 104 Pac. 945 (1909).

Connecticut.—Norman Printers' Supply Co. v. Ford, 77 Conn. 461 (1904); Leonard v. Mallory, 75 Conn. 433, 53 Atl. 778 (1902); Chapin v. Pease, 10 Conn. 69, 25 Am. Dec. 56 (1833).

Dakota.—Knapp v. Sioux Falls Nat. Bank, 5 Dak. 378, 40 N. W. 587 (1888).

Florida.—Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 So. 410 (1909); Atlantic Coast Line R. Co. v. Mallard, 54 Fla. 143, 44 So. 366 (1907); Mizell v. Travelers' Ins. Co., 44 Fla. 799, 33 So. 454 (1902).

Georgia.—Stewart Bros. v. Randall Bros., 76 S. E. 352 (1912); Interna-

tional Harvester Co. v. Adams, 135 Ga. 104, 86 S. E. 1093 (1910); Blakely Oil & Fertilizer Co. v. Proctor & Gamble Co., 134 Ga. 139, 67 S. E. 389 (1910); Fain & Stamps v. Ennis, 4 Ga. App. 716, 62 S. E. 466 (1908); Martin v. City of Gainesville, 126 Ga. 577, 55 S. E. 499 (1906).

Idaho.—Hilbert v. Spokane International Ry. Co. 20 Idaho 54, 116 Pac. 1116 (1911); Wheeler v. Oregon R. & N. Co., 16 Idaho 375, 102 Pac. 347 (1909); Whitman v. McComas, 11 Idaho 564, 83 Pac. 604 (1905); Wilson v. Vogeler, 10 Idaho 599, 79 Pac. 508 (1905).

Illinois.—Stephens v. Collison, 99 N. E. 914 (1912); Hately v. Kiser, 97 N. E. 651 (1912); State Bank of Clinton v. Barnett, 250 Ill. 312, 95 N. E. 178 (1911), *reversing judgment* 151 Ill. App. 79 (1909); People v. Welch, 143 Ill. App. 191 (1908); Home Building & Loan Ass'n v. McKay, 217 Ill. 551, 75 N. E. 569, 108 Am. St. Rep. 263 (1905), *reversing judgment* 118 Ill. App. 586.

Indiana.—Greener v. Nielhaus, 44 Ind. App. 674, 89 N. E. 377 (1909); Stauffer v. Martin, 43 Ind. App. 675, 88 N. E. 363 (1909).

Iowa.—State v. Nahoo, 152 Iowa 665, 133 N. W. 129 (1911); Massena Savings Bank v. Garside, 151 Iowa 168, 130 N. W. 918 (1911); Holmes v. Rivers, 145 Iowa 702, 124 N. W. 801 (1910); Speer v. Speer, 146 Iowa 6, 123 N. W. 176, 27 L. R. A. (N. S.) 294 n., 140 Am. St. Rep. 268 (1909); Schaefer v. Anchor Mut. Fire Ins. Co., 133 Iowa 205, 100 N. W. 857 (1904).

Kansas.—Campbell v. Brown, 85 Kan. 527, 117 Pac. 1010 (1911).

Kentucky.—National Concrete Const. Co. v. Duvall, 150 Ky. 192, 150 S. W. 46 (1912); Ohio & K. Ry. Co. v. Beuris, 146 Ky. 612, 143 S. W. 16 (1912); Foster-Milburn Co. v. Chinn,

jury will not be permitted to draw the inference that a fact exists

137 Ky. 834, 120 S. W. 364 (1909); *Reeves v. Baker*, 112 S. W. 609, 33 Ky. L. Rep. 1004 (1908); *Buffalo Coal Creek Min. Co. v. Troendle*, 99 S. W. 622, 30 Ky. L. Rep. 740 (1907).

Louisiana.—*State v. Reeves*, 129 La. 714, 56 So. 648 (1911); *State v. Thomas*, 28 La. Ann. 827 (1876); *Janney v. Ober*, 28 La. Ann. 281 (1876); *Spears v. Spears*, 27 La. Ann. 537 (1875); *Quartrevaux v. Caboche*, 14 La. 365 (1838).

Maine.—*Gains v. Hasty*, 63 Me. 361 (1873); *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257 (1856). See, also, *Smith v. Lawrence*, 98 Me. 92, 56 Atl. 455 (1903).

Maryland.—*Dimmick v. Hendley*, 84 Atl. 171 (1912); *Sumwalt Ice Co. v. Knickerbocker Ice Co. of Baltimore City*, 114 Md. 403, 80 Atl. 48 (1911); *Canton Lumber Co. v. Liller*, 112 Md. 258, 76 Atl. 415 (1910); *State v. Flanagan*, 111 Md. 481, 74 Atl. 818 (1909); *Baumgartner v. Eigenbrot*, 100 Md. 508, 60 Atl. 601 (1905).

Massachusetts.—*Hyslop v. Boston & M. R. R.*, 208 Mass. 362, 94 N. E. 310, 21 Am. & Eng. Ann. Cas. 1121 (1911); *Pennsylvania Iron Works v. Mackenzie*, 190 Mass. 61, 76 N. E. 228 (1906).

Michigan.—*Mills v. Warner*, 167 Mich. 619, 133 N. W. 494 (1911); *McNetton v. Herb*, 158 Mich. 525, 123 N. W. 17, 16 Detroit Leg. N. 679 (1909); *Brown v. Evans*, 149 Mich. 429, 112 N. W. 1079, 14 Detroit Leg. N. 476 (1907); *City of Grand Rapids v. Coit*, 149 Mich. 668, 113 N. W. 362, 14 Detroit Leg. N. 555 (1907); *Greenman v. O'Riley*, 144 Mich. 534, 108 N. W. 421, 13 Detroit Leg. N. 344, 115 Am. St. Rep. 466 (1906).

Minnesota.—*Collins v. Dowlan*, 136 N. W. 854 (1912).

Mississippi.—*Illinois Cent. R. Co. v. Langdon*, 71 Miss. 146, 14 So. 452 (1893); *Hall v. Clopton*, 56 Miss. 555 (1879); *Rothschild v. Hatch*, 54 Miss.

554 (1877); *Allen v. Lenore*, 53 Miss. 321 (1876); *Herron v. Bondurant & Todd*, 45 Miss. 683 (1871); *Melius v. Houston*, 41 Miss. 59 (1866).

Missouri.—*Howell v. Sherwood*, 147 S. W. 810 (1912); *State ex rel. Bressman v. Theisen* (App. 1912), 142 S. W. 1088; *Gibony v. Foster*, 130 S. W. 314 (1910); *Lindsay v. Bates*, 223 Mo. 294, 122 S. W. 682 (1909); *Byrne v. Hafner-Feed Co.* (App. 1909), 122 S. W. 349.

Montana.—*Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860 (1909); *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319 (1903); *Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510 (1903); *State v. Welch*, 22 Mont. 92, 55 Pac. 927 (1899); *State v. Shafer*, 22 Mont. 17, 55 Pac. 526 (1898).

Nebraska.—*Ponca v. Crawford*, 18 Nebr. 551, 26 N. W. 365 (1886). See also *Clancy v. Barker*, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559 (1904).

Nevada.—*Kennedy v. Kennedy*, 74 Pac. 7 (1903).

New Hampshire.—*Lambert v. Hamlin*, 73 N. H. 138, 59 Atl. 941 (1905); *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495 (1903); *Dearborn v. Sawyer*, 59 N. H. 95 (1879); *Heywood v. Brooks*, 47 N. H. 231 (1866); *Page v. Parker*, 40 N. H. 47 (1860).

New Jersey.—*King v. Atlantic City Gas & Water Co.*, 70 N. J. L. 679, 58 Atl. 345 (1904); *Demoney v. Walker*, 1 N. J. L. 33 (1790).

New York.—*Cohen v. Ressler*, 133 N. Y. Suppl. 431 (1912); *Allen Kingston Motor Car Co. v. Consolidated Nat. Bank of City of New York*, 129 N. Y. Suppl. 1070, 145 App. Div. 294 (1911); *Russell v. Amlot*, 116 N. Y. Suppl. 1080, 132 App. Div. 584 (1909); *Roche v. Nason*, 93 N. Y. Suppl. 565, 105 App. Div. 256 (1905),

or an event occurred because a person not called as a witness has

affirmed 185 N. Y. 128, 77 N. E. 1007 (1906); *Carpenter v. New York Evening Journal Pub. Co.*, 89 N. Y. Suppl. 263, 96 App. Div. 376 (1904).

North Carolina.—*Hill v. Aetna Life Ins. Co.*, 150 N. C. 1, 63 S. E. 124 (1908); *Whitten v. Western Union Telegraph Co.*, 141 N. C. 361, 54 S. E. 289 (1906); *Pegram v. Seaboard Air Line Ry.*, 139 N. C. 303, 51 S. E. 975 (1905).

North Dakota.—*Cochrane v. National Elevator Co.*, 20 N. D. 169, 127 N. W. 725 (1910); *Johnston v. Spoonheim*, 19 N. D. 191, 123 N. W. 830, 41 L. R. A. (N. S.) 1 n. (1909).

Ohio.—*Benster v. Powell*, 11 Ohio Cir. Ct. R. 491, 5 Ohio Cir. Dec. 206, *reversed* 58 Ohio St. 735, 51 N. E. 1,100 (1896); *Adams v. Brown*, 16 Ohio St. 75 (1865).

Oklahoma.—*Bash v. Howald*, 27 Okla. 462, 112 Pac. 1125 (1910); *Moore v. O'Dell*, 27 Okla. 194, 111 Pac. 308 (1910).

Oregon.—*Anderson v. Robinson*, 127 Pac. 546 (1912); *Taylor v. Brown*, 49 Oreg. 423, 90 Pac. 673 (1907).

Pennsylvania.—*Ranck v. Brackbill*, 209 Pa. 499, 58 Atl. 884 (1904); *Corser v. Hale*, 149 Pa. St. 274, 24 Atl. 285 (1892); *Shaw v. Susquehanna Boom Co.*, 125 Pa. St. 324, 17 Atl. 426 (1889); *Johnston v. Patterson*, 114 Pa. St. 398, 6 Atl. 746 (1886); *Hipps v. Wardle*, 1 Atl. 727, 1 Pa. Sup. Ct. Cas. 147 (1885).

Rhode Island.—*White v. Almey*, 82 Atl. 397 (1912); *Baxter v. Pate-naude*, 32 R. I. 197, 78 Atl. 625 (1911).

South Carolina.—*Lewis v. Western Union Telegraph Co.*, 84 S. C. 54, 65 S. E. 941 (1909).

South Dakota.—*Fallon v. Rapid City*, 17 S. D. 570, 97 N. W. 1009 (1904); *Tenney v. Rapid City*, 17 S. D. 283, 96 N. W. 96 (1903).

Tennessee.—*Brazelton v. Turney*,

7 Coldw. 267 (1869); *Dement v. Scott*, 2 Head 367, 75 Am. Dec. 747 (1859). See also *Kolb v. Knoxville*, 111 Tenn. 311, 76 S. W. 823 (1903).

Texas.—*Gamble v. Martin* (Civ. App. 1912), 151 S. W. 327; *Ericksen v. McWhorter* (Civ. App. 1912), 143 S. W. 245; *Gulf, C. & S. F. Ry. Co. v. Coulter* (Civ. App. 1911), 139 S. W. 16; *Johnson & Moran v. Buchanan*, 54 Tex. Civ. App. 328, 116 S. W. 875 (1909); *Gulf, C. & S. F. Ry. Co. v. McMurrrough*, 41 Tex. Civ. App. 216, 91 S. W. 320 (1905).

Utah.—*Lumm v. Howells*, 27 Utah, 80, 74 Pac. 432 (1903); *Marks v. Sullivan*, 9 Utah, 12, 33 Pac. 224 (1893).

Vermont.—*Wilmington Sav. Bank v. Waste*, 76 Vt. 331, 57 Atl. 241 (1904); *Hurlburt's Estate v. Hurlburt*, 63 Vt. 667, 22 Atl. 850 (1890); *St. Johnsbury v. Waterford*, 15 Vt. 692 (1843).

Virginia.—*Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880 (1906); *Hopper v. Com.*, 6 Gratt. 684 (1849); *Claiborne v. Parrish*, 2 Wash. 146 (1795).

Washington.—*Warwick v. Hitchings*, 50 Wash. 140, 96 Pac. 960 (1908); *Dixon v. Northern Pac. Ry. Co.*, 37 Wash. 310, 79 Pac. 943, 68 L. R. A. 895, 107 Am. St. Rep. 810 (1905); *McNichol v. Collins*, 30 Wash. 318, 70 Pac. 753 (1902).

West Virginia.—*Thompson v. Updegraff*, 3 W. Va. 629 (1869).

Wisconsin.—*In re Klehr's Will*, 147 Wis. 653, 133 N. W. 1105 (1912); *Salchert v. Reinig*, 135 Wis. 194, 115 N. W. 132 (1908); *Grotjan v. Rice*, 124 Wis. 253, 102 N. W. 551 (1905); *State v. Rosenthal*, 123 Wis. 442, 102 N. W. 49 (1905); *Martin v. Eastman*, 109 Wis. 286, 85 N. W. 359 (1901).

United States.—*In re J. S. Appel Suit & Cloak Co.*, 198 Fed. 322

declared such to be the case. Allowing for all recognized excep-

(1912); *Updike v. Mace*, 194 Fed. 1001 (1912); *Noble v. United States*, 190 Fed. 538 (1911); *Klander-Weldon Dyeing Mach. Co. v. Gagnon*, 166 Fed. 286, 92 C. C. A. 204 (1908); *Salem News Pub. Co. v. Caliga*, 144 Fed. 965, 75 C. C. A. 673 (1906).

England.—*Rex v. Eriswell*, 3 T. R. 707 (1790).

Hearsay evidence is incompetent to establish any specific fact which is susceptible of being proved by witnesses who speak from their own knowledge. *Hirshberg, Hollander & Co. v. Robinson & Son*, 75 N. J. L. 256, 66 Atl. 925 (1907).

Admissions.—An extrajudicial declaration regarding an oral admission may be rejected as hearsay. *State v. Thomas*, 28 La. Ann. 827 (1876); *St. Louis v. Arnot*, 94 Mo. 275, 7 S. W. 15 (1887).

Cause.—Declarations as to cause are regarded as hearsay and are accordingly rejected.

Georgia.—*Kemp v. Central of Georgia Ry. Co.*, 122 Ga. 559, 50 S. E. 465 (1905).

Indiana.—*Treschman v. Treschman* 28 Ind. App. 206, 61 N. E. 961 (1901).

Massachusetts.—*Wesson v. Washburn Iron Co.*, 95 Mass. 95, 90 Am. Dec. 181 (1866).

Michigan.—*Edgell v. Francis*, 66 Mich. 303, 33 N. W. 501 (1887); *Patterson v. Wabash, St. L. & P. Ry. Co.*, 54 Mich. 91, 19 N. W. 761 (1884).

Minnesota.—*Bathke v. Krassin*, 82 Minn. 226, 84 N. W. 796 (1894).

Missouri.—*Love v. Love*, 98 Mo. App. 562, 73 S. W. 255 (1903).

South Carolina.—*Willis v. Western Union Telegraph Co.*, 73 S. C. 379, 53 S. E. 639 (1906).

Tennessee.—*Kolb v. City of Knoxville*, 111 Tenn. 311, 76 S. W. 823 (1903).

Texas.—*Ft. Worth & D. C. Ry. Co.*

v. Snyder & Dupree, 40 Tex. Civ. App. 345, 89 S. W. 1119 (1905); *Western Union Tel. Co. v. Wofford* (Civ. App. 1897), 42 S. W. 119.

Collateral facts.—The suggestion has been made that while hearsay statements are not properly receivable in proof of material facts, they may be admitted in support of those which are collateral in their nature. *Justus' Succession*, 47 La. Ann. 302, 16 So. 841 (1895).

Corroboration.—A witness cannot be corroborated by proof that he had previously made similar statements. *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169 (1898).

Death of a person cannot be proved by hearsay declarations. *Chambers v. Morris*, 159 Ala. 606, 48 So. 687 (1909); *Lynch v. Chicago & A. Ry. Co.*, 208 Mo. 1, 106 S. W. 68 (1907); *Donovan v. Twist*, 93 N. Y. Suppl. 990, 105 App. Div. 171 (1905); *York v. Hilger*, (Tex. Civ. App. 1905) 84 S. W. 1117. Nor can the circumstances surrounding the death, as for instance whether the deceased committed suicide, be so established. *In re Estate of Dolbeer*, 153 Cal. 652, 96 Pac. 266 (1908).

Deeds.—Declarations in the nature of hearsay will not be received for the purpose of qualifying or limiting a delivery of a deed to the grantee. *Sheldon v. Crane*, 146 Iowa 461, 125 N. W. 238 (1910). See *Hollis v. Sales*, 103 Ga. 75, 29 S. E. 482 (1897).

Discharged employee will not be permitted, in an action for damages for failure to obtain employment due to the acts of the employer, to state what reasons those to whom he applied for work gave as the ground of their refusal. *Willner v. Silverman*, 109 Md. 341, 71 Atl. 962, 24 L. R. A. (N. S.) 895 (1909).

Except for purposes of impeachment, upon proper foundation laid, a

tions and the influence of conflicting principles, the scope of the rule, though limited, is still considerable.³

Official duty.—In the absence of special circumstances,⁴ an unsworn statement does not become admissible merely because made in the course of official duty.⁵

witness is not permitted to testify as to what other witnesses had stated in their depositions or on the witness stand in a former trial. *Louisville Gas Co. v. Kentucky Heating Co.*, 142 Ky. 253, 134 S. W. 205 (1911).

Mental condition.—The same rule applies to hearsay declarations as to a person's mental condition. *Robinson v. Jones*, 105 Md. 62, 65 Atl. 814 (1907).

Negative facts may be as objectionable to the rule excluding hearsay as positive ones. *Pelly v. Denison & S. Ry. Co.*, (Tex. Civ. App. 1904) 78 S. W. 542. Thus a partner will not be allowed to testify that neither his partner nor the firm had ever been notified of a certain fact. *Dunn & Lallande Bros. v. Gunn*, 149 Ala. 583, 42 So. 686 (1906).

Ownership.—Hearsay declarations will not be received for the purpose of showing ownership.

Arkansas.—*Terry v. Clark*, 76 Ark. 435, 88 S. W. 987 (1905).

New York.—*Bently v. Ard*, 125 N. Y. Suppl. 735, 69 Misc. Rep. 562 (1910).

North Carolina.—*Joyner v. Early*, 139 N. C. 49, 51 S. E. 778 (1905).

Texas.—*International & G. N. R. Co. v. Lane* (Civ. App. 1910), 127 S. W. 1066; *Carlisle v. Gibbs*, 57 Tex. Civ. App. 592, 123 S. W. 216 (1909).

Wisconsin.—*Vagts v. Utman*, 125 Wis. 265, 104 N. W. 88 (1905).

Thus, for instance, ownership of a right of way cannot be so established. *Nashville, C. & St. L. Ry. v. Karthaus*, 150 Ala. 633, 43 So. 791 (1907); *Twining v. Goodwin*, 83 Conn. 500, 77 Atl. 953, 22 Am. & Eng. Ann. Cas. 845 (1910).

Passbooks.—In an action between a depositor and a third person, the depositor's passbook is not competent to show a deposit at a certain time. *Austrian v. Laubheim*, 78 N. J. L. 178, 73 Atl. 226 (1909); *affd.* 80 N. J. L. 459, 78 Atl. 1184 (1910).

3. § 2722.

4. §§ 2870 *et seq.*, §§ 3151 *et seq.*

Official reports made to an administrative board in pursuance of a legal duty may be received in evidence upon being properly authenticated to the tribunal. *Chicago, R. I. & G. Ry. Co. v. Risley Bros. & Co.*, 55 Tex. Civ. App. 66, 119 S. W. 897 (1909).

5. *Alabama.*—*Alabama City, G. & A. Ry. Co. v. Appleton*, 171 Ala. 324, 54 So. 638 (1911); *Jackson v. State*, 106 Ala. 12, 17 So. 49 (1894).

District of Columbia.—*Moore v. Langdon*, 2 Mackey, 127, 47 Am. Rep. 262 (1882).

Georgia.—*Moultrie Lumber Co. v. Driver Lumber Co.*, 122 Ga. 26, 49 S. E. 729 (1905); *Baker v. Goldsmith*, 91 Ga. 173, 16 S. E. 988 (1892); *Owsley v. Woolhopter*, 14 Ga. 124 (1853).

Illinois.—*Covenant Mut. Life Ass'n v. Tuttle*, 87 Ill. App. 309 (1900); *Chicago Protection L. Ins. Co. v. Foote*, 79 Ill. 361 (1875).

Missouri.—*State Nat. Bank v. Levy* (App. 1910), 125 S. W. 542 (report of a congressional sub-committee on Indian affairs); *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142 (1904).

New York.—*Taylor v. Nichols*, 119 N. Y. Suppl. 1042, 134 App. Div. 787 (1909) (schedules and evidence in bankruptcy); *German American Ins. Co. v. New York Gas, etc., Power Co.*,

Opinion.—That the unsworn statement takes the form of an opinion does not insure its admissibility.⁶ Statements by physi-

185 N. Y. 581, 78 N. E. 1103 (1906), *affirming* 93 N. Y. Suppl. 46, 103 App. Div. 310 (1905) (unverified certificates); *Twaddell v. Weidler*, 186 N. Y. 601, 79 N. E. 1117 (1906) (memorandum of surrogate's clerk); *Woodgate v. Fleet*, 44 N. Y. 1; 11 App. Pr. (N. S.) 41 (1870).

Ohio.—*Roberts v. Briscoe*, 44 Ohio St. 596, 10 N. E. 61 (1887).

Tennessee.—*Elliot v. Shultz*, 10 Humphr. 234 (1849).

Texas.—*Cathey v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App. 1910), 124 S. W. 217 (records of conductors of freight trains); *San Antonio Light Pub. Co. v. Lewy*, 52 Tex. Civ. App. 22, 113 S. W. 574 (1908).

Washington.—*Dunkin v. City of Hoquiam*, 56 Wash. 47, 105 Pac. 149 (1909) (report of medical examiner).

Wisconsin.—*Befay v. Wheeler*, 84 Wis. 135, 53 N. W. 1121 (1893).

United States.—*Naftzger v. U. S.*, 200 Fed. 494 (1912); *Cook v. U. S.*, 138 U. S. 157, 11 S. Ct. 268, 34 L. ed. 906 (1891).

Arbitrator's finding.—Where differences have been submitted to an arbitrator under an agreement that his conclusion should not necessarily be binding his decision or finding upon the facts submitted will not be received in evidence in a subsequent action between the same parties. *Truax v. Bliss*, 139 Mich. 153, 102 N. W. 635, 11 Detroit Leg. N. 764 (1905).

Conductor's report to the company of an accident in compliance with the rules of the company will not be received. The circumstances under which such a report is made naturally tend to the making of a self-serving one. *Conner v. Seattle R. & S. Ry. Co.*, 56 Wash. 310, 105 Pac. 634, 25 L. R. A. (N. S.) 930 n., 134 Am. St. Rep. 1110 (1909).

Whether work has been properly done cannot be established by the unsworn statement of a third party. Therefore unverified certificates whether made by private individuals or an official will not be received for the purpose of showing that electric wires were properly installed and maintained. *German Am. Ins. Co. v. New York Gas & El. Co.*, 93 N. Y. Suppl. 46, 103 App. Div. 310 (1905), *affirmed* 185 N. Y. 581, 78 N. E. 1103 (1906).

6. Alabama.—*Gordon v. State*, 129 Ala. 113, 30 So. 30 (1900); *Stewart v. Conner*, 13 Ala. 94 (1848); *Powell v. Governor*, 9 Ala. 36 (1846).

California.—*People v. Altmeyer*, 135 Cal. 80, 66 Pac. 974 (1891).

Illinois.—*Lake Erie, etc., R. Co. v. Zoffinger*, 107 Ill. 199 (1883).

Maryland.—*Hillers v. Taylor*, 116 Md. 165, 81 Atl. 286 (1911).

Massachusetts.—*Com. v. Mooney*, 110 Mass. 99 (1872); *Sheldon v. Root*, 16 Pick. 567, 28 Am. Dec. 266 (1835); *Phelps v. Hartwell*, 1 Mass. 71 (1804).

Michigan.—*Pratt v. Hamilton*, 161 Mich. 258, 126 N. W. 196, 17 Detroit Leg. N. 288 (1910).

Missouri.—*State v. Huff*, 161 Mo. 459, 61 S. W. 900, 1104 (1901).

Nebraska.—*Nebraska Plumbing Supply Co. v. Payne*, 84 Neb. 390, 121 N. W. 243 (1909); *Johnson v. Plum Creek First Nat. Bank*, 28 Nebr. 792, 45 N. W. 161 (1890); *Ponca v. Crawford*, 18 Nebr. 551, 26 N. W. 365 (1886).

New Jersey.—*Collins v. Langan*, 58 N. J. L. 6, 32 Atl. 258 (1895).

New York.—*People v. Dorthy*, 156 N. Y. 237, 50 N. E. 800 (1898); *Shipman v. Frech*, 15 Daly 151, 3 N. Y. Suppl. 932, 22 N. Y. St. Rep. 234 (1889).

cians or to them are entitled to no special consideration in this connection.⁷

Understanding.—A person's understanding in regard to a certain matter⁸ as, for instance, who owns certain land⁹ or the cause of another's illness¹⁰ will not be received.

Telephone communications.—Evidence as to what a person holding a conversation over the telephone told the witness was said by the person at the other end of the line is hearsay¹¹ and the statement is not rendered competent by a declaration by such other person that he has received the information which was telephoned him at the time such conversation took place.¹²

Ohio.—*Jones v. State*, 54 Ohio St. 1, 42 N. E. 699 (1896).

Pennsylvania.—*Com. v. Hazlett*, 16 Pa. Super. Ct. 534 (1901).

Tennessee.—*Owens v. State*, 16 Lea 1 (1885).

Texas.—*Gulf, C. & S. F. R. Co. v. Farmer*, 102 Tex. 235, 115 S. W. 260 (1909), *reversing* (Civ. App. 1908), 108 S. W. 729; *Mercer v. State* (Cr. App. 1902), 66 S. W. 555; *Bass v. State* (Cr. App. 1901), 65 S. W. 919; *Hurst v. State* (Cr. App. 1897), 40 S. W. 264.

Virginia.—*Hopkins v. Wampler*, 108 Va. 705, 62 S. E. 926 (1908).

Wisconsin.—*Hildebrand v. Carroll*, 106 Wis. 324, 82 N. W. 145, 80 Am. St. Rep. 29 (1900).

See, however, *Moore v. Palmer*, 14 Wash. 134, 44 Pac. 142 (1896).

7. *Alabama.*—*Hussey v. State*, 87 Ala. 121, 6 So. 420 (1888); *Alabama Great Southern R. Co. v. Arnold*, 80 Ala. 600, 2 So. 337 (1886); *Blackman v. Johnson*, 35 Ala. 252 (1859).

Georgia.—*Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 838 (1884).

Indiana.—*Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253 (1889).

Maine.—*Heald v. Thing*, 45 Me. 392 (1858).

New York.—*Platt v. Hollands*, 85 N. Y. App. Div. 231, 83 N. Y. Suppl. 556 (1903); *Mellwitz v. Manhattan*

R. Co., 17 N. Y. Suppl. 112, 62 Hun 622, 43 N. Y. St. Rep. 354 (1891).

Ohio.—*New York L. Ins. Co. v. La Boiteaux*, 5 Ohio Dec. (Reprint) 242, 4 Am. L. Rec. 1 (1875).

Tennessee.—*Kolb v. Knoxville*, 111 Tenn. 311, 76 S. W. 823 (1903) (cause of illness).

Texas.—*Missouri, etc., R. Co. v. Criswell*, 34 Tex. Civ. App. 278, 78 S. W. 388 (1904).

United States.—*Vicksburg, etc., R. Co. v. O'Brien*, 119 U. S. 99, 7 S. Ct. 118, 30 L. ed. 299 (1886).

8. *Combs v. Combs*, 130 Ky. 827, 114 S. W. 334 (1908); *Roe v. Versailles Bank*, 167 Mo. 406, 67 S. W. 303 (1902); *Spande v. Western Life Indemnity Co.* (Or. 1911), 117 Pac. 973.

9. *Waldroof v. Ruddell*, 96 Ark. 171, 131 S. W. 670 (1910); *Rockcastle Min. L. & O. Co. v. Isaacs*, 141 Ky. 80, 132 S. W. 165 (1910).

10. *Mo. K. & T. Ry. Co. v. Williams* (Tex. Civ. App. 1911), 133 S. W. 499.

11. *Millner v. Silverman*, 109 Md. 341, 71 Atl. 962, 24 L. R. A. (N. S.) 395 (1909); *Texas & P. Ry. Co. v. Felker*, 44 Tex. Civ. App. 420, 99 S. W. 439 (1907); *Jacobs v. Cohn*, 91 N. Y. Suppl. 339, 46 Misc. Rep. 115 (1904).

12. *Texas & P. Ry. Co. v. Felker*, 44 Tex. Civ. App. 420, 99 S. W. 439 (1907).

§ 2701. (*Hearsay Rule stated*); A controlling Rule.— While, as has been amply seen in the preceding chapter relating to extrajudicial statements independently relevant, and as will more fully appear in the sequel, the scope of the rule against hearsay seems much restricted by countervailing principles, its domination within its appropriate field appears complete. Here alone is the substantive right of the proponent to prove his case,¹ which is ordinarily deemed paramount and protected and enforced as such, compelled by judicial administration to give way to what is, in all other connections regarded as a subsidiary administrative principle or canon, that of preventing the jury from being misled.² The marvel is not that procedure should treat hearsay statements as calculated to mislead the jury. This as well as the inherent weakness³ of this species of evidence may be conceded without understanding why it was not deemed wise in this as in other connections to run the risk of misleading the jury when relevant testimony of this class absolutely essential to proof of the proponent's case is tendered in evidence.⁴ Even the suggestion that remote or collateral facts, e. g., those deliberative in their nature, might properly be treated as beyond the operation of the rule,⁵ has failed to commend itself to the favorable action of the courts.⁶ There is, however, a distinction taken between its operation in civil and criminal cases. In the former should the hearsay statement be

But one who is in a room at the time another is talking over the telephone may testify to what was said by that person. *Warren, Gzowski & Co. v. Forst & Co.*, 8 D. L. R. 640, 23 O. W. R. 311, 46 Can. S. C. R. 642 (1912). And where a train despatcher's orders were given by telephone to the conductor who was required to repeat them back verbatim to the former, a person was permitted to state that he had heard the conductor repeat back "meet at S." *Meade v. Detroit J. & C. Ry.*, 165 Mich. 489, 130 N. W. 1114, 18 Det. Leg. N. 251 (1911). See also *Edge v. Southwest Missouri Electric Ry. Co.*, 206 Mo. 471, 104 S. W. 90 (1907).

§ 2701-1. § 334.

2. § 1745.

3. § 2711.

4. The establishment of the exceptions to the hearsay rule seems to have proceeded in a general way upon the correct theory.

5. *Justus' Succession*, 47 La. Ann. 302, 16 So. 841 (1895).

6. **Surprise.**— The existence of surprise and the threatened prejudice of the party caused thereby does not justify ignoring the rule as to hearsay evidence, or bring the same within any exception to the rule. *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860 (1909).

Where, however, a reasonable apprehension exists that one of the parties may be prejudiced by surprise, the fact affords good ground for appropriate administrative action. *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860 (1909).

admitted without objection it becomes evidence in the case,⁷ subject, of course, to any infirmative suggestions due to its inherent weakness.⁸ In criminal actions, on the contrary, the hearsay statement is to be rejected, unless the defendant actively assents to its reception.⁹

§ 2702. (*Hearsay Rule stated; A Controlling Rule*); An Absolute Bar.—The anomalous feature of the rule against hearsay is that, unless the conditions of a recognized exception are presented, the bar of the rule is absolute. No forensic necessity on the part of a litigant suffices to bring into operation the administrative power of a presiding judge. The fundamental administrative duty of the court to protect a litigant in the substantive right to prove his case by permitting him to use secondary evidence¹ where the primary is practically unattainable is forced to yield at this point. The case proposed for proof may be absolutely dependent upon the establishment of a fact which can only be shown by an extrajudicial assertion. The declarant may be unavailable, by reason of his having left the jurisdiction² or even the country itself.³ He may be too sick to attend the trial⁴ or, if present, he may not be permitted to testify⁵ or the proponent may be without the power of compelling him to do so.⁶ He may even be affirmatively shown to be dead.⁷ While this necessity thus conclusively

7. *State Bank v. Wroddy*, 10 Ark. 638 (1858). See *Nunn v. Jordan*, 31 Wash. 506, 72 Pac. 124 (1903). See, however, *Laughlin v. Inman*, 138 Ill. App. 40 (1907).

8. §§ 2711 *et seq.*

9. *Phillips v. State*, 29 Ga. 105 (1859).

§ 2702-1. §§ 339 *et seq.*

2. *Johnson v. State*, 59 Ala. 37 (1877).

3. *Pearson v. Darrington*, 32 Ala. 227 (1858); *Brown v. Steele*, 14 Ala. 63 (1848).

4. *Gaither v. Martin*, 3 Md. 146 (1852).

Lack of time in which to take a deposition does not confer admissibility. Though the sickness of a witness has come to the attention of the proponent only the day before

the trial, the unsworn statement will not be received. *Gaither v. Martin*, 3 Md. 146 (1852).

5. *Blann v. Beal*, 5 Ala. 357 (1843); *Churchill v. Smith*, 16 Vt. 560 (1844).

6. *State v. Yanz*, 74 Conn. 177, 50 Atl. 37, 92 Am. St. Rep. 205, 54 L. R. A. 780 (1901); *Braddon v. Speke*, 9 How. St. Tr. 1127 (1684).

7. *Alabama*.—*Pearson v. Darrington*, 32 Ala. 227 (1858).

California.—*In re Welch*, 110 Cal. 605, 42 Pac. 1089 (1895).

Connecticut.—*Abel v. Fitch*, 20 Conn. 90 (1849).

Georgia.—*Dozier v. McWhorter*, 117 Ga. 786, 45 S. E. 61 (1903).

Illinois.—Chicago, etc., R. Co. v. *Foster*, 46 Ill. App. 621 (1893).

Indiana.—*Salem Gravel Road Co.*

appears, the relevancy of the assertion may also be equally clear. Such, it may be assumed, is the declarant's knowledge on the subject and so demonstrable his absence of a controlling motive to misrepresent that a rational mind would find no difficulty in drawing from the existence of an unsworn statement the inference that it states the truth. The potency of the hearsay rule compels, nevertheless, the rejection of the declaration,⁸ although the considerations that the hearsay statement is secondary evidence and that in numerous instances the theory of the English law of evidence, in constituting the so-called "exceptions" has recognized this fact seem obvious. It may fairly be said that, speaking generally, the exception excluding hearsay is the only procedural rule of evidence

v. Pennington, 62 Ind. 175 (1878); *Hamlyn v. Nesbit*, 37 Ind. 284 (1871); *Doe v. Cunningham*, 6 Blackf. 430 (1843).

Kentucky.—*Alexander v. Harrodsburg First Nat. Bank*, 114 Ky. 683, 71 S. W. 883, 24 Ky. L. Rep. 1486 (1903); *Cherry v. Boyd*, Litt. Sel. Cas. 8 (1800). See also *New York L. Ins. Co. v. Johnson*, 72 S. W. 762, 24 Ky. L. Rep. 1867, 75 S. W. 257, 25 Ky. L. Rep. 438 (1903).

Maryland.—*Duvall v. Hambleton*, 98 Md. 12, 55 Atl. 431 (1903).

Michigan.—*Coston v. Coston*, 145 Mich. 390, 108 N. W. 736, 13 Detroit Leg. N. 540 (1906); *Egan v. Grece*, 79 Mich. 629, 45 N. W. 74 (1890).

Missouri.—*Strode v. Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S. W. 379 (1903).

Nebraska.—*Shold v. Van Treeck*, 128 N. W. 1134 (1910).

Nevada.—*McLeod v. Lee*, 17 Nev. 103, 28 Pac. 124 (1882).

New Hampshire.—*Elwell v. Roper*, 72 N. H. 585, 58 Atl. 507 (1904); *Wendell v. Abbott*, 45 N. H. 349 (1864).

New Jersey.—*Schweitzer v. St. Leo's Catholic Church of Irvington* (Suppl. 1910), 78 Atl. 400; *Collins v. Langan*, 58 N. J. L. 6, 52 Atl. 258 (1895).

New York.—*Farmer v. Emigrant Industrial Sav. Bank*, 124 N. Y. 646,

27 N. E. 412 (1891); *Carney v. Downey*, 41 Hun 637, 2 N. Y. St. Rep. 707 (1886); *Gray v. Goodrich*, 7 Johns 95 (1810).

North Carolina.—*Westfeldt v. Adams*, 135 N. C. 591, 47 S. E. 816 (1904).

Pennsylvania.—*Hogg v. Wilkins*, 1 Grant Cas. 67 (1864); *Bonnet v. Devebaugh*, 3 Binn. 175 (1810); *Galoway v. Ogle*, 2 Binn. 468 (1810).

South Carolina.—*State v. Allen*, 56 S. C. 495, 35 S. E. 204 (1899); *Lynn v. Thompson*, 17 S. C. 129 (1881); *State v. Easterling*, 1 Rich. L. 310 (1845).

Tennessee.—*Day v. McGinnis*, 1 Heisk. 310 (1870).

Texas.—*Johnson v. State* (Cr. App. 1900), 55 S. W. 576; *Anglin v. Barlow* (Civ. App. 1898), 45 S. W. 827; *Brown v. Brown* (Civ. App. 1896), 36 S. W. 918; *Nix v. Cole* (Civ. App. 1895), 29 S. W. 561.

England.—*Garnons v. Barnard*, 1 Anstr. 296 (1793).

8. *Johnson v. State*, 59 Ala. 37 (1877); *Reeves v. State*, 7 Tex. App. 276 (1879).

"No matter how convincing the testimony may be to the 'intelligent mind,' unless it can be presented under fixed rules it cannot be received." *State v. Medicott*, 9 Kan. 257 (1872), per Kingman, C. J.

which excludes testimony for the admission of which a sound administrative reason exists. As a matter of principle, not only does the hearsay rule mar any scientific symmetry to which the law of evidence might otherwise lay claim but inflicts serious injury upon the successful administration of justice.⁹

The rule seems as applicable to preliminary as to final issues.¹⁰ Where a jury is present, the use of hearsay is none the less objectionable because elicited by questions asked by the judge.¹¹

§ 2703. (Hearsay Rule stated; A Controlling Rule; An Absolute Bar); Confessions by third Persons.—An excellent illustration of the mischiefs produced by a rigid exclusion of extrajudicial statements within the hearsay rule, however necessary to the cause of the proponent or relevant in themselves considered, is furnished in case of the confessions by a third person of having committed the crime for which the proponent is on trial. Such extrajudicial admissions of guilt are rejected¹ although the logical

9. "If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements made by persons who are dead respecting matters of which they had a personal knowledge, and made *ante litem motam*, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence." *Sugden v. St. Leonards*, 1 P. D. 154, 250, 45 L. J. P. 49, 34 L. T. Rep. (N. S.) 372, 24 Wkly. Rep. 860 (1876), per Mellish, L. J.

10. *Early v. Oliver*, 63 Ga. 11 (1879).

11. *Bornheimer v. Baldwin*, 42 Cal. 27 (1871).

§ 2703-1. *Alabama*.—*Owensby v. State*, 82 Ala. 63, 2 So. 764 (1886); *Alston v. State*, 63 Ala. 178 (1879); *Snow v. State*, 54 Ala. 138 (1875).

Georgia.—*Robinson v. State*, 114 Ga. 445, 40 S. E. 253 (1901); *Howard v. State*, 109 Ga. 137, 34 S. E. 330 (1899); *Brooks v. State*, 96 Ga. 353, 23 S. E. 413 (1895); *Woolfolk*

v. State, 85 Ga. 69, 11 S. E. 814 (1890).

Indiana.—*Green v. State*, 154 Ind. 655, 57 N. E. 637 (1900); *Siple v. State*, 154 Ind. 647, 57 N. E. 544 (1900).

Iowa.—*State v. Vincent*, 24 Iowa 570, 95 Am. Dec. 753 (1868).

Kansas.—*State v. Smith*, 35 Kan. 618, 11 Pac. 908 (1886).

Louisiana.—*State v. West*, 45 La. Ann. 928, 13 So. 173 (1893).

Maryland.—*Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325 (1879).

Massachusetts.—*Com. v. Chabcock*, 1 Mass. 144 (1804).

Missouri.—*Lindsay v. Bates*, 223 Mo. 294, 122 S. W. 682 (1909); *State v. Terry*, 172 Mo. 213, 72 S. W. 513 (1903); *State v. Hack*, 118 Mo. 92, 23 S. W. 1089 (1893); *State v. Duncan*, 116 Mo. 288, 22 S. W. 699 (1893).

New York.—*People v. Schooley*, 149 N. Y. 99, 43 N. E. 536 (1896); *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636 (1881), *affirming* 23 Hun 454 (1881).

North Carolina.—*State v. Beverly*,

bearing of such a statement, whatever may be urged by way of infirmative considerations, seems unquestionable. It is obviously within the rights of the accused to prove, if he can, that a third person actually committed the crime for which he has been put upon his defense.² He can, however, in the absence of satisfactory proof of conspiracy³ or some other legally sufficient form of agency, derive no aid in connection with such a contention from the fact

88 N. C. 632 (1883); *State v. Baxter*, 82 N. C. 602 (1880); *State v. Haynes*, 71 N. C. 79 (1874).

Oregon.—*State v. Fletcher*, 24 *Oreg.* 295, 33 *Pac.* 575 (1893).

South Carolina.—*State v. Rice*, 49 S. C. 418, 27 S. E. 452, 61 *Am. St. Rep.* 816 (1896).

Tennessee.—*Peck v. State*, 86 *Tenn.* 259, 6 S. W. 389 (1888); *Rhea v. State*, 10 *Yerg.* 258 (1837).

Texas.—*Hodge v. State* (Cr. App. 1901), 64 S. W. 242; *Woods v. State* (Cr. App. 1900), 60 S. W. 244; *Woods v. State* (Cr. App. 1894), 26 S. W. 625.

Vermont.—*State v. Totten*, 72 *Vt.* 73, 47 *Atl.* 105 (1899); *St. Johnsbury v. Waterford*, 15 *Vt.* 692 (1843).

Washington.—*State v. Hunter*, 18 *Wash.* 670, 52 *Pac.* 247 (1898).

United States.—*U. S. v. Miller*, 26 *Fed. Cas.* No. 15,773, 4 *Cranch C. C.* 104 (1830).

Canada.—*Rose v. Cuyler*, 27 *U. C. Q. B.* 270 (1868).

"The decisions appear to be uniform that confessions of third persons cannot be received as evidence that they committed the crime, and that the defendant did not, and this for the plain reason that they are hearsay; they are strictly narratives of past transactions not made under oath, and are only competent as admissions against the persons making them." *Com. v. Trefethen*, 157 *Mass.* 180, 192, 31 *N. E.* 961, 24 *L. R. A.* 235 (1892).

"Even if this letter could be regarded as a confession of Kellogg that he committed the murder, it

was only the declaration of a third party, merely hearsay testimony, and upon no rule of evidence admissible. If such declarations were competent upon any trial for homicide, they would tend clearly to confuse the jury and to divert their attention from the real issue. The letter did not tend to establish that Kellogg committed the offense; was not a part of the *res gestae*, and in no sense relieved the prisoner from the charge for which he was upon trial, or raised any presumption that Kellogg was the guilty party. Confessions of this character are sometimes made to screen offenders, and no rule is better established than that extrajudicial statements of third persons are inadmissible." *Greenfield v. People of State of N. Y.*, 85 *N. Y.* 75, 87, 39 *Am. Rep.* 636 (1881), per *Miller, J.*, affirming 23 *Hun* 454.

A contrary view.—Some slight authority exists to the contrary. *Clymer v. Littler*, 1 *W. Bl.* 345 (1762) (confession of forgery by attesting witness). See, also, *Doe v. Ridgway*, 4 *B. & Ald.* 53, 6 *E. C. L.* 387 (1820); *Averson v. Kinnaird*, 6 *East* 188, 2 *Smith K. B.* 286, 8 *Rev. Rep.* 455 (1805). On the authority of the case from *Blackstone*, it has been said obiter that a confession of larceny by a deceased person is admissible in a suit against third persons. *Coleman v. Frazier*, 4 *Rich. (S. C.)* 146, 53 *Am. Dec.* 727 (1850).

2. *Snow v. State*, 58 *Ala.* 372 (1877).

3. *Howard v. State*, 109 *Ga.* 137, 34 *S. E.* 330 (1899).

that the person whom he claims to be the criminal has confessed to having perpetrated the offense.⁴ Extrajudicial statements⁵ and other acts of a third person from which his guilt may circumstantially be inferred are within the prohibition. The declarant is not a party to the record. His statement, therefore, cannot be received as an admission.⁶ The extrajudicial statement cannot be admitted as a declaration against interest, because the interest of the speaker is neither pecuniary nor proprietary.⁷

§ 2704. (*Hearsay Rule stated*); Statutory Exceptions.—It is not surprising to find that the hardship and injustice of excluding a relevant unsworn statement which is essential to the contention of its proponent should have attracted the attention of the law-making body. A specific instance where this intolerable situation was found to be of frequent occurrence has been in connection with claims by or against the estates of deceased persons. The administrative expedient has been adopted of admitting the statements of the decedent as evidence on actions for or against his estate¹ or of forbidding the reception of self-serving testimony from the surviving party to the transaction. Under appropriate circumstances, the extrajudicial statements of the deceased will be received in evidence.² A more general relief is furnished by a statute of Massachusetts³ which would seem well adapted for the purpose for which it was intended. No declaration of a deceased person shall be excluded as evidence on the ground of its being

4. *Smith v. State*, 9 Ala. 990 (1846).

5. *Wilson v. State*, (Tex. Cr. App. 1900) 55 S. W. 489 (1900); *Buel v. State*, 104 Wis. 132, 80 N. W. 78 (1899).

6. §§ 1311, 1312.

7. § 2779.

§ 2704-1. *Foot v. Brown*, 81 Conn. 218, 70 Atl. 699 (1908) (title to land); *Mooney v. Mooney*, 80 Conn. 446, 68 Atl. 985 (1908).

In order that the declaration of the decedent should be competent under such a statute, it is essential that the action should have been brought directly by or against his legal rep-

resentatives. *Mooney v. Mooney*, 80 Conn. 446, 68 Atl. 985 (1908).

2. *Mulcahy v. Mulcahy*, 84 Conn. 659, 81 Atl. 242 (1911); *Pixley v. Eddy*, 56 Conn. 336, 15 Atl. 758 (1888); *Hamilton v. Lamphear*, 54 Conn. 237, 7 Atl. 19 (1886).

Special indulgence is accorded to the declarations of decedents in favor of those administering their estates. Such statutes, being remedial, have been broadly construed. *Mulcahy v. Mulcahy*, 84 Conn. 659, 81 Atl. 242 (1911).

3. Mass. Stats. 1898, c. 535; Rev. Laws, chap. 175, § 66.

hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant.⁴ It is important to observe an obvious tendency on the part of judicial administration to regard the existence of the essential conditions of this statute as a sufficient warrant for admitting the secondary evidence of extrajudicial statements in proof of the facts asserted. The enactment well states the ground upon which the proponent's Necessity for introducing this grade of evidence rests and the proof of the further elements of Objective and Subjective Relevancy which makes such an introduction very much in the public interest. The death of the declarant announces the strongest reason why the proponent should be excused from furnishing the primary evidence, the testimony of the declarant. Objective Relevancy being a requisite of all evidence is secured by the implication of the statute, while adequate knowledge and freedom from Controlling Motive to Misrepresent, the two conditions of Subjective Relevancy, may well be thought to have been fully provided for by the requirement that the judge must be satisfied that the declaration has been made in good faith and *ante litem motam*. Extrajudicial statements of

4. *Marston v. Reynolds*, 211 Mass. 590, 98 N. E. 601 (1912); *Comstock v. Livingston*, 210 Mass. 581, 97 N. E. 106 (1912); *Carroll v. Boston Elevated Ry. Co.*, 210 Mass. 500, 96 N. E. 1040 (1912); *White v. Boston Elevated Ry. Co.*, 208 Mass. 193, 94 N. E. 278 (1911); *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406 (1909); *Dickinson v. City of Boston*, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664 (1905); *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 64 N. E. 726 (1902). See, also, *Glidden v. United States Fidelity & Guaranty Co.*, 198 Mass. 109, 84 N. E. 143 (1908); *Goyette v. Keenan*, 196 Mass. 416, 82 N. E. 427 (1907); *Com. v. Felch*, 132 Mass. 22 (1882); *Lund v. Tyngsborough*, 9 Cush. 36 (1851) (Contra under express statutory provision). Intrinsic evidence furnished by the declaration itself may establish the

fact of knowledge; *Marston v. Reynolds*, 211 Mass. 590, 98 N. E. 601 (1912) to the satisfaction of the presiding judge.

An extrajudicial statement thus admitted may be independently relevant, e. g., to show an acceptance by an alleged donee of the gift in question. *Supple v. Suffolk Sav. Bank for Seamen*, 198 Mass. 393, 84 N. E. 432, 126 Am. St. Rep. 451 (1908).

The fact that a letter by a person since deceased contains some irrelevant matter does not render it inadmissible under this statute. *Randall v. Clafin*, 194 Mass. 560, 80 N. E. 594 (1907).

It is not material that the statement of the declarant was made concerning the fatal accident for which the suit in question was brought. *Chaput v. Haverhill, G. & D. St. Ry. Co.*, 194 Mass. 218, 80 N. E. 597 (1907).

deceased persons when so made should, upon principle, be received in evidence if reasonably necessary to proof of the proponent's case.

§ 2705. (Hearsay Rule stated); Hearsay Memoranda refreshing Memory.—Memoranda to refresh memory of a witness cannot, in the absence of special circumstances,¹ be based upon the hearsay statements of others. In general, a witness must know of his own knowledge that the statements of a memorandum are true.² In many cases this branch of the rule has been held to exclude the use of the entries of a book of account as memoranda to refresh the recollection of the witness,³ even where the latter knows the general correctness with which the books are kept.⁴ Nor will a witness be permitted to use book entries to refresh his memory merely because he has the custody of the books containing them.⁵

§ 2706. (Hearsay Rule stated); Implied Hearsay.—Where the sole relevancy of an act consists in the extrajudicial assertion

§ 2705-1. § 3060.

2. *California*.—*Carpenter v. Sibley*, 15 Cal. App. 589, 119 Pac. 391 (1911).

Illinois.—*Cleveland, etc., R. Co. v. Brown*, 53 Ill. App. 227 (1893).

Maryland.—*Green v. Caulk*, 16 Md. 556 (1860); *Lewis v. Kramer*, 3 Md. 265 (1852).

Massachusetts.—*L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354 (1894).

Michigan.—*Radley v. Seider*, 99 Mich. 431, 58 N. W. 366 (1894).

Missouri.—*Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145 (1895).

New York.—*Thomas v. Woodruff*, 53 N. Y. Super. Ct. 327 (1886) (tradesmen's bills); *Matter of Drinker*, 9 N. Y. St. 254 (1887) (steno-graphic minutes).

Oregon.—*Keller v. Bley*, 15 Oreg. 429, 15 Pac. 705 (1887).

Pennsylvania.—*Robeson v. Schuyllkill Nav. Co.*, 3 Grant, 186 (1855).

Texas.—*Gulf, etc., R. Co. v. Frost* (Civ. App. 1896), 34 S. W. 167 (account or sales).

Utah.—*McCornick v. Sadler*, 10

Utah, 210, 37 Pac. 332 (1894) (tradesmen's bills).

Washington.—*Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098 (1894).

3. *Alabama*.—*Crawford v. Mobile Branch Bank*, 8 Ala. 79 (1845).

Iowa.—*Hopley v. Wakefield*, 54 Iowa 711, 7 N. W. 136 (1880).

Maine.—*Bradley v. Davis*, 26 Me. 45 (1846).

Michigan.—*Hamilton Provident, etc., Soc. v. Northwood*, 86 Mich. 315, 49 N. W. 37 (1891).

North Dakota.—*Keith v. Haggart*, 2 N. D. 18, 48 N. W. 432 (1891).

Vermont.—*Hibbard v. Mills*, 46 Vt. 243 (1873).

Washington.—*Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098 (1894).

4. *Bradley v. Davis*, 26 Me. 45 (1846); *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354 (1894).

5. *Memphis, etc., R. Co. v. Maples*, 63 Ala. 601 (1879); *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354 (1894); *Young v. Miles*, 20 Wis. 615 (1866).

which it implies, its reception in evidence is felt to be contrary to the rule excluding hearsay.¹ Except for the connotation of the implied assertion, the fact itself, *ex hypothesi*, is irrelevant. However probative the declaration may be in itself considered it would normally be excluded as hearsay if offered independently. Under the circumstances, judicial administration is justified in rejecting the covering or containing fact. The question of much greater administrative nicety is presented where this latter fact itself possesses a logical relevancy or bearing upon the issue. To admit it in evidence would be to run the obvious danger of enabling, if not forcing, the jury to evade the hearsay rule by giving probative weight, proving power, to the unsworn assertion. Upon sound and recognized administrative principles, the risk of evading the hearsay rule will be encountered should the fact itself seem fairly necessary to proof of the proponent's case, the paramount right in this connection.² Thus it may be shown that the officials of a given town decline to allow a certain individual to vote, although the fact carries an implication of a declaration that the person is not, in their opinion, a qualified voter.³

§ 2707. (*Hearsay Rule stated*); Knowledge based on Reputation.—Testimony based on no personal knowledge or observation on the part of the witness but resting upon a *reputation* prevalent through the community, is objectionable as hearsay.¹ As established by scandal and gossip, local reputation may constitute a peculiarly objectionable form of hearsay. It is not under oath nor are the tests of cross-examination applied to it.

§ 2706-1. *In re Louck's Estate*, 160 Cal. 551, 117 Pac. 673 (1911) (belief of by-standers).

2. § 334 *et seq.*

3. *Meserve v. Folsom*, 62 Vt. 504, 20 Atl. 926 (1889).

§ 2707-1. *Alabama*.—*Ramsey v. Smith*, 138 Ala. 333, 35 So. 325 (1903).

Georgia.—*Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110 (1907).

Illinois.—*Munford v. Miller*, 7 Ill. App. 62 (1880).

Iowa.—*Scott v. Sovereign Camp of Woodmen of the World*, 149 Iowa

562, 129 N. W. 302 (1910) (belief of by-standers).

North Carolina.—*Hopkins v. Hopkins*, 132 N. C. 25, 43 S. E. 506 (1903).

Texas.—*White v. Whaley*, 1 White & W. Civ. Cas. Ct. App., § 101 (1881).

Vermont.—*Hicks v. Cram*, 17 Vt. 449 (1845).

Compare *Continental Ins. Co. v. Cummings*, 98 Tex. 115, 81 S. W. 705 (1904), *reversing judgment*. *Continental Fire Ins. Co. v. Cummings*, (Civ. App. 1903), 78 S. W. 378.

§ 2708. (Hearsay Rule stated); Testimony based on hearsay.

—A hearsay statement cannot be employed in whole¹ as the

§ 2708-1. Alabama.—Lacy v. Meador, 170 Ala. 482, 54 So. 161 (1911); Ross v. Roy, 39 So. 583 (1905); Curtis v. Parker & Co., 136 Ala. 217, 33 So. 935 (1903); McDonald v. Wood, 118 Ala. 589, 24 So. 86 (1897); Payne v. Crawford, 102 Ala. 387, 14 So. 854 (1893).

Arkansas.—Shelton v. Shelton, 143 S. W. 110 (1912); Spencer Lumber Co. v. Dover, 90 Ark. 488, 138 S. W. 985 (1911); Little Rock & H. S. W. Ry. Co. v. Cross, 78 Ark. 220, 93 S. W. 981 (1906); Central Coal & Coke Co. v. John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49 (1901); Little Rock, etc., R. Co. v. Alister, 62 Ark. 1, 34 S. W. 82 (1896).

California.—*In re* Estate of Dolbeer, 96 Pac. 266 (1908); Russell v. Brosseau, 65 Cal. 605, 4 Pac. 643 (1884). See also Baily v. Kreutzmann, 141 Cal. 519, 75 Pac. 104 (1904); *In re* Wickes' Estate, 139 Cal. 195, 72 Pac. 902 (1903); Williams v. Long, 139 Cal. 186, 72 Pac. 911 (1903).

Colorado.—Persse v. Atlantic-Pacific R. Tunnel Co., 5 Colo. App. 117, 37 Pac. 951 (1894).

Connecticut.—Raymond v. Parker, 84 Conn. 694, 81 Atl. 1030 (1911); Turgeon v. Woodward, 83 Conn. 537, 78 Atl. 577 (1910).

Delaware.—Giordano v. Brandywine Granite Co., 3 Pennewill, 423, 52 Atl. 332 (1901).

Georgia.—Walton v. Mitchell (App. 1912), 74 S. E. 1006; Caruth v. Lovelless, 135 Ga. 802, 70 S. E. 321 (1911); International Harvester Co. of America v. Adams, 68 S. E. 1093 (1910); Evans & Pennington v. Nail, 1 Ga. App. 42, 57 S. E. 1020 (1907); Akins v. Georgia Railroad & Banking Co., 111 Ga. 815, 35 S. E. 671 (1900).

Idaho.—Valentine v. Rosenhaupt, 19 Idaho 130, 112 Pac. 685 (1910).

Illinois.—Reh fuss v. Hill, 243 Ill.

140, 90 N. E. 187 (1909); Chicago City R. Co. v. Douglass, 104 Ill. App. 41 (1902); Chicago Protection L. Ins. Co. v. Foote, 79 Ill. 361 (1875).

Iowa.—Sheldon v. Crane, 146 Iowa 461, 125 N. W. 238 (1910) (wife); Arnd v. Aylesworth, 145 Iowa 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638 (1909); Peck v. Parchen, 52 Iowa 46, 2 N. W. 597 (1879).

Kansas.—Campbell v. Brown, 85 Kan. 527, 117 Pac. 1010 (1911).

Kentucky.—Fidelity & Casualty Co. of New York v. Cooper, 137 Ky. 544, 126 S. W. 111 (1910) (husband); Cleaver v. Louisville & N. R. Co., 100 S. W. 223, 30 Ky. L. Rep. 1059 (1907).

Louisiana.—State v. Swindall, 129 La. 760, 56 So. 702 (1911).

Maryland.—Chelton v. State, 45 Md. 564 (1876); Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 534 (1875); Green v. Caulk, 16 Md. 556 (1860).

Michigan.—Grimme v. General Council of Fraternal Aid Ass'n, 167 Mich. 240, 132 N. W. 497 (1911); Stabler v. Clark, 155 Mich. 26, 118 N. W. 605, 15 Detroit Leg. N. 834 (1908); Sterling v. City of Detroit, 134 Mich. 22, 95 N. W. 986, 10 Detroit Leg. N. 399 (1903); Ellis v. Whitehead, 95 Mich. 105, 54 N. W. 752 (1893); Harrison Wire Co. v. Moore, 55 Mich. 610, 22 N. W. 62 (1885) (deposition).

Mississippi.—Barclay v. Smith, 36 So. 449 (1904); Grangers' L. Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446 (1879); Melius v. Houston, 41 Miss. 59 (1866).

Missouri.—Brown v. Carson, 132 Mo. App. 371, 111 S. W. 1181 (1908); State v. Goddard, 62 Mo. 198, 62 S. W. 697 (1901).

Montana.—McCrimmon v. Murray, 43 Mont. 457, 117 Pac. 73 (1911).

basis of the testimony of the witness to the effect that a

New Jersey.—*Dranow v. MacDonald*, 76 N. J. L. 259, 69 Atl. 1009 (1908).

New York.—*Gage v. Peetsch*, 43 N. Y. Suppl. 487, 19 Misc. Rep. 369 (1897); *Evans v. Deming*, 41 Hun 637, 2 N. Y. St. Rep. 349 (1846). See also *White Mfg. Co. v. De la Vergne Refrigerating Mach. Co.*, 84 N. Y. Suppl. 192 (1903).

North Carolina.—*Mechanics' Bank & Trust Co. v. Whilden*, 74 S. E. 1047 (1912); *King v. Bynum*, 137 N. C. 491, 49 S. E. 955 (1905).

Oregon.—*Gettins v. Hennessey*, 120 Pac. 369 (1912); *Goodnough Mercantile Co. v. Galloway*, 48 Oreg. 239, 84 Pac. 1049 (1906).

Pennsylvania.—*Scull v. Wallace's Ex'rs*, 15 Serg. & R. 231 (1826).

Rhode Island.—*Baxter v. Pate-naude*, 32 R. I. 197, 78 Atl. 625 (1911) (understood).

South Carolina.—*Mason v. Apalachee Mills*, 81 S. C. 554, 62 S. E. 399, rehearing denied 81 S. C. 554, 62 S. E. 871 (1908); *Murdock v. Courtenay Mfg. Co.*, 52 S. C. 428, 30 S. E. 142, 29 S. E. 856 (1898).

Texas.—*Linger v. Balfour* (Civ. App. 1912), 149 S. W. 795; *Oltmanns Bros. v. Poland* (Civ. App. 1912), 142 S. W. 653; *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Civ. App. 1911), 133 S. W. 499; *International Harvester Co. of America v. Campbell* (Civ. App. 1906), 96 S. W. 93; *Kirby Lumber Co. v. C. R. Cummings & Co.*, 39 Tex. Civ. App. 220, 87 S. W. 231 (1905).

Virginia.—*City of Richmond v. Wood*, 63 S. E. 449 (1909).

Wyoming.—*Acme Cement Plaster Co. v. Westman*, 122 Pac. 89 (1912) (pay rolls).

United States.—*Lawlor v. Loewe*, 187 Fed. 522, 109 C. C. A. 288 (1911); *Western Assur. Co. of Toronto v. Polk*, 104 Fed. 649, 44 C. C. A. 104 (1900).

That the witness was too young at the time to remember the subject of his present testimony renders the latter hearsay and inadmissible. *Hardy v. Randall*, 173 Ala. 516, 55 South. 997 (1911).

The testimony of a witness as to statements made by a person not a witness is hearsay. *State v. Grills* (R. I. 1912), 85 Atl. 281.

"It is requisite that, whatever facts the witness may speak to, he should be confined to those lying in his own knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be." *Greenleaf on Ev.*, § 98.

Assumption against hearsay.—In the absence of any evidence, it will be assumed, in an appellate court, that testimony is based upon the personal knowledge of the witness. *Ellis v. Guggenheim*, 20 Pa. St. 287 (1853). See, also, *In re Bell's Estate*, 157 Cal. 528, 108 Pac. 497 (1910).

On the other hand the danger lest the testimony may have been in part at least, founded upon hearsay has been regarded as sufficient reason for excluding it. *Worden v. Gore-Meehan Co.*, 83 Conn. 642, 78 Atl. 422 (1910). See, also, *Moore v. Maxwell & Delhomme*, 155 Ala. 299, 46 So. 755 (1908).

Boundary lines.—The testimony of an owner as to the position of his boundary lines, if based entirely upon what witness has been told by his surveyor, will be rejected as hearsay. *McDonald v. Wood*, 118 Ala. 589, 24 So. 86 (1897). See *McKeon v. Roan*, (Tex. Civ. App. 1907) 106 S. W. 404. That the statement is in official form does not modify the rule. *Cook v. U. S.*, 138 U. S. 157, 11 S. Ct. 268, 34 L. ed. 906 (1891).

That the witness claims to be testifying as an expert furnishes no ground for admitting his testimony based upon the statements of others.

certain fact exists.² Nor can it be used in part for such purpose.³ The witness is required to speak as to his own knowledge. A present conviction of the truth of a fact which has been reached by weighing the extrajudicial statements of others does not satisfy the requirements of this rule.⁴ Accordingly, a question by counsel which embodies such an **unsworn** statement is to be rejected. The judgment of an expert not called as a witness cannot be submitted to the jury by the expedient of incorporating it in a question addressed to another witness.⁵ Nor, in the absence of some special justification, will one be permitted to testify to his former statements on a given matter.⁶

Mason v. Apalache Mills, 81 S. C. 554, 62 S. E. 399 (1908) rehearing denied, 81 S. C. 554, 62 S. E. 871.

The state of the case.—Like other administrative rulings, the question of admissibility is to be determined upon the state of the case as it is at the time the evidence is offered. Thus, it is no sufficient ground for receiving a statement that it may become relevant if a particular witness is produced and testifies. **Armstrong v. Ackley**, 71 Iowa 76, 32 N. W. 180 (1887).

Telephone communications.—One who speaks with another by means of a telephone may properly testify as to the independently relevant fact of what was said to him. **Sullivan v. Kuykendall**, 4 Ky. L. Rep. (abstract) 908 (1883). If he recognized the voice, he may further testify who said it. **Vaughn v. State**, 130 Ala. 18, 30 So. 669 (1900). The person to whom one or both of these facts is narrated cannot, however, testify as to them or either of them upon the information so furnished. **Sullivan v. Kuykendall**, 4 Ky. L. Rep. (1883).

2. **Cornish v. Chicago, etc., R. Co.**, 49 Iowa 378 (1878). And see **Ramsey v. Smith**, 138 Ala. 333, 35 So. 325 (1903).

3. **Patrick v. Howard**, 47 Mich. 40, 10 N. W. 71 (1881); **Levy v. J. L. Mott Iron Works**, 127 N. Y. Suppl.

506, 143 App. Div. 7 (1911) (hospital records not shown to be true); **Robeson v. Schuylkill Nav. Co.**, 3 Grant Cas. (Pa.) 186 (1855); **Monk v. State**, 27 Tex. App. 450, 11 S. W. 460 (1889). *But compare* **Hornum v. McNeil**, 80 N. Y. Suppl. 728 80 N. Y. App. Div. 637 (1903).

The statement of a witness who has personally weighed "practically all" of the certain cotton seed as to the weight of each car load is admissible as evidence of the fact of weight, although it be shown that a clerk occasionally weighed a wagon load of it. **Eastern Texas R. Co. v. Daniel & Burton**, (Tex. Civ. App. 1911) 133 S. W. 506.

Incorporation.—That one witness testifying of her own knowledge, accepts and incorporates in her own testimony part of that given by another witness does not make the evidence of the former objectionable as hearsay. **Breeden v. Martens**, 21 S. D. 357, 112 N. W. 960 (1907).

4. **Lamar v. Pearre**, 90 Ga. 377, 17 S. E. 92 (1892).

5. **Sullivan v. Hugly**, 32 Ga. 316 (1861).

6. **Durham v. Luce**, (Tex. Civ. App. 1911) 140 S. W. 850; **Murphy v. State**, (Tex. Cr. App. 1897) 40 S. W. 978; **Harvey v. State**, 35 Tex. Cr. 545, 34 S. W. 623 (1896).

Admissions.— That the party to a litigation has made a verbal admission is to be covered by the testimony of one who heard it.⁷ Hearsay, however, though repeated by a party to the suit continues to be incompetent.⁸

Conduct based upon hearsay.— It has been held that where conversations or other statements have been rejected as hearsay every material act that the witness did that had its sole origin in the hearsay statement made to him should likewise be rejected.⁹

Joint Knowledge.— Should the sanction of an oath be given to the statement of an informant the objection that the second witness is testifying from hearsay may be removed. Thus, where a witness testifies that he has informed a given person of a fact which the speaker has himself forgotten, he has been regarded as rendering the evidence of a person so informed competent as to what the fact is.¹⁰ Further illustrations of the same principle are furnished in the many instances where the joint knowledge of two or more persons is essential to the complete establishment of a fact. The question, for example, being as to what was the testimony of a witness, spoken in a foreign language, the testimony both of the interpreter and of the stenographer taking notes at the trial are essential. The interpreter, who alone knows what the witness has said, testifies that he reported the same in English correctly in the hearing of the stenographer. Judicial administration then permits the latter to read his notes as to what the testimony of the witness, as reported by the stenographer, actually was.¹¹ The oath as to the correctness of the report of the testimony is necessarily that of the interpreter. He is, therefore, a necessary witness. Standing alone, the testimony of the stenographer is objectionable as being based upon hearsay.¹²

7. *State v. Thomas*, 28 La. Ann. 827 (1876); *St. Louis v. Arnot*, 94 Mo. 275, 7 S. W. 15 (1887).

8. *Stephens v. Vroman*, 16 N. Y. 381 (1857).

9. *Louisville & N. R. Co. v. Murphy*, (Ky. 1912) 150 S. W. 79.

If a witness could relate what he did on the faith of hearsay statements, the whole of what occurred might as well be admitted, because what could be admitted under this rule would be equally as effective as

if there was added to it what was excluded. *Louisville & N. R. Co. v. Murphy*, (Ky. 1912) 150 S. W. 79.

10. *Shear v. Van Dyke*, 10 Hun (N. Y.) 528 (1877) (number of loads of hay); *Hart v. Atlantic Coast Line R. R.*, (N. C. 1907) 56 S. E. 559. For some consideration of the application of this principle to book entries, see §§ 2885, 3074.

11. *Com. v. Storti*, 177 Mass. 339, 58 N. E. 1021 (1901).

12. *State v. Noyes*, 36 Conn. 80 4

Market value.—Testimony as to market value on information derived from daily communications is not objectionable as being based upon hearsay.¹³ As is more fully seen at another place,¹⁴ standard price lists and market reports in general circulation, and relied on by the commercial world, especially those engaged in the particular branch are admissible to show market values of articles of trade.¹⁵ Testimony of witnesses based upon such reports may be received,¹⁶ it not being necessary to show in what manner the

Am. Rep. 37 (1869); *State v. Terline*, 23 R. I. 530, 51 Atl. 204, 91 Am. St. Rep. 650 (1902).

13. *Erk v. Simpson*, (Ga. 1912) 73 S. E. 1065.

14. § 2099c.

15. *Arkansas*.—*St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760, 118 Am. St. Rep. 75 (1907).

Illinois.—*Tully v. Western Union Telegraph Co.*, 141 Ill. App. 312 (1908).

Iowa.—*Wilbur v. Buckingham*, 153 Iowa 194, 132 N. W. 960 (1911).

Maryland.—*Mount Vernon Brewing Co. v. Teschner*, 108 Md. 158, 69 Atl. 702 (1908) (malt).

Michigan.—*Tri-State Milling Co. v. Breisch*, 145 Mich. 232, 108 N. W. 657, 13 Detroit Leg. N. 478 (1906); *Kibler v. Caplis*, 140 Mich. 28, 103 N. W. 531, 21 Detroit Leg. N. 57, 112 Am. St. Rep. 388 (1905).

Missouri.—*Brockman Commission Co. v. Aaron*, 130 S. W. 116 (1910).

Nebraska.—*Chicago, B. & Q. Ry. Co. v. Todd*, 74 Neb. 712, 105 N. W. 83 (1905).

North Carolina.—*Moseley v. Johnson*, 144 N. C. 257, 56 S. E. 922 (1907) (stocks and bonds).

Texas.—*Southern Kansas Ry. Co. v. Bennett*, 46 Tex. Civ. App. 379, 103 S. W. 1115 (1907).

"As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries: and

courts would justly be the subject of ridicule, if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon." *Sisson v. Cleveland & T. R. R. Co.*, 14 Mich. 489, 497, per Cooley, J. (1866).

16. *St. Louis & S. F. Ry. Co. v. Lane* (Tex. Civ. App. 1909), 118 S. W. 847 (cattle market); *Galveston, H. & S. A. Ry. Co. v. Karrer* (Tex. Civ. App. 1908), 109 S. W. 440; *Southern Kansas Ry. Co. of Texas v. Bennett*, 46 Tex. Civ. App. 379, 103 S. W. 1115 (1907); *Texas & P. Ry. Co. v. Scott & Co.* (Tex. Civ. App. 1905), 86 S. W. 1065; *Chicago, R. I. & T. Ry. Co. v. Halsell* (Tex. Civ. App. 1904), 81 S. W. 1241.

A witness cannot state the condition of a given market based merely upon private letters, telegrams, or other advices, such as circular letters sent out by a commission company. *Betts v. Southern California Fruit Exch.*, 144 Cal. 402, 77 Pac. 993 (1904); *Fountain v. Wabash R. Co.*, 114 Mo. App. 676, 90 S. W. 393 (1905); *Steinmetz v. Cosmopolitan Range Co.*, 94 N. Y. Suppl. 456, 47 Misc. Rep. 611 (1905); *Texas & P. Ry. Co. v. Slator* (Tex. Civ. App. 1907), 102 S. W. 156; *Texas & P. Ry. Co. v. Arnett*, 40 Tex. Civ. App. 76, 88 S. W. 448 (1905); *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 39 Tex. Civ. App. 129, 86 S. W. 938 (1905); *Texas & P. Ry. Co. v. Crowley*, (Tex. Civ. App. 1905), 86 S. W. 342; *Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards*, 99 Tex. 343, 89 S. W. 968

information therein stated was obtained.¹⁷ The witness, however, cannot testify simply as to the statements contained in a trade journal, nothing more being shown as to their accuracy.¹⁸ Market quotations arbitrarily fixed by members of an exchange based

(1905), *reversing judgment* (Civ. App.), 86 S. W. 47.

Offers for the property in question or for similar property are not admissible to show value.

Alabama.—*Tennessee Coal, Iron & R. Co. v. State*, 141 Ala. 103, 37 So. 433 (1904).

Illinois.—*Crosby v. Dorward*, 248 Ill. 471, 94 N. E. 78, 140 Am. St. Rep. 230 (1911).

Indiana.—*Pichon v. Martin*, 35 Ind. App. 167, 73 N. E. 1009 (1905).

Montana.—*Helena Power Transmission Co.*, 38 Mont. 388, 99 Pac. 106 (1909); *Yellowstone Park R. Co. v. Bridger Coal Co.*, 34 Mont. 545, 87 Pac. 963, 115 Am. St. Rep. 546 (1906).

Nevada.—*State v. Nevada Cent. R. Co.*, 28 Nev. 186, 81 Pac. 99, 113 Am. St. Rep. 834 (1905).

New York.—*In re Crotona Park*, 142 N. Y. App. Div. 665, 127 N. Y. Suppl. 379 (1911).

Oklahoma.—*Blincoe v. Choctaw, O. & W. R. Co.*, 19 Okla. 286, 83 Pac. 903, 4 L. R. A. (N. S.) 890 (1905).

Texas.—*Hammond v. Decker*, 46 Tex. Civ. App. 232, 102 S. W. 453 (1907).

Washington.—*North Coast R. Co. v. Newman*, 66 Wash. 374, 119 Pac. 823 (1911); *Chicago, M. & P. S. Ry. Co. v. True*, 62 Wash. 646, 114 Pac. 515 (1911); *Chicago, M. & St. P. Ry. Co. v. Alexander*, 47 Wash. 131, 91 Pac. 626 (1907).

This also applies to offers to buy corporate stocks. *Morril v. Bentley*, 150 Iowa 677, 130 N. W. 734 (1911), modifying judgment (Iowa 1910), 126 N. W. 155.

17. *Mount Vernon Brewing Co. v. Teschner*, 108 Md. 158, 69 Atl. 702, 16 L. R. A. (N. S.) 758 n. (1908).

It is not required that the editor of a daily paper containing reports of sales should have personal knowledge of the individual sales so reported. *Bullard v. Stewart*, 46 Tex. Civ. App. 49, 102 S. W. 174 (1907).

“Administrative requirements. — It is difficult to understand upon what principle ‘lists,’ ‘prices current,’ and similar evidence can be admitted, if a newspaper giving the market prices which the particular trade relies on cannot be. We are of opinion, therefore, that, if it be shown that a newspaper offered in evidence is accepted by the trade as trustworthy and reliable in stating the market prices of the article in question, it should be admitted without requiring evidence of how the information published is obtained; but, unless there is some testimony that it is so accepted by the trade, courts should require evidence as to how the information was obtained by the publishers. Proper care on the part of the trial court can generally avoid injury to the parties to suits, when such evidence is offered.” *Mount Vernon Brewing Co. v. Teschner*, 108 Md. 158, 69 Atl. 702, 16 L. R. A. (N. S.) 758 n. (1908).

18. *Jones v. Ortel*, 114 Md. 205, 78 Atl. 1030 (1910); *Meriwether v. Quincy, O. & K. C. R. Co.*, 128 Mo. App. 647, 107 S. W. 434 (1908); *Henderson v. Wabash R. Co.*, 126 Mo. App. 610, 105 S. W. 13 (1907); *Fountain v. Wabash R. Co.*, 114 Mo. App. 676, 90 S. W. 393 (1905); *Bunte v. Schumann*, 92 N. Y. Suppl. 806, 46 Misc. Rep. 593 (1905).

Statements resting upon hearsay may be primary evidence of value. *Landrum v. Swann*, (Ga. App. 1910) 68 S. E. 862.

upon prices actually paid may also properly be rejected as hearsay.¹⁹

Mortality tables.—A physician who has examined mortality tables may testify as to the expectancy of life, in the absence of a specific objection that the witness had not shown such knowledge as qualified him to give the testimony in question.²⁰

Contents of lost documents.—The contents of lost documents must be established by the testimony of one who has first-hand knowledge on the subject. The witness cannot testify on the basis that hearsay statements of third persons have given him correct information in regard thereto.²¹

Subjective symptoms of patient.—The testimony of an examining physician as to the subjective symptoms stated to him by his patient and the history of the case may be received as constituting part of the basis of the physician's diagnosis of the case but not as to the true condition of the patient.²²

§ 2709. (Hearsay Rule stated; Testimony based on Hearsay); Statements of Results.—*An entirely different question* is presented where a person who subsequently testifies as a witness has examined a set of documents, public or private, and is asked to state the effect of these papers. This the witness is at perfect liberty to do,¹ the administrative advantage of thus expediting the

19. *Brockman Commission Co. v. Aaron*, (Mo. App. 1910) 130 S. W. 116.

20. *Ft. Worth & D. C. Ry. Co. v. Spear*, (Tex. Civ. App 1908) 107 S. W. 613.

21. *Nichols v. Kingdom Iron Ore Co.*, 56 N. Y. 618 (1874); *Propst v. Mathis*, 115 N. C. 526, 20 S. E. 710 (1894); *New York Mut. L. Ins. Co. v. Tillman*, 84 Tex. 31, 19 S. W. 294 (1892); *Paige v. Loring*, 18 Fed. Cas. No. 10,672, 1 Holmes 275 (1873).

22. *Salminen v. Ross*, (Mass. 1910) 185 Fed. 997. Compare *Kath v. Wisconsin Cent. R. Co.*, 121 Wis. 503, 99 N. W. 217 (1904).

§ 2709-1. *California.*—*San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410 (1898).

Iowa.—*State v. Brady*, 100 Iowa

191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693 (1896).

Missouri.—*Masonic Mut. Ben. Soc. v. Lackland*, 97 Mo. 137, 10 S. W. 895, 10 Am. St. Rep. 298 (1888).

New Jersey.—*State v. Powell*, 7 N. J. L. 244 (1824).

Pennsylvania.—*Scull v. Wallace Ex'rs*, 15 Serg. & R. 231 (1826).

But see *Kelley v. Stevens*, 58 Kan. 569, 50 Pac. 595 (1897); *Masonic Mut. Ben. Soc. v. Lackland*, 97 Mo. 137, 10 S. W. 895, 10 Am. St. Rep. 298 (1888).

Private boundaries.—A surveyor's testimony as to the location of a boundary line predicated on his survey, based on data learned from his investigation of records, is not objectionable as hearsay, and is admissible to show the location of the line,

trial being obvious. No infraction of the hearsay rule is involved.² Such knowledge may readily be acquired by the witness in the course of public³ or official⁴ duty. The testimony is not objectionable as being based upon hearsay. The witness is not giving the contents of the documents as such. He is merely stating what he has found out and knows of his own knowledge, what the writings are about, what they are seeking to effect, what position the persons concerned assume in them and the like.

§ 2710. (Hearsay Rule stated; Testimony based on Hearsay); Administrative Details.—An administrative question of some nicety arises in view of the danger that a witness may, in reality, be basing his testimony on hearsay. Can a rule of procedure or practice be formulated as to this matter of preliminary examination? If so, what is it? Is it on the whole sounder administration, more economical of time and better calculated to facilitate the orderly dispatch of business, that the proponent should, in all cases, establish the fact that his proposed witness is qualified to testify as to his own personal knowledge, and thereby waste the court's time in the preliminary examination of witnesses whom no one doubts to be so qualified; or, on the other hand, invariably to dispense with the preliminary proof of personal knowl-

though the records are the best evidence of what they contain. *St. Louis Southwestern Ry. Co. of Texas v. Alexander Eccles & Co.*, 53 Tex. Civ. App. 125, 115 S. W. 648 (1909).

2. Under a prevailing practice or by separate order of the presiding judge the proponent may be required to make formal tender of the documents themselves or, at least, to have them present in court for the purposes of cross-examination.

A tabulated statement made by a witness of the amounts claimed by customers to have been paid by them to one who is alleged to have been a defaulter has been rejected, notwithstanding the fact that it was claimed that the production as witnesses of the persons paying would be impracticable and entail a large expense. *Fidelity & Deposit Co. of*

Maryland v. Champion Ice Mfg. etc., Co., 133 Ky. 74, 117 S. W. 393 (1909).

3. An administrator who has learned in the course of his discharge of the trust that a given claim was made by or against the estate may properly testify to that effect. *Stewart v. Chadwick*, 8 Iowa 463 (1859).

4. An expert on cattle diseases who has ascertained from the records and correspondence of the national department of agriculture, with which he is connected, the localities in the State of Texas where "cattle fever" is prevalent, may state, as a result of his investigations which districts of the State are so affected, although he has never visited them. *Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230 (1895).

edge, and so, perhaps, get deep into the examination of a witness only to discover in the end that he knows nothing except what some one else has told him? By certain courts, the first course has been adopted.¹ To others the second has seemed preferable.² The question as to the advisability of holding a preliminary examination into the personal knowledge of the witness would appear to be a purely practical one most wisely left to be determined by the circumstances of each individual case. It may sufficiently appear, for example, from the statement itself that it is made by one who has no personal knowledge on the subject.³ One who can neither read nor write cannot well testify from his own knowledge as to the contents of a written instrument.⁴ Should the witness propose to testify as to something which he says he "found out"⁵ or has learned "from some source"⁶ the hearsay nature of his testimony becomes obvious. To warrant exclusion, however, it should appear that the proposed evidence is actually based upon hearsay, and that it may be so founded. Should the testimony resting upon hearsay have been admitted in evidence, it will be stricken out upon the motion of the party aggrieved.⁷

The claim of a witness to a possession of personal knowledge will not suffice to admit his statement if other facts conclusively show that he could not have had such knowledge.⁸

§ 2711. *Reasons for Hearsay Rule; (1) Inherent Weakness.*

— In treating hearsay statements, unsworn declarations employed in proof of the facts asserted, as secondary evidence,¹ the judicial administration of the earlier English law of evidence acted in a

§ 2710-1. *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 643 (1884); *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92 (1892); *Atlanta Glass Co. v. Noizet*, 88 Ga. 43, 13 S. E. 833 (1891); *People v. Abbott*, 116 Mich. 263, 74 N. W. 529 (1894); *Rosenthal v. Middlebrook*, 63 Tex. 333 (1885); *Tipkens v. State*, (Tex. Cr. App. 1898) 43 S. W. 1000; *Short v. State*, (Tex. Cr. App. 1895) 29 S. W. 1072. And see *Texas, etc., R. Co. v. Daugherty*, (Tex. Civ. App. 1903) 76 S. W. 605; *Gresham v. Harcourt*, 33 Tex. Civ. App. 196, 75 S. W. 808 (1903).

2. *Peck v. Parchen*, 52 Iowa 46 54,

2 N. W. 597 (1879). But, see *Overman v. Hibbard*, 30 Iowa 115 (1870).

3. *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92 (1892).

4. *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 643 (1884).

5. *Rosenthal v. Middlebrook*, 63 Tex. 333 (1885).

6. *Scales v. Desha*, 16 Ala. 308 (1849).

7. *Chicago, etc., R. Co. v. Fietsam*, 123 Ill. 518, 15 N. E. 169 (1888); *Rooker v. Rooker*, 83 Ind. 226 (1882).

8. *Field v. Tenny*, 47 N. H. 513 (1867).

§ 2711-1. §§ 2762 *et seq.*

wise and scientific spirit.² Even when relevant at all, which seems by no means to occur so frequently as the state of the authorities would apparently indicate,³ the evidence of an extrajudicial statement, when employed as hearsay, to prove the fact which it asserts, is of a distinctly inferior grade. So much greater by comparison is the probative force of the testimony of the original percipient witness, the maker of the unsworn statement, given in court under the sanction of an oath and subject to the test of cross-examination as to constitute it in this connection a primary grade of proof. It cannot well be doubted that under the ordinary administrative principle which requires that the best available evidence be produced,⁴ the testimony of the actual declarant in the extrajudicial statement should be submitted whenever reasonably possible, the speaker being alive and accessible.⁵ Should it appear that the fact in question can satisfactorily be established by the testimony of witnesses who can speak from their own knowledge, no administrative necessity for receiving hearsay to the same effect can well be exhibited.⁶ As an administrative matter, a question as to the

2. The truth of this statement is not affected by the circumstance that the procedural tendencies of a later time, freezing as it were, into rigidity a process of natural, but as yet uncompleted development, created the anomaly of the unbending rule and a limited number of equally uncompromising "exceptions."

3. § 2722.

4. §§ 464 *et seq.*

5. *Alabama*.—*State Bank v. McDade*, 4 Port. 252 (1837).

Colorado.—*Sloan Sawmill, etc., Co. v. Guttshall*, 3 Colo. 8 (1876).

Georgia.—*Wallace v. Spullock*, 32 Ga. 488 (1861).

Illinois.—*Grubey v. National Bank*, 133 Ill. 79, 24 N. E. 575 (1890); *Dorland v. Bradley*, 66 Ill. 412 (1872).

Indiana.—*Kendall v. Hall*, 6 Blackf. 507 (1843); *Fuller v. Wilson*, 6 Blackf. 403 (1843).

Iowa.—*Hutchinson v. Watkins*, 17 Iowa 475 (1864).

Mississippi.—*Carmichael v. Penn-*

sylvania Bank, 4 How. 567, 35 Am. Dec. 408 (1840).

Missouri.—*Bain v. Clark*, 39 Mo. 252 (1866); *Langsdorf v. Field*, 36 Mo. 440 (1865); *Truesdail v. Sanderson*, 33 Mo. 532 (1863).

New Hampshire.—*Ross v. Knight*, 4 N. H. 236 (1827).

New York.—*Stouvenel v. Stephens*, 26 How. Pr. 244 (1863); *Woodward v. Paine*, 15 Johns. 493 (1818); *Alexander v. Mahon*, 11 Johns. 185 (1814).

Pennsylvania.—*Hummel v. Brown*, 24 Pa. St. 310 (1855).

Tennessee.—*Arnett v. Weeks*, 8 Humphr. 547 (1847).

Vermont.—*Deming v. Lull*, 17 Vt. 398 (1845); *Low v. Perkins*, 10 Vt. 532, 33 Am. Dec. 217 (1838).

Wisconsin.—*Persons v. Burdick*, 6 Wis. 63 (1857).

United States.—*Reid v. Hodgson*, 20 Fed. Cas. No. 11,667, 1 Cranch C. C. 491 (1808).

6. *Iowa*.—*Carnes v. Crandall*, 10 Iowa 377 (1860).

propriety of the hearsay rule arises only when the case of the proponent requires proof of the extrajudicial statement, when the latter is probatively relevant and the fact can be proved in no other way.⁷ The fulfilment of the condition that the unsworn statement must be probatively relevant is rendered extremely difficult by the inherent weakness of this species of evidence considered as a whole.

Aside from certain general considerations, such as the liability of the hearsay statement to be misunderstood,⁸ misreported⁹ or the

Kentucky.—Bradshaw v. Com., 10 Bush 576 (1874).

Maine.—Gould v. Smith, 35 Me. 513 (1853).

Massachusetts.—Crouch v. Eveleth, 15 Mass. 305, 306 (1818).

Missouri.—Chouteau v. Searey, 8 Mo. 733 (1844).

New Hampshire.—Page v. Parker, 40 N. H. 47 (1860).

New York.—Jackson v. Etz, 5 Cow. 314 (1826).

United States.—Hopt v. Utah, 110 U. S. 574, 26 L. ed. 873 (1883); *Mima Queen v. Hepburn*, 7 Cranch 290, 3 L. ed. 348 (1813), *affirming* 20 Fed. Cas. No. 11,503, 2 Cranch C. C. 3 (1810).

7. "The cases in which hearsay, declarations of parties, and reputation, have been allowed in evidence, are where no better evidence can be supposed to exist." Crouch v. Eveleth, 15 Mass. 305, 306 (1818), per Parker, C. J.

8. *Louisville & N. R. Co. v. Murphy* (Ky. 1912), 150 S. W. 79 (mistake and deception).

Hearsay is excluded because the probabilities of falsehood and misrepresentation, either willful or unintentional, being introduced into a statement, are greatly multiplied every time it is repeated. The original statement, even if correctly reported, is not under the safeguards of the personal responsibility of the author as to its truth or the tests of a cross-examination as to its ac-

curacy. *Sheppard v. Austin*, 159 Ala. 361, 48 So. 696 (1909).

"And the misconstruction to which such evidence is exposed from the ignorance or inattention of the hearers, or from criminal motives, are powerful additional objections." *Marshall v. Chicago & G. E. R. Co.*, 48 Ill. 475 (1868), per Breese, C. J.

"The danger that casual observations would be misunderstood, misremembered, and misreported, increases the number and force of the objections to the admission of hearsay." *Lund v. The Inhabitants of Tyngsborough*, 9 Cush. (Mass.) 36 (1851), per Fletcher, J.

Evidence of oral admissions and declarations belong to a class of proofs which should be received with great caution. Even when they proceed from the mouths of honest and disinterested witnesses, they are liable to imperfection and error; and a word, or a look, misunderstood, will produce upon the mind of the hearer an impression entirely different from that which the speaker intended to convey. *Gould v. Hurley* (N. J. Ch. 1909), 73 Atl. 129, *citing Jones v. Knauss*, 31 N. J. Eq. 609, 616 (1879).

9. "That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised un-

like,¹⁰ its inherent weakness is attributable to two main facts. (1) It is not under oath. (2) It is not subject to cross-examination. Such being the case, the extrajudicial statement can, upon ordinary administrative principles, be received only when some element of probative force is present other than the general credit of the declarant,¹¹ something to replace the proving power ordinarily arising from the sanctity of an oath and the tests furnished by cross-examination.

Ancient declarations.—Declarations made many years previous to the time at which they are testified to are, for similar and still stronger reasons, entitled to but little consideration.¹²

§ 2712. (Reasons for Hearsay Rule; (1) Inherent weakness); Lack of Oath.—Of the two main facts which impair the probative force of an unsworn statement used as hearsay, lack of oath¹ and the absence of cross-examination,² probably the latter is, at the present time, regarded as being by far the more serious.³ Indeed, the importance of the oath is more frequently regarded as an incident of cross-examination, than as a valuable guaranty for truth in itself considered.⁴ While, therefore, lack of the sanction of an oath is spoken of by judges as being an infirmative consideration

der its cover, combine to support the rule that hearsay evidence is totally inadmissible." *Mima Queen v. Hepburn*, 7 Cranch (U. S.) 290, 295, 3 L. ed. 348 (1813), per Marshall, C. J.

10. "That it is peculiarly liable to be obtained by fraudulent contrivances; and above all, that it is exceedingly infirm, unsatisfactory and intrinsically weak in its very nature and character." *Ellicott v. Pearl*, 10 Pet. (U. S.) 412, 436, 9 L. ed. 475 (1836), per Story, J.

11. *Johnston v. Spoonheim*, 19 N. D. 191, 123 N. W. 830, 41 L. R. A. (N. S.) 1 n. (1909).

12. *Boeck v. Milke*, 141 Iowa 713, 118 N. W. 874, rehearing denied and opinion supplemented 120 N. W. 120 (1909).

§ 2712-1. *Louisville & N. R. Co. v. Murphy*, (Ky. 1912) 150 S. W. 79; *Diel v. Kellogg*, 163 Mich. 162, 128

N. W. 420, 17 Detroit Leg. N. 891 (1910).

2. § 2713.

3. **Judicial hearsay.**—The fact stated in the text is clearly indicated by the circumstance that in case of so-called judicial hearsay, e. g., affidavits, pleadings and the like, though the statement is sworn to, it is still rejected under the hearsay rule as proof of the facts asserted wherever not tested by cross-examination.

§ 2758.

4. **Earlier ages** would have reversed this estimate. While the efficiency, range and power of cross-examination as a test for truth have been steadily growing until at the present time it is justly regarded as the great separator of truth from the mass of baser material in which it commonly comes to courts of law, the judicial importance of the oath has

in relation to hearsay of practically co-ordinate importance with absence of cross-examination,⁵ such can scarcely be regarded as the fact. The real reason for thus joining the two requirements of oath and cross-examination is that cross-examination, in a juridical sense, takes place under oath. An extrajudicial statement given under oath, as appears elsewhere in connection with judicial hearsay⁶ is as objectionable to the present rule, if not tested by cross-examination, as an unsworn statement would be.⁷

decreased with equal steadiness. It might be said that the relative value of the two in succeeding ages of legal development has been indicative of the influence of reason as compared to that of formal or technical procedure. However this may be, the potency of the oath is greatly diminished since the time when the Middle Ages looked upon it as sacramental, an ordeal § 269j *et seq.*, § 95sn. 2, involving an appeal to Heaven, the *judicium Dei* which, if successfully undergone demonstrated the truth of the statement which the oath-taker had made. With the conservatism characteristic of English law, this procedural requirement that testimony should be given under oath has, with minor exceptions, been retained and some trace of an inherent value attaching to the mere fact of an oath seems still to linger. The ostensible sanction conferring credibility upon a sworn statement has, however, repeatedly changed with a diminished compelling power, as seems obvious from the well-established circumstances that as oaths have multiplied perjury has increased, at least in an equal ratio. It may well be doubted, therefore, whether the oath itself would confer probative force in any conspicuous degree except, perhaps, in case of a class of witnesses morally unbalanced, with neither the integrity of the honest man to whose veracity an oath is not necessary or the recklessness of the unprincipled witness who swears according to his assumed in-

terest. Men of the intermediate type, the legally honest, may be steadied in truth-telling by the existence of an oath.

5. The general rule is, that one person cannot be heard to testify as to what another person has declared, in relation to a fact within his knowledge, and bearing upon the issue. It is the familiar rule which excludes hearsay. The reasons are obvious, and they are two. First, because the averment of fact does not come to the jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and secondly, because the party, upon whose interests it is brought to bear, has no opportunity to cross-examine him on whose supposed knowledge and veracity the truth of the fact depends." *Warren v. Nichols*, 6 Metc. (Mass.) 261, 264 (1843), per Shaw, C. J.

6. § 2758.

7. *Kullman, Salz & Co. v. Superior Ct. of California*, 15 Cal. App. 286, 114 Pac. 589 (1911); *Busby's Trial*, 8 How. St. Tr. 525, 545 (1681).

"Statements in a pleading or an affidavit or deposition upon information and belief are no more to be accepted as evidence in a trial of an issue of fact than if they were orally made. They can amount to no more than mere hearsay testimony, incompetent for the proof of a fact, and therefore cannot serve as the basis for a finding or raise a conflict." *Kullman, Salz & Co. v. Superior Court of California* in and

§ 2713. (Reasons for Hearsay Rule; (1) Inherent weakness); 'Absence of Cross-Examination.—The absence of cross-examination is a more serious matter. Not without good reason has the main objection to the reception of hearsay been rested upon this ground.¹ The extrajudicial statement comes to the tribunal un-

for County of Salano, 15 Cal. App. 276, 114 Pac. 589 (1911).

"Declarations made under oath do not differ in principle from declarations made without that sanction and both come within the rule which excludes all hearsay evidence." *Lent v. Shear*, 160 N. Y. 462, 55 N. E. 2 (1899).

§ 2713-1. *Alabama*.—*Walker v. State*, 52 Ala. 192 (1875); *Drish v. Davenport*, 2 Stew. 266, 270 (1830).

Arkansas.—*Cornelius v. State*, 12 Ark. 782, 804 (1852); *State Bank v. Woody*, 10 Ark. 638 (1850).

California.—*San Francisco Teaming Co. v. Gray*, 11 Cal. App. 314, 104 Pac. 999 (1909).

Connecticut.—*State v. Dart*, 29 Conn. 153, 155, 76 Am. Dec. 596 (1860).

Illinois.—*Digby v. People*, 113 Ill. 123, 55 Am. Rep. 402 (1885); *Barnes v. Simmons*, 27 Ill. 512, 81 Am. Dec. 248 (1862); *Starkey v. People*, 17 Ill. 17 (1855).

Indiana.—*Morgan v. State*, 31 Ind. 193 (1869).

Kentucky.—*Leiber v. Com.*, 9 Bush 11 (1872); *Walston v. Com.*, 16 B. Monr. 15, 35 (1855); *Cherry and Steele v. Boyd*, Litt. Sel. Cas. 7 (1800).

Louisiana.—*State v. Brunetto*, 13 La. Ann. 45 (1858).

Maine.—*Heald v. Thing*, 45 Me. 392 (1858).

Maryland.—*Maitland v. Bank*, 40 Md. 540, 559 (1874); *Green v. Caulk*, 16 Md. 556 (1860).

Massachusetts.—*Bartlett v. Emerson*, 7 Gray 174 (1856); *Com. v. Starkweather*, 10 Cush. 59 (1852); *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36 (1851).

Mississippi.—*Lampley v. Scott*, 24 Miss. 528 (1852).

Nebraska.—*Village of Ponca v. Crawford*, 18 Nebr. 551, 26 N. W. 365 (1886).

New Hampshire.—*Patten v. Ferguson*, 18 N. H. 529 (1847).

New Jersey.—*Estell v. State*, 51 N. J. L. 182, 17 Atl. 118 (1889); *Overseer of Westfield v. Warren*, 8 N. J. L. 249 (1826).

New York.—*Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274, 47 Am. Rep. 41 (1884); *Stouvenel v. Stephens*, 26 How. Pr. (N. Y.) 244 (1863); *Wilson v. Boerem*, 15 Johns. 286 (1818).

North Carolina.—*Propst. v. Mathis*, 115 N. C. 526, 20 S. E. 710 (1894); *State v. Hargrave*, 97 N. C. 457, 1 S. E. 774 (1887); *State v. Williams*, 67 N. C. 12 (1872).

North Dakota.—*Johnston v. Spoonheim*, 19 N. D. 191, 123 N. W. 830, 41 L. R. A. (N. S.) 1 n. (1909).

Ohio.—*Summons v. State*, 5 Ohio St. 325, 343 (1856).

Pennsylvania.—*Railing v. Com.*, 110 Pa. 100, 105, 1 Atl. 314 (1885); *Moritz v. Brough*, 16 Serg. & R. 403 (1827); *Buchanan v. Moore*, 10 Serg. & R. 275 (Pa.) (1823).

South Carolina.—*State v. Belcher*, 13 S. C. 459, 462 (1880); *Robinson v. Blakely*, 4 Rich. L. 586 (S. C.), 55 Am. Dec. 703 (1851); *Walker v. Meetze*, 2 Rich. L. 570 (1846).

Tennessee.—*Phillips v. State*, 9 Humph. 246, 49 Am. Dec. 709 (1848).

Texas.—*Byers Bros. v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760 (1895).

Vermont.—*State v. Wood*, 53 Vt. 560 (1881).

tested. As has been well said: "A person who relates a hearsay,

Virginia.—*Brogy's Case*, 10 Gratt. 722, 729 (1853).

United States.—*Salem News Pub. Co. v. Caliga*, 144 Fed. 965, 75 C. C. A. 673 (1906); *Southern Express Co. v. Todd*, 56 Fed. 104, 5 C. C. A. 432 (1893); *Chaffee v. U. S.*, 18 Wall. 516, 21 L. ed. 908 (1873); *Medway v. U. S.*, 6 Ct. of Cl. 421, 434 (1870).

England.—*Sugden v. St. Leonard's*, L. R. 1 P. D. 154 (1876); *R. v. Jenkins*, L. R. 1 C. C. R. 187, 193 (1869); *Smith v. Blakey*, L. R. 2 Q. B. 326 (1867).

The exclusion of hearsay evidence is based on the principle that every person has the right to face the witness against him and to test him by cross-examination. *San Francisco Teaming Co. v. Gray*, 11 Cal. App. 314, 104 Pac. 999 (1909).

"It is a general principle in the law of evidence, that hearsay from a person not a party to the suit, is not admissible; because such person was not under oath, and the opposite party had no opportunity to cross-examine." *Chapman v. Chapman*, 2 Conn. 347, 348 (1817), per Swift, C. J.

"The general rule is, that hearsay evidence, that is, statements coming from one not a party in interest, and not a party to the proceeding and not made under oath, is not admissible, for the reason that such statements are not subjected to the ordinary tests required by law for ascertaining their truth, the author of the statements not being exposed to cross-examination in the presence of a court of justice, and not speaking under the penal sanction of an oath, with no opportunity to investigate his character and motives, and his deportment not subject to observation." *Marshall v. Chicago & G. E. R. Co.*, 48 Ill. 475, 476 (1868), per Breese, C. J.

"These rules have been adopted to guard against the manifest danger to human life that is so liable to arise from the admission, as evidence of declarations not made under the sanction of an oath, and not offering to the party to be affected by them an opportunity of cross-examination, or to call attention to omitted facts that if stated might modify or completely overturn the inference drawn from the declarations made. . . . These rules have been found so essential as safeguards in the investigation of truth that they have become fundamental in our system of jurisprudence, and some of them have been placed for greater security in our constitutions." *State v. Medicott*, 9 Kan. 257, 283, 287 (1872), per Kingman, C. J.

"The argument, in short, is that such evidence is hearsay. It is argued that such declarations are not made under the sanction of an oath, and that there is no opportunity to examine and cross-examine the person making them, so as to test his sincerity and truthfulness or the accuracy and completeness with which the declarations describe his intention or state of mind." *Com. v. Trefethen*, 157 Mass. 180, 185 31 N. E. 961, 24 L. R. A. 235 (1892), per Field, C. J.

"The plaintiff, by means of this species of evidence would be taken by surprise, and be precluded from the benefit of a cross-examination of Stanley as to all those material points which have been suggested as necessary to throw full light on his information." *Coleman v. Southwick*, 9 Johns. (N. Y.) 45, 49, 6 Am. Dec. 253 (1812), per Kent, C. J.

"The general objection to the deposition of John Buck is that it is in the nature of hearsay evidence, and that the defendant had no op-

is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities: he intrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author."² No one familiar with the actual trials can have failed to observe a marked increase in the probative force of testimony which has successfully withstood the probing of a well-conducted cross-examination. A proponent whose witness is stating the truth can ask for no better help for the establishment of his position. An untested statement, on the contrary, is properly regarded by judicial administration as dangerous. Until an attempt is made to break a piece of timber, it may be impossible to say whether the wood of which it is composed is sound or rotten. In much the same way, in the absence of the searching test which cross-examination alone makes practically possible, the tribunal has, as a rule, no satisfactory data

portunity of cross-examination." *Farmers' Bank v. Whitehill*, 16 S. & R. (Pa.) 89, 90 (1827), per Duncan, J.

"The ground upon which we proceed in each case is the presumption of the truth of the declarations, they being subjected to the tests which the law recognizes—the presence of the accused and the right of cross-examination. *U. S. v. Maccomb*, 5 McLean 286, 26 Fed. Cas. 15,702 (1851), per Drummond, J.

"In England hearsay evidence, that is to say the evidence of a man who is not produced in court and who therefore cannot be cross-examined, as a general rule is not admissible at all." *Dysart Peerage Case*, L. R. 6 App. Cas. 489, 503 (1881), per Lord Blackburn.

"The administering of an oath furnishes some guarantee for the sincerity of the opinion; and the power of cross-examination gives an opportunity of testing the foundation and the value of it." *Wright v. Tatham*, 7 Ad. & E. 313, 359, 5 Cl. & F. 670, 689 (1837), per Coltman, J.

"That the admitting hearsay evidence in the present affair, would introduce a dangerous precedent, in regard the other side could not have the benefit of cross-examining. In some cases, it is true, hearsay evidence is admitted from the necessity of the thing. . . . That in civil cases there is not the same necessity, because a bill in equity may be filed to perpetuate the testimony of ancient witnesses, and then the evidence may be cross-examined. But *Mrs. Piggot* being dead, no declaration of hers can be evidence, because the defendant has no opportunity to cross-examine her. *Craig dem Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1139, 1181 (1743).

"The statements and declarations of opinion received in evidence in this case were made by parties not examined upon oath, or subject to cross-examination." *Gresham Hotel Co. v. Manning*, Ir. R. 1 C. L. 125, 128 (1867), per O'Brien, J.

2. *Coleman v. Southwick*, 9 Johns. (N. Y.) 45, 50, 6 Am. Dec. 253 (1812).

upon which to estimate the probative force of the statement submitted. Under such circumstances judicial administration should be alert to protect the jury from being misled. A presiding judge might well be justified upon principle, in declaring that such a statement was irrelevant, without probative force, or that the jury could not reasonably act upon it. Grave danger may properly be felt to exist lest the jury, being without guide in determining the actual probative force, may accord the extrajudicial statement a proving power to which it is not rationally entitled. Should the declarant be available as a witness, or it be unnecessary, for some other reason, to rely upon evidence tainted with this essential infirmity, the right to reject the evidence for the protection of the jury cannot well be questioned.

On the other hand, the use of a rigid rule of procedure to the effect that however necessary the extrajudicial statement may be to the proponent in proving his case and however probatively relevant in point of fact it may be, it must be rejected unless tested by cross-examination or an opportunity afforded for that purpose would, upon principle, at least seem opposed to sound administrative principles.

§ 2714. (*Reasons for Hearsay Rule; (1) Inherent weakness; Absence of Cross-Examinations*); Affidavits, Depositions, etc.

— For a like reason affidavits ¹ or depositions taken in proceedings between third persons ² are regarded as hearsay.

§ 2714-1. California.—Krullman, Salz & Co. v. Superior Court of California in and for County of Solano, 15 Cal. App. 276, 114 Pac. 589 (1911).

Illinois.—Becker v. Quigg, 54 Ill. 390, 394 (1870).

Minnesota.—Kipp v. Clinger, 97 Minn. 135, 106 N. W. 108 (1906).

Montana.—Bean v. Missoula Lumber Co., 40 Mont. 31, 104 Pac. 869 (1909).

New York.—Holliday v. Roxbury Distilling Co., 115 N. Y. Suppl. 383, 130 App. Div. 654 (1909); Hanor v. Housel, 113 N. Y. Suppl. 163, 128 App. Div. 801 (1908).

Oregon.—Tobin v. Portland Flouring Mills Co., 41 Oreg. 269, 68 Pac. 743, 1108 (1902).

Texas.—Houston Oil Co. v. Kimball (Civ. App. 1908), 114 S. W. 662; Thomson v. Hubbard, 22 Tex. Civ. App. 101, 53 S. W. 841 (1899).

Vermont.—Billings v. Metropolitan Life Ins. Co., 70 Vt. 477, 41 Atl. 516 (1898).

United States.—Walsh v. Rogers, 13 How. 283, 13 L. ed. 283 (1851).

Common-Law Practice Commissioners, Second Report, p. 31 (1853); Buller, Trials at Nisi Prius, 241 (1767).

“One serious objection to the admission of *ex parte* affidavits is, that the opposite party is denied the privilege of cross-examination. This is a most efficacious test for the discovery of truth, and should never be departed from, except from actual ne-

§ 2715. (*Reasons for Hearsay Rule; (1) Inherent weakness; Absence of Cross-Examinations*); Effect of prior Cross-Examinations.— It follows from the fact that hearsay is objectionable,

cessity. A witness, subjected to this test, cannot easily impose on the court, or fabricate falsehood." *Becker v. Quigg*, 54 Ill. 390, 394 (1870), per Thornton, J.

"Testimony thus taken is liable to great abuse. At best it is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood. The person who prepares the witness and examines him can generally have just so much or so little of the truth, or such a version of it, as will suit his case." *Walsh v. Rogers*, 13 How. (U. S.) 283, 287, 14 L. ed. 147 (1851), per Grier, J.

2. *Waterson v. Leat*, 10 Fla. 326 (1863); *Berkeley Peerage Case*, 4 Camp. 401, 412 (1811); *R. v. Eriswell*, 3 T. R. 707 (1790); *Goodright v. Moss*, Cowper 592 (1777); *Toronto Carpet Co. v. Wright*, 3 D. L. R. 725, 22 Man. L. R. 294, 21 W. L. R. 304 (1912). See, *Oltmanns Bros. v. Poland* (Tex. Civ. App. 1912), 142 S. W. 653.

Buller's Trials at Nisi Prius, 241 (1767).

"Offering a deposition or an answer in evidence against a person not a party to the original suit * * * cannot be done, for this reason, because such person has it not in his power to cross-examine." *Goodright v. Moss*, 2 Cowper, 591, 594 (1777), per Lord Mansfield.

"A deposition cannot be given in evidence against any person that was not party to the suit; and the reason is, because he had not liberty to cross-examine the witness: and it is against natural justice that a man should be concluded by proofs in a cause to which he was not a party." *Buller, Trials at Nisi Prius*, 239 (1817).

Requirement of notice.—The obvious intention of statutory enactments which authorize the taking of depositions being that the opposite party should attend and cross-examine, the court is justified in suppressing a deposition taken under such circumstances that the opposite party could not attend. For example, where several depositions are held at considerable distance at the same time or so near thereto that the party notified cannot attend, depositions at the taking of which he was not present may be excluded from evidence. *Evans v. Rothschild*, 54 Kan. 747, 39 Pac. 701 (1895), per Allen, J.; *Cole v. Hall*, 131 Mass. 90 (1881), per Gray, C. J.

The rule requiring notice does not apply to the view which a skilled or unskilled witness takes for the purpose of enabling him to testify. *State v. Leabo*, 89 Mo. 247, 253, 1 S. W. 288 (1886), per Henry, C. J.; *Burg v. R. Co.*, 90 Iowa 106, 118, 57 N. Y. 680, 48 Am. St. Rep. 419 (1894).

The same rule applies to the taking of measurements and other preliminary steps for qualifying a witness.

Georgia.—*Augusta & S. R. Co. v. Dorsey*, 68 Ga. 228 (1881) (model).

Iowa.—*Burg v. R. Co.*, 90 Iowa 106, 118, 57 N. W. 680, 48 Am. St. Rep. 419 (1894).

Missouri.—*State v. Brooks*, 92 Mo. 542, 579, 5 S. W. 257 writ of error dismissed, 124 U. S. 394, 8 S. Ct. 443, 31 L. ed. 454 (1887); *State v. Leabo*, 89 Mo. 247, 253, 1 S. W. 288 (1886).

North Carolina.—*State v. Whitaker*, 98 N. C. 753, 3 S. E. 488 (1887); *State v. Morris*, 84 N. C. 756, 760 (1881).

Rhode Island.—*State v. Nagle*, 25 R. I. 105, 54 Atl. 1063 (1903).

principally because it's objective and subjective relevancy has not been tested by cross-examination, that where such cross-examination has previously been had, the hearsay rule does not apply. Thus where the evidence of a deceased witness on a former trial, given on substantially the same issue and between the same parties or their privies, has been subjected to cross-examination or a reasonable opportunity has been afforded for the exercise of that right, the former testimony is receivable should the witness be dead or otherwise unavailable.¹ Such former testimony may have been given on a more or less informal proceeding not held according to the course of the common law.² The form of action is immaterial;—provided the party now to be affected actually cross-examined or might have done so, and that the issues in the two proceedings were at least substantially the same.³

Tennessee.—*Moore v. State*, 96 Tenn. 209, 33 S. W. 1046 (1896); *Byers v. Railroad*, 94 Tenn. 345, 352, 29 S. W. 128 (1894); *Mississippi & T. R. Co. v. Ayers*, 16 Lea 725, 727 (1886) (expert); *Lipes v. State*, 15 Lea 125, 54 Am. Rep. 402 (1885) (foot-prints).

Washington.—*Moran Bros. Co. v. Snoqualmie F. P. Co.*, 29 Wash. 292, 69 Pac. 757 (1902).

Wisconsin.—*Hayes v. State*, 112 Wis. 304, 87 N. W. 1076 (1901); *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816 (1901).

United States.—*Day v. U. S.*, 30 C. C. A. 572, 87 Fed. 125 (1898) (inspection of horses).

Where a deposition taken by plaintiff contains responsive answers which are unfavorable to him it is held that an objection to its introduction by defendant on the ground that it contains self-serving declaration cannot be availed of by the former; *Everston v. Warrach* (Tex. Civ. App. 1910), 132 S. W. 514.

2715-1. *Minneapolis Mill Co. v. R. Co.*, 51 Minn. 304, 315, 53 N. W. 639 (1892), per Mitchell, J.; *Bradley v. Mirick*, 91 N. Y. 293, 296 (1883), per Rapallo, J.; *Wright v. Tatham*, 1 A. & E. 3 (1834), per Tindal, C. J.;

Cazenove v. Vaughan, 1 M. & S. 4, 6 (1813), per Ellenborough, L. C. J.; *Starkie, Evidence*, 97 (1824).

2. *Orr v. Hadley*, 36 N. H. 575, 580 (1858), per Eastman, J.

3. Chief Baron Gilbert, *Evidence*, 68 (1726).

"As that was a trial between different parties, having different rights, and with whom the plaintiff had no privity, and as he had no opportunity to examine or cross-examine the witnesses, it would be contrary to the first principles of justice to bind or in any way affect his interests by the evidence given on that occasion." *Lane v. Brainerd*, 30 Conn. 565, 579 (1862), per Hinman, C. J.

"We do not understand that the admissibility of such evidence depends so much upon the particular character of the tribunal, as upon other matters. If the testimony be given under oath in a judicial proceeding, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon to do so, the great and ordinary tests of truth being no longer wanting, the testimony so given is admitted in any subsequent suit between the par-

§ 2716. (*Reasons for Hearsay Rule; (1) Inherent weakness; Absence of Cross-Examination*); Nature of Tribunal.—The rule against the reception of hearsay may apply even where the original statement has been made under oath and in the course of a hearing before a judicial tribunal. Where it can reasonably be inferred by the court from the nature of the tribunal before which a statement is made, that the party to be affected by it had no opportunity for effective cross-examination, or where such is affirmatively shown to have been the case, the declaration, though a judicial one, and under oath, will be rejected as hearsay, if tendered in evidence. Of this nature are hearings before bankruptcy commissioners,¹ barrack commissioners,² commissioners to try land titles,³ mayors,⁴ state senate committees⁵ and so forth.⁶

Some mention of the use of early depositions, under oath but

ties. . . . It seems to depend rather upon the right to cross-examine, than upon the precise nominal identity of the parties." Bailey v. Woods, 17 N. H. 365, 372 (1845), per Gilchrist, J.

"The main reason for the exclusion of hearsay evidence, is to be found in the want of the sanction of an oath, of legal authority requiring the statement, and an opportunity for cross-examination. Where these important tests of truth are not wanting, and the testimony of the statements of the deceased witness, is on a subsequent trial between the same parties, touching the same subject-matter, and open to all the means of impeachment, and objections as to competency, which might be taken if the deceased person could be personally present as a witness, there would not appear to be any sound and satisfactory ground for its exclusion." Summons v. State, 5 Oh. St. 325, 343 (1856), per Bartley, C. J.

"Mr. Tatham, the lessor of the plaintiff in this action, had precisely the same power of objecting to the competency of Bleasdale, the same right of cross-examination, and of calling witnesses to discredit or con-

tradict his testimony, on the former trial, as he would have had if Mr. Wright had been the sole plaintiff in that suit, or as he would have had now if Bleasdale had been alive and subpoenaed as a witness." Wright v. Tatham, 1 A. & E. 3, 19 (1834), per Tindal, C. J.

"It would always be matter for enquiry by the judge trying the case, whether the prisoner had had a full opportunity for cross-examination, if the charge on which the deposition taken was not identical with that stated in the indictment." R. v. Beeston, Dears. Cr. C. 405, 413 (1854), per Jervis, C. J.

§ 2716-1. Rolle's Abr. II 679, pl. 9.

2. Attorney-General v. Davison, McCl. & Y. 160, 167 (1825).

3. Jackson v. Bailey, 2 Johns. (N. Y.) 17 (1806).

4. R. v. Paine, 5 Mod. 163 (1696).

5. Julian v. Kansas City Star Co., 209 Mo. 35, 107 S. W. 496 (1907).

6. The offer made to a defendant that he may cross-examine, if he sees fit, is sufficient to safeguard his rights. State v. Hill, 2 Hill S. C. 607, 27 Am. Dec. 406 (1835); R. v. Smith, Holt N. P. 614 (1817); Trials at Nisi Prius, 240 (1763).

without opportunity for cross-examination, is given in another place.⁷

Parliamentary Hearings.—A doubt has been suggested as to whether the rule excluding hearsay is binding upon Parliament.⁸

§ 2717. (*Reasons for Hearsay Rule; (1) Inherent weakness; Absence of Cross-Examination; Nature of Tribunal*); Coroner's Inquest.—Upon principle, and upon authority in America¹ a statement given by a witness under oath at a coroner's inquest will not be admissible on a subsequent trial against a defendant who had no opportunity for cross-examination.² Notwithstanding the adoption, near the end of the 17th century, of a general rule of procedure rejecting sworn statements where the party against whom these were to be used had had no such opportunity,³ an exception seems to have existed in England in case of the depositions taken before coroners.⁴ This is universally regarded as an anomaly, the basis of it being the dignity and traditional importance of the office. The deposition is accordingly treated as a record.⁵

7. § 2758.

8. Fenwick's Trial, 13 How. St. Tr. 537. 591-607, 618-750 (1696).

§ 2717-1. *Alabama.*—Sylvester v. State, 71 Ala. 17 (1881).

Illinois.—Pittsburgh C. & St. L. R. Co. v. McGrath, 115 Ill. 172, 3 N. E. 439 (1885).

Louisiana.—State v. Parker, 7 La. Ann. 83 (1852).

Ohio.—Insurance Co. v. Schmidt, 40 Ohio St. 112 (1883).

Pennsylvania.—McLain v. Com., 99 Pa. 86 (1881).

South Carolina.—State v. Jones, 29 S. C. 201, 7 S. E. 296 (1888); State v. Campbell, 1 Rich. L. 125 (1844).

Texas.—Texas Cent. R. Co. v. Dumas (Tex. C. A. 1912), 149 S. W. 543; Meyers v. State, 33 Tex. Cr. 204, 216, 26 S. W. 196 (1894).

2. State v. Houser, 26 Mo. 431 (1858).

Even where a right of cross-examination has been afforded before the coroner, it has been required, in order that the deposition should be admis-

sible in evidence, that the person to be affected by its statements should have been so represented before the magistrate as to secure a cross-examination in accordance with his present interest. Jackson v. Crilly, 16 Colo. 103, 26 Pac. 331 (1891). The contrary effect, see State v. McNeil, 33 La. Ann. 1333 (1881).

"The great principle that the accuser and accused must be brought face to face, and that the latter shall have the opportunity to cross-examine, can never be departed from with safety." People v. Restell, 3 Hill (N. Y.) 289, 297 (1842), per Bronson, J. **3.** § 2699.

4. R. v. Eriswell, 3 T. R. 707 (1790); Foster, Crown Law, 328 (1762); R. v. Westbeer, 1 Leach Cr. L., 4th ed., 12 (1739).

5. Thatcher v. Waller, T. Jones 53 (1688).

Secondary evidence.—The deponent in this case being beyond the sea—good administrative ground is furnished for accepting the deposition

§ 2718. (*Reasons for Hearsay Rule; (1) Inherent weakness; Absence of Cross-examination; Nature of Tribunal*); Justices' Courts.—Even after the establishment of a general rule excluding judicial statements under oath where no cross-examination had been permitted,¹ doubts were entertained as to its applicability to depositions given before justices of the peace. Although the party affected by such judicial statements had, in many cases, no opportunity of cross-examination, courts continued to receive such statements for some time after the general establishment of the rule against receiving hearsay sworn statements.² At a somewhat later date, the rule of absolute exclusion of such statements in harmony with the general rule, came to prevail.³ No question has existed as to the rule regarding justices' courts and the proceedings of examining magistrates since the establishment of the rule excluding hearsay.⁴ Statements under oath in these courts are not admissible as assertions unless the person affected had an opportunity for cross-examination of the declarant.

§ 2719. (*Reasons for Hearsay Rule*); (2) Distrust of the Jury.—Whatever may be the ostensible reason assigned for the English rule against hearsay, it cannot be doubted that the underlying cause is a distrust of the jury, fear lest it may be misled.¹ Comparing the English treatment of hearsay on jury trials with that accorded to it in other systems,² must make it plain that considerations other than the inherent weakness of the evidence have affected the formation of the rule. The controlling consideration

as secondary evidence. *Thatcher v. Waller*, T. Jones, 53 (1688).

§ 2718-1. § 2699.

"Declarations under oath do not differ in principle from declarations made without that sanction and both come within the rule which excludes all hearsay evidence." *Lent v. Shear*, 160 N. Y. 462, 470, 55 N. E. 2 (1899), per Vann, J.

2. R. v. Westbeer, 1 Leach Cr. L., 4th ed. 12 (1739). See, however, *Thatcher v. Waller*, T. Jones, 53 (1677).

Absence by Procurement.—A satisfactory administrative reason for admitting a hearsay statement under oath, e. g., an *ex parte*

deposition, is furnished where the deponent is absent by procurement of the party claiming to be aggrieved by being refused an opportunity of cross-examining him. *Fenwick's Trial*, 13 How. St. Tr. 537, 591-607, 618-750 (1696).

3. R. v. Ferry Frystone, 2 East 53 (1801); *R. v. Eriswell*, 3 T. R. 707 (1790); *R. v. Woodcock*, 1 Leach Cr. L., 4th ed. 500 (1789).

4. R. v. Paine, 5 Mod. 163 (1696).

§ 2719-1. Wright v. Doe, 7 A. & E. 313, 375, 2 N. & P. 305, 34 E. C. L. 178 (1837); *Berkeley's Case*, 4 Campb. 401 (1811).

2. § 2720.

has been, not that the evidence is weak but that in case of an untrained mind, it is apt to be *misleading*, to be taken at its face, or, at least, at more than its real, value. Assuming that, notwithstanding the modern growth of the average juror in education and intelligence, this danger continues to exist, it may be observed that the judicial reasoning upon which the rule is being maintained is decidedly anomalous.³ The right and duty of the court to prevent the jury from being misled are not questionable.⁴ Any reasonable effort which a judge may make, by proper cautions or the adoption of an alternative mode of proof which may be fairly calculated to remove the danger will be fully justified. But on a square issue between the judge's duty to protect the proponent's right to prove his case⁵ and that of protecting the jury from being misled, the former is universally regarded as paramount, except in the present connection. Here alone has it been thought wise to decline attempting to do justice, because the attempt may fail. Whatever may be deemed the inherent weakness of hearsay statements as proof of the facts asserted in them, judges have never expressed any apprehension as to their own ability to deal satisfactorily with this species of evidence.⁶ Sitting in equity or in admiralty, men of seasoned intellect do not hesitate to use extrajudicial statements as a secondary means of proof.⁷ To inform the conscience of the court in preparing to rule upon questions of administration, e g, the reasonableness of excuse for failure to produce a primary grade of evidence⁸ or in awarding sentence,⁹ hearsay may be received by the judge. The sound administrator is fully conscious of its dangers and its weaknesses. He takes it, nevertheless, if relevant, for what it may be logically worth. Only when a jury is present does a presiding judge feel it necessary to reject the hearsay statements although logically probative and all which the proponent has to offer. The wider experience of the judge may, it is thought, be safely relied upon to discount the effect

3. § 2574.

4. § 1745.

5. §§ 334 *et seq.*

6. *Mima Queen v. Hepburn*, 7 Cranch. (U. S.) 290, 3 L. ed. 438 (1813).

7. *Mima Queen v. Hepburn*, 7 Cranch. (U. S.) 290, 3 L. ed. 348 (1813); *Wright v. Doe*, 7 A. & E. 313,

375, 2 N. & P. 305, 34 E. C. L. 178 (1837), per Bosanquet, J.; *Berkley's Case*, 4 Campb. 401 (1811), per Mansfield, C. J.

8. *Bridges v. Hyatt*, 2 Abb. Pr. 449, *affirmed* 16 N. Y. 546 (1856).

9. *Granger v. Com.*, 78 Va. 212 (1883).

of a cross-examination to an extent which could not fairly be anticipated in case of a jury. The rule against hearsay is, however, procedural. Where the mischiefs, which it seeks to prevent, may reasonably be assumed to be present, the administrative power of the judge does not extend so far as to suspend or abrogate it. An extrajudicial statement, for example, is none the less objectionable because elicited by questions asked by the judge.¹⁰

§ 2720. (*Reasons for Hearsay Rule; (2) Distrust of the Jury*); Hearsay in other judicial Systems.—No system of jurisprudence could fail to notice these inherent weaknesses; they lie entirely on the surface. Yet no other than the English has hesitated to use this species of evidence so far as probative whenever the exigencies of proof have seemed to warrant or require such a course. The civil law employed hearsay¹ and it is accordingly recognized in the modern systems of continental Europe founded upon the civil law. The canon and ecclesiastical law employ it. Hearsay is also receivable under the law of Scotland.² Even English judges sitting for the trial of questions of fact have freely availed themselves of such probative force as it might be found to possess.³ The unique position of the common law courts in England on jury trials has been thus concisely stated: "It is not the province of this Court to consider whether such evidence is properly receivable in the Ecclesiastical Courts. Those courts are constituted upon principles very different from those which regulate the courts of common law. Where the judges are authorized to deal both with the facts and the law, a much larger discretion with respect to the reception of evidence may not unreasonably be allowed than in courts of common law, where the evidence, if re-

10. *Bornheimer v. Baldwin*, 42 Cal. 27 (1871).

§ 2720-1. Ayl. Par. Jur. Can. Angl. 444; Best on Ev. (Chamberlayne's 3d Amer. Ed.) 54; Lancel. Inst. Jur. Can. lib. 3, tit. 14, §§ 1 and 54; (i) Mascard de Prob. Concl. 754, 755.

2. "In Scotland, and most of the Continental States, the judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when

they come to consider of their judgment, on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds." *Berkeley's Case*, 4 Campb. 401, 415 (1811), per Mansfield, C. J.

3. § 2719.

ceived by the judge, must necessarily be submitted entire to the jury. By the rules of evidence established in the courts of law, circumstances of great moral weight are often excluded, from which much assistance might in particular cases be afforded in coming to a just conclusion, but which are nevertheless withheld from the consideration of the jury upon general principles, lest they should produce an undue influence upon the minds of persons unaccustomed to consider the limitations and restrictions which legal views upon the subject would impose. This is matter of daily experience, and requires no illustration by examples.”⁴

§ 2721. *Scope of Hearsay Rule.*—Applying equally to civil and criminal cases, embracing oral, printed, written or composite statements, indifferently affecting declarations which are implied as well as those more fully expressed, the rule against hearsay statements has evidently a wide range of influence, even when restricted to its normal scope. As the term is commonly employed, the application of the rule is still wider being made to cover two large classes of extrajudicial statements which must carefully be excluded before the true juridical value of the rule can be satisfactorily estimated. The first of these classes, the instances in which the unsworn statement is circumstantially relevant, constituent or probative by reason of its bare existence, has already been considered in the preceding chapter.¹ It remains to place on one side, as not properly within the scope of the hearsay rule which excludes extrajudicial statements when used as proof of the facts asserted a second and very large class of unsworn statements, those which are logically *irrelevant*.

§ 2722. (*Scope of Hearsay Rule*); No Application to irrelevant Statements.—In judging, however, as to the real scope and juridical value of any rule of exclusion like that rejecting hearsay it is necessary to bear in mind that such an exclusion can apply, properly speaking, only to that which is already evidence.¹ The

⁴. Wright v. Tatham, 7 A. & E. 313, 375, 2 N. & P. 305, 34 E. C. L. 178 (837), per Bosanquet, J.

§ 2721-1. § 2581.

§ 2722-1. If any exceptional circumstance such as the calling of a particular witness would suffice to

make the evidence relevant and admissible, its existence at the time the evidence is offered must, upon ordinary administrative principles, be affirmatively shown. *Armstrong v. Ackley*, 71 Iowa 76, 32 N. W. 180 (1887).

hearsay rule cannot be invoked to exclude statements which are merely irrelevant.

By a parity of reasoning, the so-called "exceptions" to the hearsay rule, in which the extrajudicial declaration is used as secondary evidence of the facts asserted, must be regarded as applicable only to admission of statements which are already objectively and subjectively relevant and which would otherwise be rejected as hearsay.

§ 2723. (*Scope of Hearsay Rule*); Administrative Details:—

The inherent weakness of an extrajudicial statement tendered in proof of the facts asserted to which attention has just been given¹ may be such in any particular case as to reduce the proving quality of the unsworn statement below the point of relevancy. If so, it would seem that nothing further remained to be said. The hearsay rule has no application in the premises. That which is not relevant is not evidence.² This has the air of a truism. Yet the disregard of so obvious a fact has consequences of some importance. In accordance with what may perhaps be fairly designated as a habit of stating the second reason first, excellent judicial administrators are constantly adding to the apparent instances in which the rule against hearsay is said to apply, a large number of cases where the statement in question is irrelevant upon any issue raised in the case. The situation presented is this: An unsworn statement as to the logical bearing of which the judge may be doubtful is tendered in evidence. His Honor knows that even should the statement be in some degree probative it still must be rejected. As a saving of time, to avoid argument, to prevent the appearance of ruling upon the weight of evidence, or for some similar reason, the exclusion is put into the form of saying that the declaration is rejected as hearsay. In this way an apparent instance of the application of the hearsay rule is added to the mass already accumulated.³

§ 2723-1. §§ 2711 *et seq.*

2. § 1711.

3. No special treatment is accorded by the courts in this respect, to the rule against hearsay. Notwithstanding that the infirmative considerations upon which the rule is based have been so powerful in any indi-

vidual case, as to remove all rational probative force from the testimony, it is still the practice of the court, in most instances, to treat the irrelevant testimony as excluded by the rule.

Wherever the familiar ear-marks of the basis of an exclusionary rule

§ 2724. (Scope of Hearsay Rule; Administrative Details); Incomplete Statements.—As the hearsay rule has no proper application to statements which are not relevant, it cannot be said to extend to the exclusion of extrajudicial statements which have no logical bearing upon any issue raised in the case¹ in the absence

are presented, a presiding judge is extremely apt to invoke the operation of such rule, regardless of whether the fact rejected is intrinsically evidentiary or not. From the standpoint of reason, this amounts to killing, as it were, by special judicial pronouncement, that which is already dead. It is excluding from within a particular circle that which has no claim to enter it. Yet when the inference of a person who knows nothing about a matter is rejected, the judge is apt to say that it is "merely a matter of opinion." § 1793. Should an unsworn statement which has no logical connection with the existence of the fact which it asserts be offered in evidence, or should it assert a fact which is without probative relation to a *res gestae* fact, the court is prone to say that "hearsay is not evidence." § 2722. In like manner, an offer to prove that A did a particular act at one time because he had done a dissimilar one at another, the irrelevant fact is, perhaps more often than not, excluded as *res inter alios*. § 3151. Should a proponent offer the inference that A did a particular act because he was possessed of a trait of character entirely without force as a motive or stimulus in inducing him to do so the judge is quite as apt to reject the offer as "character evidence" as if the trait invoked were of the most highly predisposing nature. § 3267. In view of the practical conditions under which litigation is carried on, it is perhaps too much to expect that this should be otherwise. So inveterate, however, has the practice be-

come that it might almost be said that the four great exclusionary rules of evidence, Opinion, Hearsay, *Res Inter Alios* and Character, when they exclude evidence merely assign the particular reasons which make the fact irrelevant and permit the acceptance of relevant facts within the rule by designating a species of secondary evidence which enables this to be done.

§ 2724-1. Alabama.—Tennessee, etc. R. Co. v. Danforth, 112 Ala. 80, 20 So. 502 (1895); Motes v. Bates, 80 Ala. 382 (1885).

California.—Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33 (1893).

Illinois.—Carter v. Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669 (1894).

Indiana.—Allen County v. Bacon, 96 Ind. 31 (1884).

Iowa.—Bennett v. Marion, 119 Iowa 473, 93 N. W. 558 (1903).

Maine.—Rice v. Perry, 61 Me. 145 (1870).

Maryland.—Oelrichs v. Artz, 21 Md. 524 (1863).

Massachusetts.—Linnehan v. Matthews, 149 Mass. 29, 20 N. E. 453 (1889); Framingham Mfg. Co. v. Barnard, 2 Pick. 532 (1824). See also, Prescott v. Ward, 10 Allen 203 (1865).

Minnesota.—St. Paul Nat. German-American Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016, 80 N. W. 363 (1899); Finch v. Green, 16 Minn. 355 (1871).

Mississippi.—Goodall v. Stewart, 65 Miss. 157, 3 So. 257 (1887).

Missouri.—Mulford v. Caesar, 53 Mo. App. 263 (1893).

Nebraska.—Farmers' L. & T. Co.

of some connected fact of which no evidence is furnished.² In criminal cases, extrajudicial statements made by third persons, in no way connected with the accused, or uttered in his presence are simply irrelevant when offered in proof of the facts asserted³ and are properly to be rejected upon this preliminary ground rather than under the rule against hearsay.

§ 2725. Relevancy of Hearsay. The absence of cross-examination in case of an extrajudicial statement employed as hearsay,

v. Montgomery, 30 Nebr. 33, 46 N. W. 214 (1890).

New Jersey.—*Peterson v. Christianson*, 68 N. J. L. 392, 56 Atl. 288 (1902).

New York.—*Shipman v. Frech*, 15 Daly 151, 3 N. Y. Suppl. 932, 22 N. Y. St. Rep. 234 (1889); *Milbank v. Dennistown*, 10 Bosw. 382 (1863).

Pennsylvania.—*D'Homergue v. Morgan*, 3 Whart. 26 (1837); *Davis v. Collins*, 4 Yeates 100 (1804).

South Carolina.—*Cathcart v. Gibson*, 2 Speers 661 (1844).

Texas.—*Olive v. Hester*, 63 Tex. 190 (1885); *Thompson v. Comstock*, 59 Tex. 318 (1883).

Vermont.—*Gates v. Moore*, 51 Vt. 222 (1878).

Wisconsin.—*Saveland v. Green*, 40 Wis. 431 (1876).

United States.—*Sutherland v. Round*, 57 Fed. 467, 6 C. C. A. 428 (1893).

2. *Alabama*.—*Rivers v. State*, 97 Ala. 72, 12 So. 434 (1892).

Florida.—*Lee v. Walker*, 25 Fla. 149, 6 So. 57 (1889).

Kentucky.—*Pence v. Com.*, 51 S. W. 801, 21 Ky. L. Rep. 500 (1899); *Wright v. Haddock*, 7 Dana 253 (1838).

Massachusetts.—*Prescott v. Ward*, 10 Allen 203 (1865).

Michigan.—*White v. Ross*, 47 Mich. 172, 10 N. W. 188 (1881).

Mississippi.—*Hairston v. State*, 10 So. 479 (1891).

New York.—*Hard v. Ashley*, 18 N. Y. Suppl. 413 (1892).

Texas.—*Johnson v. State* (Cr. App. 1900), 55 S. W. 576.

Virginia.—*North British & Mercantile Ins. Co. v. Nidiffer*, 112 Va. 591, 72 S. E. 130 (1911).

Canada.—*Phelps v. Wilson*, 13 U. C. C. P. 38 (1863).

Waiver. One who has opened up a given line of inquiry may not be at liberty to object when his opponent undertakes to pursue the subject further. *Van Ingen v. Mail, etc., Pub. Co.*, 14 Misc. (N. Y.) 326, 35 N. Y. Suppl. 838, 70 N. Y. St. Rep. 355, *aff'd* 156 N. Y. 376, 50 N. E. 979 (1895) (where counsel opened the inquiry on cross-examination).

3. *Alabama*.—*Evans v. State*, 109 Ala. 11, 19 So. 535 (1895); *Tolbert v. State*, 87 Ala. 27, 6 So. 284 (1888).

California.—*People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75 (1891); *People v. Griffin*, 52 Cal. 616 (1878).

Indiana.—*Good v. State*, 61 Ind. 69 (1878); *Binns v. State*, 57 Ind. 46, 26 Am. Rep. 48 (1877).

Kentucky.—*Twyman v. Com.*, 33 S. W. 409, 17 Ky. L. Rep. 1038 (1895).

South Carolina.—*State v. Dukes*, 40 S. C. 481, 19 S. E. 134 (1893).

Tennessee.—*Britton v. State*, 4 Coldw. 173 (1867).

Texas.—*Aud v. State*, 36 Tex. Cr. R. 76, 35 S. W. 671 (1896).

United States.—*U. S. v. Burr*, 25 Fed. Cas. No. 14,694 (1807).

or, more properly, the difficulty of mentally affixing any determinate, evidentiary value to a declaration not so tested, has led judicial administration, as is most clearly seen in connection with the "exceptions" to the hearsay rule, to require that a clear and unmistakable relevancy, objective and subjective, should be established if such a declaration is to be received in evidence. This seems a sound principle of administration in the absence of such a demonstration of overwhelming forensic necessity on the part of the proponent as would warrant incurring some hazard by way of misleading the jury. It has resulted that even where the proof of the *res gestae*, properly so-called, is circumstantial rather than direct, the degree of probative relevancy sufficient to admit other facts does not suffice for the reception of an unsworn statement. In case of other facts, no individual sufficiency is required. Circumstances almost deliberative in their lack of probative relevancy may be received, in the hope of "building up a case" which, by the mutual correlation of the parts, may carry mental conviction. To the extrajudicial statement, however, a higher standard of relevancy is customarily applied. The mere fact, for example, that the oral utterance is a natural one, or that a written entry was one which, if other facts were true, would probably have existed exactly as it was found do not suffice to admit these statements. As is elsewhere intimated,¹ it is an administrative peculiarity of the probative relevancy of the hearsay statement that the subjective relevancy, the state of the declarant's mind is of far greater consequence than the objective relevancy of the statement which he makes. As to the latter, there can, as a rule, be no question. Should one arise it can be readily determined. Subjective relevancy deals with the unseen. It presents a problem in psychology in each individual case and receives the earnest consideration both of procedure in formulating general rules for admissibility and of administration in enforcing them.

§ 2726. (Relevancy of Hearsay); Probative Force of Statements.—It may be observed, before proceeding to consider in any detail the objective and subjective relevancy of extrajudicial statements employed as hearsay, that the existence of these forms of relevancy are also the conditions upon which rests the probative

force of all evidence, so far as given by witnesses. The proving power of all statements, given *in judicio* is due to the same co-existence of objective and subjective relevancy. The relevancy of the assertions by witnesses or the declarations of documents, is probative in its nature.¹ That any assertive statement, whether hearsay or made under oath, should be received as logically tending to prove that the fact is as it is declared to be, these two conditions of objective and subjective relevancy must be fulfilled. Either, without the other, is insufficient. Both are necessary. Should the witness be shown to have the most adequate knowledge on the subject as to which he speaks and be entirely free from any controlling motive to misrepresent the truth as to it yet if the declaration actually tendered has no logical connection in the nature of things, mediate or immediate, to the existence of some fact in the *res gestae*, it cannot be received. Should objective relevancy be present and subjective relevancy be absent, should it appear, for example, that the statement of the witness would, if believed, clearly tend to establish the existence of a true *res gestae* fact but it should at the same time appear that the witness knows nothing regarding the matter of his own knowledge or is so far under the influence of a motive to misstate the truth as to render it irrational to believe him, his assertion will be unhesitatingly rejected.

§ 2727. (Relevancy of Hearsay); Objective Relevancy.—Applying more specifically to hearsay declarations, the familiar general propositions that seem to be essential to the probative force of all statements which are to be judicially used, the rule may

§ 2726-1. Direct perception.—It may fairly be considered that the use of the direct perception of the court for the ascertainment of facts in the case is not, properly speaking, the obtaining of evidence or the employment of a medium of proof. Facts so gained are rather constituent or deliberative in their nature. So far as they tend directly to establish the proposition in issue, they pass under the measuring of the rule of law or logic applied by the judicial or intellectual faculties of the tribunal. The process is deter-

mined by legally or logically synthetic reasoning. On the other hand, so far as the real evidence (§§ 27, 31) so observed, e.g., the appearance and demeanor of a witness while giving his testimony, have only an indirect bearing upon the existence of *res gestae* facts by determining the credibility of the declarants who give it, the relevancy is deliberative. The mental process involved in their use seems more nearly to resemble weighing than that of either measuring or proving.

fairly be deduced that no extrajudicial statement when used as proof of the facts asserted will be admitted unless it would, if believed, logically establish, mediately or immediately, the existence of some fact in the *res gestae*, properly so called. The declaration which, if true, lacks this objective correlation with some ultimate *factum probandum* is to be rejected.¹ This is properly done, not by virtue of any rule peculiar to hearsay but under the general administrative duty of the court to keep from the attention of the jury matters upon which they cannot rationally act. Naturally no proponent would care to offer a statement which has nothing to do with the case. Should he chance to do so, its rejection would be automatic, instinctive and by universal consent. It is to be observed therefore, that although objective relevancy is a necessary condition for the reception in evidence of extrajudicial statements, the requirement is too obvious to be made the subject of controversy and its existence is assumed, *sub silentio*, judicial attention being almost exclusively devoted to the subjective relevancy of the statement tendered by the witness, more

§ 2727-1. *Alabama*.—*Tennessee*, etc. R. Co. v. Danforth, 112 Ala. 80, 20 So. 502 (1895).

California.—*Riley v. Martinelli*, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33 (1893).

Illinois.—*Carter v. Carter*, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669 (1894).

Indiana.—*Allen County v. Bacon*, 96 Ind. 31 (1884).

Iowa.—*Bennett v. Marion*, 119 Iowa 473, 93 N. W. 558 (1903).

Maine.—*Rice v. Perry*, 61 Me. 145 (1870).

Maryland.—*Oelrichs v. Artz*, 21 Md. 524 (1863).

Massachusetts.—*Linnehan v. Matthews*, 149 Mass. 29, 20 N. E. 453 (1889).

Minnesota.—*St. Paul Nat. German-American Bank v. Lawrence*, 77 Minn. 282, 79 N. W. 1016, 80 N. W. 363 (1899).

Mississippi.—*Goodall v. Stewart*, 65 Miss. 157, 3 So. 257 (1887).

Missouri.—*Mulford v. Caesar*, 53 Mo. App. 263 (1893).

Nebraska.—*Farmers L. & T. Co. v. Montgomery*, 30 Nebr. 33, 46 N. W. 214 (1890).

New Jersey.—*Peterson v. Christianson*, 68 N. J. L. 392, 56 Atl. 288 (1902).

New York.—*Millbank v. Dennistown*, 10 Bosw. 382 (1863).

Pennsylvania.—*D'Homergue v. Morgan*, 3 Whart. 26 (1838).

South Carolina.—*Cathcart v. Gibson*, 2 Speers 661 (1844).

Texas.—*Olive v. Hester*, 63 Tex. 190 (1885).

Vermont.—*Gates v. Moore*, 51 Vt. 222 (1878).

Wisconsin.—*Saveland v. Green*, 40 Wis. 431 (1876).

United States.—*Sutherland v. Round*, 57 Fed. 467, 6 C. C. A. 428 (1893).

The right to object to reception of evidence objectively irrelevant may be considered waived in advance by a party introducing the topic in question himself. *Van Ingen v. Mail*, etc., Pub. Co., 14 Misc. (N. Y.) 326, 35 N. Y. Suppl. 838 (1895).

especially that relating to the presence or absence of a motive to misrepresent.

§ 2728. (*Relevancy of Hearsay; Objective Relevancy*); Disconnected Statements.—Perhaps the most frequent instance in which the court's attention is directed to the consideration of extrajudicial statements not objectively relevant is where a necessary connecting link, essential to such relevancy is missing. Here, again, nothing peculiarly characteristic of the rule excluding extrajudicial statements as proof of the facts asserted is being presented. Under the general rule which requires all evidence to be relevant,¹ the existence of all facts necessary to make a given statement evidentiary for a given purpose must be satisfactorily established. Should an essential link be absent, the rejection of the declaration which follows² is due to this necessary general rule, requiring relevancy rather than to any quality characteristic of a hearsay statement.

§ 2729. (*Relevancy of Hearsay; Objective Relevancy; Disconnected Statements*); Agency must be shown.—In pursuance of the line of thought to which reference has already been made by which judicial administrators are accustomed to state the second and impregnable reason to the exclusion of one preliminary but more controversial in its nature, the statements of alleged agents when offered against a principal are rejected as hearsay when the true ground of exclusion apparently is that, until the authority of the agent to bind his principal is shown,¹ his declara-

§ 2728-1. § 1711.

2. Alabama.—Alabama Great Southern R. Co. v. Vail, 155 Ala. 382, 46 So. 587 (1908); Rivers v. State, 97 Ala. 72, 12 So. 434 (1893).

California.—Conlin v. Osborn, 120 Pac. 755 (1912).

Florida.—Lee v. Walker, 25 Fla. 14, 96 So. 57 (1889).

Kentucky.—Wright v. Haddock, 7 Dana 253 (1838).

Massachusetts.—Prescott v. Ward, 10 Allen, 203 (1865).

Michigan.—White v. Ross, 47 Mich. 172, 10 N. W. 188 (1881).

Mississippi.—Hairston v. State, 10 So. 479 (1891).

New York.—Hard v. Ashley, 68 Hun 634, 18 N. Y. Suppl. 413, 44 N. Y. St. Rep. 792, *affirmed* 136 N. Y. 645, 32 N. E. 1015 (1892).

Texas.—Johnson v. State (Cr. App. 1900), 55 S. W. 576.

Canada.—Phelps v. Wilson, 13 U. C. C. P. 38 (1863).

§ 2729-1. Unless at least *prima facie* evidence of a person's authority as agent appears, declarations by him are not receivable to establish the fact of agency. Union Const. Co. v. Western Union Tel. Co. (Cal. 1912), 125 Pac. 242.

tions are irrelevant² and are not admissible³ to establish the fact

2. Florida.—Mizell v. Travelers' Ins. Co., 44 Fla. 799, 33 So. 454 (1902).

Massachusetts.—Linnehan v. Matthews, 149 Mass. 29, 20 N. E. 453 (1889).

Minnesota.—Enneking v. Woebkenberg, 88 Minn. 259, 92 N. W. 932 (1903).

Nebraska.—Bedford v. State, 36 Nebr. 702, 55 N. W. 263 (1893).

New York.—Mautner v. Brody, 120 N. Y. Suppl. 734 (1910); Adams v. Elwood, 176 N. Y. 106, 68 N. E. 126 (1903); Platt v. Hollands, 85 N. Y. App. Div. 231, 83 N. Y. Suppl. 556 (1903); Shidlovsky v. Gorman, 51 N. Y. App. Div. 253, 64 N. Y. Suppl. 993 (1900).

North Carolina.—Perkins v. Brinkley, 133 N. C. 86, 45 S. E. 465 (1903); Kelly v. Durham Traction Co., 132 N. C. 368, 43 S. E. 923 (1903).

3. Alabama.—Eubanks v. Anniston Mercantile Co., 171 Ala. 488, 55 So. 98 (1911); Cohn & Goldberg Lumber Co. v. Robbins, 159 Ala. 289, 48 So. 853 (1909); Crone & Co. v. I. Long & Son, 159 Ala. 487, 49 So. 227 (1909); Union Naval Stores Co. v. Pugh, 156 Ala. 369, 47 So. 48 (1908); Gambill v. Fuqua, 148 Ala. 448, 42 So. 735 (1906).

Arkansas.—Bell v. State, 93 Ark. 600, 125 S. W. 1020 (1910); Latham v. First Nat. Bank, 92 Ark. 315, 67 S. E. 92 (1909).

California.—Brown v. Spencer, 126 Pac. 493 (1912); Kast v. Miller & Lux, 159 Cal. 723, 115 Pac. 932 (1911).

Colorado.—Western Imp. & L. Co. v. First Nat. Bank (App. 1912), 128 Pac. 476.

Connecticut.—Coe v. Kutinsky, Adler & Co., 82 Conn. 685, 74 Atl. 1065 (1910).

Florida.—Florida East Coast Ry. Co. v. Lassiter, 58 Fla. 234, 50 So. 428 (1909); Griffin v. Societe Ano-

nyme la Floridienne J. Buttgenbach & Co., 53 Fla. 801, 44 So. 342 (1907); Martin v. Johnson, 54 Fla. 487, 44 So. 949 (1907).

Georgia.—Michigan Mut. L. I. Co. v. Parker, 10 Ga. App. 697, 73 S. E. 1096 (1912); Carter v. Pembroke Nat. Bank (App. 1912), 75 S. E. 824; Georgia Steel Co. v. White, 136 Ga. 492, 71 S. E. 890 (1911); Becker v. Donalson, 133 Ga. 864, 67 S. E. 92 (1910); Franklin County Lumber Co. v. Grady County, 133 Ga. 557, 66 S. E. 264 (1909); Ham v. Brown, 2 Ga. App. 71, 58 S. E. 316 (1907).

Illinois.—Elevator Safety Device Co. v. Brown-Ketcham Iron Works, 153 Ill. App. 313 (1910); Sonnen-sebein v. Max Walter Co., 144 Ill. App. 438 (1908).

Iowa.—Fritz v. Chicago Grain & E. Co., 136 Iowa, 699, 114 N. W. 193 (1907).

Kentucky.—Baltimore & O. S. W. R. Co. v. Clift, 142 Ky. 573, 134 S. W. 917 (1911); Gragg v. Home Ins. Co., 107 S. W. 321, 32 Ky. L. Rep. 988 (1908); Hensley v. McDonald, 108 S. W. 362, 32 Ky. L. Rep. 1333 (1908); Edmiston v. Hurley, 99 S. W. 259, 30 Ky. L. Rep. 557 (1907).

Maryland.—Wilson v. Kelso, 115 Md. 162, 80 Atl. 895 (1911).

Massachusetts.—Beaucage v. Mercer, 206 Mass. 492, 92 N. E. 774, 138 Am. St. Rep. 401 (1910); Westheimer v. State Loan Co., 195 Mass. 510, 81 N. E. 289 (1907).

Michigan.—Logan v. Agricultural Society, 156 Mich. 537, 121 N. W. 485, 16 Detroit Leg. N. 192 (1909); Superior Drill Co. v. Carpenter, 150 Mich. 262, 114 N. W. 67, 14 Det. Leg. N. 693 (1907).

Minnesota.—Supreme Tent K. of M. v. Port Huron Sav. Bank, 84 Minn. 211, 87 N. W. 602, 87 Am. St. Rep. 351 (1901).

Mississippi.—Sumrall v. Kitselman Bros., 58 So. 594 (1912).

Missouri.—Mitchell v. Samford,

of agency. This connection between agent and principal neces-

149 Mo. App. 72, 130 S. W. 99 (1910); Groneweg & Schoentgen Co. v. Estes, 144 Mo. App. 418, 128 S. W. 786 (1910); Smith v. Pullman Co., 138 Mo. App. 238, 119 S. W. 1072 (1909); Handlan v. Miller (App. 1909) 122 S. W. 751; Jolly v. Hueb-ler, 132 Mo. App. 675, 112 S. W. 1013 (1908).

Nebraska.—Warner v. Sohn, 86 Neb. 519, 125 N. W. 1072 (1910), *affirming on rehearing*, 85 Neb. 571, 123 N. W. 1054 (1910).

New Hampshire.—Clough v. Rock-ingham County L. & P. Co., 75 N. H. 84, 71 Atl. 223 (1908).

New Jersey.—Schweitzer v. St. Leo's Catholic Church (N. J. L. 1910), 78 Atl. 410; Yoshimi v. United States Exp. Co., 78 N. J. L. 281, 73 Atl. 45 (1909); Nicholas v. Oram, 77 N. J. L. 220, 71 Atl. 54 (1908); Standard Oil Co. v. Linol Co., 75 N. J. L. 294, 68 Atl. 174 (1907); Ryle v. Manchester Building & Loan Ass'n, 74 N. J. L. 840, 67 Atl. 87 (1907).

New York.—Willis Cab & A. Co. v. General Accident, F. & L. A. Corp., 136 N. Y. Suppl. 100 (1912); Mitchell v. Gennis, 124 N. Y. Suppl. 996 (1910); Mullen v. J. J. Quinlan & Co., 195 N. Y. 109, 87 N. E. 1078, 24 L. R. A. (N. S.) 511 n. (1909); *affirming* 108 N. Y. Suppl. 1141, 124 App. Div. 916; Joseph v. Platt, 114 N. Y. Suppl. 1065, 130 App. Div. 478 (1909); Weltman v. Kotlar, 108 N. Y. Suppl. 952, 124 App. Div. 494 (1908).

North Carolina.—Sutton v. Lyons, 156 N. C. 3, 72 S. E. 4 (1911); McCormick v. Williams, 152 N. C. 638, 68 S. E. 138 (1910).

Oregon.—Spande v. Western Life Indemnity Co., 117 Pac. 973 (1911); Harding v. Oregon-Idaho Co., 57 Oreg. 34, 110 Pac. 412 (1910).

Pennsylvania.—Fee v. Adams Exp.

Co., 38 Pa. Super. Ct. 83 (1909); Bellman v. Pittsburg & A. V. Ry. Co., 31 Pa. Super. Ct. 389 (1906).

South Carolina.—Smith v. South-ern Ry. Co., 89 S. C. 415, 71 S. E. 988 (1911); Seneca Co. v. Crenshaw, 89 S. C. 470, 71 S. E. 1081 (1911); Woodward v. Cave, 79 S. C. 578, 61 S. E. 82 (1908).

South Dakota.—J. I. Case Thresh-ing Mach. Co. v. Gidley, 28 S. D. 101, 132 N. W. 711 (1911).

Texas.—Cannel Coal Co. v. Luna (Civ. App. 1912), 144 S. W. 721; Gintar v. McGee (Civ. App. 1911), 139 S. W. 622; Madeley v. Kellam (Civ. App. 1911), 135 S. W. 659; Young v. Robinson (Civ. App. 1911), 135 S. W. 715; Sullivan v. Fant, 51 Tex. Civ. App. 6, 110 S. W. 507 (1908); Gulf, C. & S. F. Ry. Co. v. Cunningham, 51 Tex. Civ. App. 368, 113 S. W. 767 (1908).

Vermont.—Prouty v. Nichols, 82 Vt. 181, 72 Atl. 988, 137 Am. St. Rep. 996 (1909).

Washington.—Singer v. Guy Inv. Co., 60 Wash. 674, 111 Pac. 886 (1910); Merrill v. O'Bryan, 48 Wash. 415, 93 Pac. 917 (1908); Larson v. Centennial Mill Co., 40 Wash. 224, 82 Pac. 294, 111 Am. St. Rep. 904 (1905).

Wisconsin.—Somers v. Germania Nat. Bank, 138 N. W. 713 (1912).

Wyoming.—Henderson v. Coleman, 19 Wyo. 183, 115 Pac. 439, 1136 (1911).

United States.—Chicago, R. I. & P. Ry. Co. v. Chickasha Nat. Bank, 174 Fed. 923, 98 C. C. A. 535 (1909).

Canada.—Le Blanc v. Laporte, Martin & Co., 40 N. B. R. 468 (1911).
See also §§ 1339 *et seq.* herein.

"Agency is not provable by the mere declarations of the agent, not made under oath or in the presence of the principal, unless communicated to and acquiesced in by the princi-

sary to the relevancy of the unsworn statement of the former when offered to affect the latter is not shown ⁴ merely by proving a close

pal." *Union Const. Co. v. Western Union Tel. Co.* (Cal. 1912), 125 Pac. 242, 244, per Shaw, J.

"It is settled that agency cannot be established by the proof of the declarations of the alleged agent, even if made in connection with the doing of the acts in question." *In re Thomas* (U. S. D. C.), 199 Fed. 214, 224 (1912), per Ray, J.

The declaration of an agent is, however, a circumstance which in connection with other facts may go to prove the fact of agency.

Alabama.—*Miller-Brent Lumber Co. v. Stewart*, 166 Ala. 657, 51 So. 943 (1910); *Childress v. Smith-Echols-Barrett H. Co.*, 162 Ala. 371, 50 So. 322 (1909).

Georgia.—*White S. M. Co. v. Horkan*, 7 Ga. App. 283, 66 S. E. 811 (1910).

Kansas.—*Olson v. Houston Nat. Bank*, 78 Kan. 592, 96 Pac. 853 (1908).

Missouri.—*H. A. Johnson & Co. v. Springfield I. & R. Co.*, 143 Mo. App. 441, 127 S. W. 692 (1910).

New Hampshire.—*Clough v. Rockingham County L. & P. Co.*, 75 N. H. 84, 71 Atl. 223 (1908).

Texas.—*Missouri Valley B. & I. Co. v. Ballard*, 53 Tex. Civ. App. 110, 116 S. W. 93 (1909); *Gulf, C. & S. F. R. Co. v. Cunningham*, 51 Tex. Civ. App. 368, 113 S. W. 767 (1908); *Sullivan v. Fant*, 51 Tex. Civ. App. 6, 110 S. W. 507 (1908).

Though there may have been error in the admission of the declarations of an agent in the first instance because of the lack of other proof of agency, if such relation is subsequently established the error is cured. *Henderson v. Coleman*, 19 Wyo. 183, 115 Pac. 439, 1136 (1911).

Use of letter heads belonging to another for the purpose of addressing a communication to a third per-

son will not of itself authorize a finding of agency on the part of the writer. *Deane v. American Glue Co.*, 200 Mass. 459, 86 N. E. 890 (1909). A person's letter head, however, is admissible to show that he held out another as his agent. *Sober v. Moony*, 48 Pa. Super. Ct. 92 (1911).

4. *Florida*.—*Mizell v. Travelers' Ins. Co.*, 44 Fla. 799, 33 So. 454 (1902).

Georgia.—*Brooks v. State*, 96 Ga. 353, 23 S. E. 413 (1895).

Illinois.—*La Salle Pressed Brick Co. v. Coe*, 53 Ill. App. 506 (1893); *Hyde v. Howes*, 2 Ill. App. 140 (1878); *U. S. Express Co. v. Hutchins*, 67 Ill. 348 (1873); *Reed v. Noxon*, 48 Ill. 323 (1868).

Iowa.—*Shillito v. Sampson*, 61 Iowa 40, 15 N. W. 572 (1883).

Louisiana.—*Waples v. Layton*, 24 La. Ann. 624 (1872).

Michigan.—*People v. Lyons*, 49 Mich. 78, 13 N. W. 365 (1882).

Minnesota.—*Minster v. Holbert*, 32 Minn. 533, 21 N. W. 718 (1884).

New York.—*Strong v. Union Transfer, etc., Co.*, 11 Misc. 430, 32 N. Y. Suppl. 124, 65 N. Y. St. Rep. 219 (1895); *Garnsey v. Rhodes*, 138 N. Y. 461, 34 N. E. 199 (1893); *O'Neil v. Hudson Valley Ice Co.*, 74 Hun 163, 26 N. Y. Suppl. 598, 56 N. Y. St. Rep. 289 (1893); *Howe Mach. Co. v. Farrington*, 82 N. Y. 121 (1880), *affirming* 16 Hun 591 (1879). See also *Courtney v. New York El. R. Co.*, 10 Misc. 115, 30 N. Y. Suppl. 932 (1894).

Oregon.—*Du Bois v. Perkins*, 21 Oreg. 189, 27 Pac. 1044 (1891).

South Carolina.—*Hutzler v. Phillips*, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687 (1888).

Texas.—*Chicago, etc., R. Co. v. Yarbrough* (Civ. App. 1896), 35 S. W. 422; *Blum v. Gaines*, 57 Tex. 135 (1882).

relationship by blood⁵ or marriage⁶ between the two, still less by the establishment of one growing out of employment⁷ or social intercourse.

United States.—Beale v. Pettit, 2 Fed. Cas. No. 1,158, 1 Wash. C. C. 241 (1805).

England.—Papendick v. Bridgwater, 5 E. & B. 166, 1 Jur. (N. S.) 657, 24 L. J. Q. B. 289, 3 Wkly. Rep. 490, 85 E. C. L. 166 (1855); Scholes v. Chadwick, 2 M. & Rob. 507 (1843).

Person referred to.—The agency of a person to whom reference is made must be affirmatively shown if it is proposed that his answer shall be used to affect the party referring another to the speaker for information on a given subject. *People v. Clauson*, 2 Utah, 502 (1880). A statement made prior to the reference would be inadmissible. *Cohn v. Goldman*, 76 N. Y. 284 (1879).

5. *Alabama*.—Benziger v. Miller, 50 Ala. 206 (1873) (father).

Georgia.—Robinson v. Stevens, 93 Ga. 535, 21 S. E. 96 (1893) (father).

Illinois.—Treat v. Merchants' L. Assoc., 198 Ill. 431, 64 N. E. 992 (1902) (daughter).

Kentucky.—Utterback v. Com., 59 S. W. 515, 60 S. W. 15, 22 Ky. L. Rep. 1011 (1900) (son).

Maine.—Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443 (1868) (mother).

Massachusetts.—O'Kelly v. O'Kelly, 8 Metc. 436 (1844) (grandchild).

Michigan.—McCormick Harvesting Mach. Co. v. Cochran, 64 Mich. 636, 31 N. W. 561 (1887) (son).

Missouri.—Wright v. Richmond, 21 Mo. App. 76 (1886) (son).

Pennsylvania.—Evans v. McKee, 152 Pa. St. 89, 25 Atl. 148 (1892) (father); Thomas v. Maddan, 50 Pa. St. 261 (1865) (father); McCormick v. Robb, 24 Pa. St. 44 (1854) (son).

South Carolina.—Dobson v. Cothran, 34 S. C. 518, 13 S. E. 679 (1890) (daughter).

Texas.—Lankster v. State, 42 Tex. Cr. 360, 59 S. W. 888 (1900) (son); Montgomery v. State, 23 Tex. App. 650, 5 S. W. 165 (1887) (father).

Virginia.—French v. Chapman, 88 Va. 317, 13 S. E. 479 (1891) (mother).

Statement in presence.—The extrajudicial statement is not necessarily admissible in evidence because made in the presence of the party himself. *Benziger v. Miller*, 50 Ala. 206 (1873); *McConnell v. Caldwell*, 73 N. C. 338 (1875). A witness speaking a foreign language is not to be affected by the statements made by his interpreter unless it is affirmatively shown that he understood what the latter was reporting as being his testimony. *Territory v. Big Knot on Head*, 6 Mont. 242, 11 Pac. 670 (1886).

6. *Iowa*.—Canaday v. Johnson, 40 Iowa 587 (1875) (wife).

Michigan.—Coldwater Nat. Bank v. Buggie, 117 Mich. 416, 75 N. W. 1057 (1898) (husband); Eddy v. McCall, 71 Mich. 497, 39 N. W. 734 (1888) (wife).

Mississippi.—Rothschild v. Hatch, 54 Miss. 554 (1877) (husband).

Missouri.—Davis v. Green, 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90 (1890) (husband).

New York.—McKay v. Lasher, 121 N. Y. 477, 24 N. E. 711 (1890) (wife); Ladue v. Warner, 3 Hun 547 (1875) (husband).

Vermont.—Davis v. Davis, 49 Vt. 464 (1887) (wife).

7. *Connecticut*.—Leonard v. Malory, 75 Conn. 433, 53 Atl. 778 (1903).

Florida.—Pensacola, etc., R. Co. v. Atkinson, 20 Fla. 450 (1884).

Georgia.—Lockett v. Pittman, 72 Ga. 815 (1884); East Tennessee, etc.,

§ 2730. (*Relevancy of Hearsay; Objective Relevancy; Disconnected Statements*); Privity must be shown.—Privity, in this connection, stands in the same administrative position as agency. An extrajudicial statement made by one said to be in privity with the person for or against whom the declaration is offered is simply irrelevant until the existence of privity is satisfactorily established.¹

§ 2731. (*Relevancy of Hearsay*); Subjective Relevancy.—If the objective relevancy of a hearsay statement is tacitly assumed as a matter of course, the question of subjective relevancy stands in quite a different position. The inquiry no longer is as to whether the declaration, if believed, would establish the *res gestae* fact, properly so called. The question is, Shall the statement be believed, credited as proving the fact, the existence of which it asserts. An administrative step of considerable importance is here taken, that from the seen to the unseen. Objective relevancy is

R. Co. v. Duggan, 51 Ga. 212 (1874).

Indiana.—Louisville, etc., R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197 (1887).

Maryland.—Baltimore, etc., R. Co. v. State, 62 Md. 479, 50 Am. Rep. 233 (1884).

Massachusetts.—McKinnon v. Norcross, 148 Mass. 533, 20 N. E. 183, 3 L. R. A. 320 (1889).

Montana.—Territory v. Big Knot on Head, 6 Mont. 242, 11 Pac. 670 (1886) (interpreter).

New York.—Lahey v. Ottmann, 73 Hun (N. Y.) 61, 25 N. Y. Suppl. 897 (1893) (servant).

Texas.—Houston, etc., R. Co. v. Hicks, 2 Posey Unrep. Cas. 437 (1883).

But see Wise v. Newatney, 26 Neb. 88, 42 N. W. 339 (1889), citing Fabrigas v. Mostyn, 20 How. St. Tr. 82, 122, 123 (1774); Blazinski v. Perkins, 77 Wis. 9, 45 N. W. 947 (1890).

§ 2730-1. Colorado.—Webber v. Emerson, 3 Colo. 248 (1877).

Connecticut.—Chapin v. Pease, 10 Conn. 69, 25 Am. Dec. 56 (1834).

Georgia.—Foster v. Thrasher, 45 Ga. 517 (1872); Gill v. Strozier, 32 Ga. 688 (1861); Dollner, Potter & Co. v. Williams, 29 Ga. 743 (1860); Bailey v. Wood, 24 Ga. 164 (1855).

Illinois.—Reed v. Noxon, 48 Ill. 323 (1868).

Kentucky.—Short v. Tinsley, 1 Mete. 397, 71 Am. Dec. 482 (1858).

Maine.—Hatch v. Bates, 54 Me. 136 (1866).

Minnesota.—Little v. Cook, 55 Minn. 265, 56 N. W. 750 (1893). See also Enneking v. Woebkenberg, 88 Minn. 259, 92 N. W. 932 (1903).

New York.—Hoguet v. Berkman, 53 Hun 636, 6 N. Y. Suppl. 214, 25 N. Y. St. Rep. 562 (1889).

North Carolina.—Yount v. Morrison, 109 N. C. 520, 13 S. E. 892 (1891).

Pennsylvania.—Evans v. McKee, 152 Pa. St. 89, 25 Atl. 148 (1892).

Texas.—Warren v. Frederichs, 76 Tex. 647, 13 S. W. 643 (1890).

Vermont.—Paris v. Hilliard, 63 Vt. 316, 21 Atl. 528 (1891).

Virginia.—Vaughan v. Winckler, 4 Munf. 136 (1813).

patent, a physical relation, a problem in logic. Subjective relevancy is a matter of mind, of emotion, of morals. It raises a question in psychology occasionally so perplexing that the absence of an opportunity of cross-examination is most keenly felt and the formulation of general rules as to what conditions rationally warrant admissibility of these untested statements is confessedly a matter of much nicety.

In connection with the two conditions of subjective relevancy, Adequate Knowledge and Absence of Controlling Motive to Misrepresent, this difficulty is almost entirely confined, in case of hearsay, as of other statements, to the latter. Adequate Knowledge, like objective Relevancy, raises in practice but little difficulty in its determination. It can be finally settled, once for all, almost on inspection.

But in the case of Absence of Controlling Motive to Misrepresent, the situation is quite different.¹

§ 2732. (*Relevancy of Hearsay; Subjective Relevancy*); Adequate Knowledge.—A qualification required in case of every witness is that he should be shown¹ or can reasonably be assumed to possess a knowledge commensurate with, sufficient to give evidentiary value to, the evidence which he proposes to offer. Should the matter be one covered by direct observation, it must appear that the declarant has enjoyed suitable facilities and opportunities for sense-perceptions, and that he has utilized them.

§ 2731-1. Sworn and unsworn statements.—A distinction is to be observed in connection with the qualification of lack of motive to misrepresent as to whether the statement under consideration is judicial or extrajudicial. In case of a *witness*, the motive to misrepresent is deemed a consideration affecting weight rather than as a condition upon admissibility. For the reception of judicial statements it is, therefore, sufficient that the testimony be objectively relevant and that the declarant be shown to have had adequate knowledge. In case of hearsay utterances, unsworn statements used in their assertive capacity, the jury are to be permitted to

consider the evidence, when permitted at all, only when it appears that the declarant had no motive which may have caused him to misrepresent the truth. It being difficult, in the absence of an effective cross-examination, to determine the actual influence of any perverting motive which might be shown to have been possible, it was deemed safer to exclude the statement altogether.

§ 2732-1. Circumstantial evidence.—Proof of actual knowledge may be made by circumstances. *McDonald v. McCaskill*, 53 N. C. 158 (1860); *Coats v. Speer*, 3 McCord, (S. C.) 227, 15 Am. Dec. 627 (1825); *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354, 45 Atl. 896 (1899).

Where the fact to be stated is one simply of knowledge, it must affirmatively appear or be justifiably assumed that the witness so far knows it as to make his knowledge helpful to the jury. Should it appear that the proposed testimony is not based upon adequate personal knowledge, gleaned from observation or otherwise, it is subjectively irrelevant and should be rejected.² The fact may be as stated but cannot be credited. The requirement is by no means restricted to the judicial use of unsworn statements. But it is naturally insisted on in such a connection so far as can reasonably be done.³

§ 2733. (*Relevancy of Hearsay; Subjective Relevancy*); Absence of controlling Motive to misrepresent.—The credibility and consequent admissibility of an unsworn statement is thus seen to rest upon its subjective relevancy and this, in main, upon the existence of the motive to misrepresent. The question is a crucial one and of some nicety and difficulty when viewed from the standpoint of Procedure.

To exhibit to the jury by the aid of cross-examination facts out of which may be thought to arise motives tending to pervert, consciously or unconsciously, the desire to truthfully narrate facts known to the declarant is a comparatively easy matter. The provisions of Procedure have been greatly taxed in an attempt to formulate general rules as to what may or may not have been omitted which may, to a certain extent supply the place of judicial testing.

Secondary Evidence.—In considering the use of hearsay statements at the present day under enlightened judicial administration by the use of reason it would be natural, in case of a hearsay statement to adopt the rule that in order for the declaration to be subjectively relevant it must appear that the declarant was not so far under the influence of bias,¹ self-interest² or other controlling

2. *Stockton v. Williams*, Walk. Ch. (Mich.) 120 (1843); *Howley v. Whipple*, 48 N. H. 487 (1869); *Doyle v. Trinity Church Corp.*, 118 N. Y. 678, 23 N. E. 928, 2 Silvernail 468 (1890); *Sugden v. St. Leonards*, I. P. D. 154, 240, 45 L. J. P. & Adm. 49, 34 L. T. Rep. (N. S.) 372, 24 Wkly. Rep. 860 (1876).

3. *Scotch law.*—The same requirement is made by the law of Scotland. *Lovat Peerage Case*, 10 App. Cas. 763 (1885).

§ 2733-1. *Lavender v. Hall*, 60 Ala. 214 (1877).

2. § 2734.

motive to misrepresent as to render it irrational that the jury should credit his story.

In dealing, however, with the "exceptions"³ to the hearsay rule, where the assertive unsworn statement is treated as secondary evidence, it is important to bear in mind that we are dealing, as it were, with the stone age of judicial evolution. The temper of the times during which the hearsay rule and its exceptions were formulated is procedural rather than administrative. Pre-appointed equivalences, the ability to state one fact in the terms of another take the place to which the judgment deduced by reason from legal principles might more properly lay claim.⁴ Thus, in relation to subjective relevancy, Adequate Knowledge in case of a declaration regarding Pedigree⁵ must be shown by membership in the family. Absence of controlling motive to misrepresent is established by the fact that the assertion was made before the warmth of partisanship or the beguiling of self-interest had been aroused by a *Lis Mota*. In other words, to secure admissibility on account of subjective relevancy the hearsay statement must have been made *ante litem motam*.⁶

Primary Evidence.—In contrast with such procedural and semi-mechanical equivalences characteristic of the use of hearsay as secondary evidence are the cases in which modern judicial administration has established the use of the assertive unsworn statement as primary evidence. The crux in all instances of the reception of hearsay statements is as to the presence of some sufficient guaranty that the declarant had no controlling motive to misrepresent. In course of legal evolution the existence of one

3. §§ 2762 *et seq.*

4. The administrative advantage of placing the determination of admissibility upon the existence of an objective fact which could be final in the premises was not to be lightly regarded. As an expedient for enhancing the power of the court as compared with that of the jury a certain amount of merit might well be claimed for the arrangement. An incidental saving of time, at present reached by the judicious use of administrative assumptions, § 1184, in shifting the burden of evidence, §§ 544, 546, may well have been ef-

fected. The enactment, however, of the modern legislation abolishing procedural exclusion of parties or others interested in the result as witnesses and leaving the credibility of such testimony to be determined by the jury, seems inconsistent, in point of principle, with the continued enforcement of such procedural equivalences as that which brands a statement made *post litem motam* as inadmissible because made by one who has a motive to misrepresent.

5. § 2915.

6. *Abel v. Fitch*, 20 Conn. 90 (1849).

of two forces was found to furnish a sufficient guaranty to this effect. These are (1) the Force of Spontaneity and in certain cases (2) the Force of Habit. In either case, experience showed that the reflective faculties, the motives of self-seeking and self-interest were temporarily numbed into inactivity by the power of more pressing consideration. The admissibility of such hearsay statements is considered elsewhere as taking place under the Relevancy of Spontaneity⁷ and under the Relevancy of Regularity.⁸ So strong is the probative force of assertive judicial declarations so affected that it has happened to modern judicial administration that the evidence is not secondary, as originally regarded by procedure but is, under modern conditions, primary, there being no species of proof of a superior grade in connection with matters to which they relate.

§ 2734. (Relevancy of Hearsay; Subjective Relevancy; Absence of controlling Motive to Misrepresent); Self-Interest.—

A party's declarations in his own favor are, as a rule, incompetent. The extrajudicial statement of one to be benefitted by the truth of that which he asserts cannot be received in proof of the facts alleged, either for the declarant's benefit or for that of his successors in interest.¹ In most cases, such a statement is plainly irrelevant for the purpose. Self-interest is deemed, in this connection, a controlling motive to misrepresent which will render the declarations inadmissible and authorize their rejection.²

7. §§ 2982 *et seq.*

8. §§ 3051 *et seq.*

§ 2734-1. *Wilson v. Terry*, 71 N. J. Eq. 785, 65 Atl. 983, *affirming* (Ch. 1905) 62 Atl. 310 (1907); *Sutton v. Whetstone*, 21 S. D. 341, 112 N. W. 850 (1907).

2. *Alabama*.—*Marsh v. Fricke*, 1 Ala. App. 649, 56 So. 110 (1911); *Hannon v. Espalla*, 148 Ala. 313, 42 So. 443 (1906).

Arkansas.—*Strickland v. Strickland*, 146 S. W. 501 (1912); *Walddroop v. Ruddell*, 96 Ark. 171, 131 S. W. 670 (1910) (owned land); *Hamburg Bank v. George & Butler*, 92 Ark. 472, 23 S. W. 654 (1909).

California.—*Guthrie v. Carney*

(App. 1912), 124 Pac. 1045; *Yordi v. Yordi*, 6 Cal. App. 20, 91 Pac. 348 (1907).

Colorado.—*Idaho Gold Coin Min. & Mill Co. v. Colorado Iron Works Co.*, 49 Colo. 66, 111 Pac. 553 (1910); *Denver & Colorado Inv. Co. v. Rudolph*, 47 Colo. 380, 107 Pac. 816 (1910).

Connecticut.—*Woodbridge Ice Co. v. Semon Ice Cream Corp.*, 81 Conn. 479, 71 Atl. 577 (1909); *Nichols v. Nichols*, 79 Conn. 644, 66 Atl. 161 (1907); *Mechanics Bank v. Woodward*, 73 Conn. 470, 47 Atl. 762 (1901).

District of Columbia.—*Wynkoop v. Shoemaker*, 37 App. D. C. 258

Little probative relevancy is gained from the circumstances

(1912); *Samaha v. Mason*, 27 App. D. C. 470 (1906).

Florida.—*Cohen v. Harris*, 61 Fla. 137, 54 So. 905 (1911).

Georgia.—*Peacock v. State*, 10 Ga. App. 402, 73 S. E. 404 (1912); *Muller Mfg. Co. v. Benton*, 137 Ga. 411, 73 S. E. 669 (1911); *Norton v. Aiken*, 134 Ga. 21, 67 S. E. 425 (1910); *Fullbright v. Neely*, 131 Ga. 342, 62 S. E. 188 (1908); *Hightower v. Ansley*, 126 Ga. 8, 54 S. E. 939 (1906).

Idaho.—*Work v. Kinney*, 8 Idaho, 771, 71 Pac. 477 (1902).

Illinois.—*Lord v. Reed*, 254 Ill. 350, 98 N. E. 553 (1912); *McKechney v. City of Chicago*, 160 Ill. App. 544 (1912); *O'Meara v. Cardiff Coal Co.*, 154 Ill. App. 321 (1910); *Bindley & Co. v. Watson*, 151 Ill. App. 123 (1909); *Oswald v. Nehls*, 233 Ill. 438, 84 N. E. 619 (1908).

Indiana.—*Hitz v. Warner*, 47 Ind. App. 612, 93 N. E. 1005 (1911); *Eppert v. Gardiner*, 48 Ind. App. 188, 93 N. E. 550 (1911); *Baker v. Baker*, 43 Ind. App. 26, 86 N. E. 864 (1909); *Leimgruber v. Leimgruber*, 172 Ind. 370, 86 N. E. 73, 88 N. E. 594 (1908).

Iowa.—*Seevers v. Cleveland Coal Co.*, 138 N. W. 793 (1912); *Cummins v. Pennsylvania Fire Ins. Co.*, 134 N. W. 79 (1912); *Magers v. Magers*, 143 Iowa, 750, 123 N. W. 330 (1909).

Kansas.—*Cooper v. Bower*, 78 Kan. 156, 96 Pac. 59 (1908) (promise of marriage), rehearing denied 96 Pac. 794; *Haines v. Goodlander*, 73 Kan. 183, 84 Pac. 986 (1906).

Kentucky.—*Cryer v. McGuire*, 148 Ky. 100, 146 S. W. 402 (1912); *McGuire v. Lovelace*, 128 S. W. 309 (1910); *Eilerman v. Farmer*, 118 S. W. 289 (1909); *Jackson Baptist Church v. Comb's Ex'r*, 130 Ky. 255, 113 S. W. 119 (1908); *Buffalo Coal Creek M. Co. v. Troendle*, 99 S. W. 622, 30 Ky. L. Rep. 740 (1907).

Louisiana.—*State v. Reeves*, 129 La. 714, 56 So. 648 (1911); *Schlater v. Le Blanc*, 121 La. 919, 46 So. 921 (1908); *Trellieu Cypress Lumber Co. v. Hansen Lumber Co.*, 121 La. 700, 46 So. 699 (1908).

Maine.—*Lazarovich v. Tatilbum*, 103 Me. 285, 69 Atl. 275 (1907); *Damren v. Trask*, 102 Me. 39, 65 Atl. 513 (1906); *Scribner v. Adams*, 73 Me. 541 (1882).

Maryland.—*Blackburn v. Beall*, 21 Md. 208 (1863).

Massachusetts.—*Troy v. Rudnick*, 198 Mass. 563, 85 N. E. 177 (1908); *Hutchinson v. Nay*, 183 Mass. 355, 67 N. E. 601 (1903).

Michigan.—*Tyler v. Wright*, 164 Mich. 606, 130 N. W. 205, 18 Det. Leg. N. 54 (1911); *Campbell v. Sech*, 155 Mich. 634, 119 N. W. 922, 15 Det. Leg. N. 1105 (1909); *Coleman v. McGowan's Estate*, 149 Mich. 624, 113 N. W. 17, 14 Det. Leg. N. 529 (1907).

Minnesota.—*Gardner v. Northern Pac. Ry. Co.*, 136 N. W. 1028 (1912); *Paine v. Crane*, 112 Minn. 439, 128 N. W. 574 (1910); *Detherage v. Eet-ruschke*, 106 Minn. 20, 118 N. W. 153 (1908).

Mississippi.—*Whitfield v. Whitfield*, 40 Miss. 352 (1866).

Missouri.—*Hitt v. Hitt*, 150 Mo. App. 631, 131 S. W. 369 (1910); *State v. Jacobs*, 133 Mo. App. 182, 113 S. W. 244 (1908).

Montana.—*Spellman v. Rhode*, 33 Mont. 21, 81 Pac. 395 (1905).

Nebraska.—*McClatchey v. Anderson*, 84 Neb. 783, 122 N. W. 67 (1909); *Bennett's Estate v. Taylor*, 4 Neb. (Unof.) 800, 96 N. W. 669 (1903).

New Hampshire.—*White v. Poole*, 74 N. H. 71, 65 Atl. 255 (1906).

New Jersey.—*Kunz v. Mason*, 73 Atl. 869 (1909); *Wilson v. Terry*, 71 N. J. Eq. 785, 65 Atl. 983 (1907), *affirming* 70 N. J. Eq. 231, 62 Atl. 310 (1905).

under which the self-serving declaration may have been made.

New York.—Abel v. National Reserve Bank, 149 App. Div. 710, 134 N. Y. Suppl. 379 (1912); Goodfield Realty Co. v. Wormser, 125 N. Y. Suppl. 521 (1910); Walleston v. Fahnestock, 116 N. Y. Suppl. 743 (1909); Gherky State Line Telephone Co., 107 N. Y. Suppl. 420, 122 App. Div. 879 (1907); Englander v. Fleck, 101 N. Y. Suppl. 125, 51 Misc. R. 567 (1906).

North Carolina.—Poole v. Anderson, 150 N. C. 624, 64 S. E. 593 (1909); Hockfield v. Southern Ry. Co., 150 N. C. 419, 64 S. E. 181, 134 Am. St. Rep. 945 (1909).

North Dakota.—Johnston v. Spoonheim, 19 N. D. 191, 123 N. W. 830, 41 L. R. A. (N. S.) 1 n. (1909).

Ohio.—McAdams v. McAdams, 80 Ohio St. 232, 88 N. E. 542 (1909).

Oregon.—Wirth v. Richter, 126 Pac. 987 (1912).

Pennsylvania.—Africa v. Trexler, 232 Pa. 493, 81 Atl. 707 (1911); Kann v. Bennett, 223 Pa. 36, 72 Atl. 342 (1909) (schedules of claim); *In re Grove's Estate*, 38 Pa. Super. Ct. 424 (1909); American Car & F. Co. v. Alexandria Water Co., 218 Pa. St. 542, 67 Atl. 861 (1907).

Rhode Island.—Tiffany v. Morgan, 73 Atl. 465 (1909); Stiff v. Havens, 69 Atl. 553 (1908).

South Carolina.—Griffin v. Forrester, 80 S. C. 220, 61 S. E. 89 (1908); Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768 (1906).

South Dakota.—Langford v. Issenhuth, 134 N. W. 889 (1912); Morse v. Stanley County, 26 S. D. 313, 128 N. W. 153 (1910); Lindquist v. Northwestern Port Huron Co., 22 S. D. 298, 117 N. W. 365 (1908); Sutton v. Whetstone, 21 S. D. 341, 112 N. W. 850 (1907).

Texas.—Curtsinger v. McGown (Civ. App. 1912), 149 S. W. 303; Wolf v. Wilhelm (Civ. App. 1912),

146 S. W. 216; Heard v. Clegg (Civ. App. 1912), 144 S. W. 1145; Quigley v. Gulf, C. & S. F. Ry. Co. (Civ. App. 1912), 142 S. W. 633; Johnson v. Hulett, 56 Tex. Civ. App. 11, 120 S. W. 257 (1909); Ross v. Moskowit, 100 Tex. 434, 100 S. W. 768 (1907), *affirming* (Civ. App. 1906), 95 S. W. 86.

Utah.—Carstensen v. Ballantyne, 122 Pac. 82 (1912); Salt Lake City Brewing Co. v. Hawke, 24 Utah 199, 66 Pac. 1058 (1901); White v. Pease, 15 Utah, 170, 49 Pac. 416 (1897).

Vermont.—Comstock's Adm'r v. Jacobs, 84 Atl. 568 (1912); Austin & McCargar v. Langlois, 83 Vt. 104, 74 Atl. 489 (1909); Ellis v. Cleveland, 55 Vt. 58 (1883).

Virginia.—Cutchin v. City of Roanoke, 74 S. E. 403 (1912); Moore Lumber Corporation v. Walker & Williamson, 110 Va. 775, 67 S. E. 374 (1910); Repass v. Richmond, 99 Va. 508, 39 S. E. 160 (1901).

Washington.—Dempsey v. Dempsey, 61 Wash. 632, 112 Pac. 755 (1911); Corbett v. Weaver, 59 Wash. 248, 109 Pac. 803 (1910); Moritz v. Herskovitz, 46 Wash. 192, 89 Pac. 560 (1907).

West Virginia.—Crothers' Adm'rs v. Crothers, 40 W. Va. 169, 20 S. E. 927 (1895).

Wisconsin.—Haueter v. Marty, 137 N. W. 761 (1912) (memorandum in pocketbook); *In re Klehr's Will*, 147 Wis. 653, 133 N. W. 1105 (1912); Glassner v. Johnston, 133 Wis. 485, 113 N. W. 977 (1907); Chase v. Woodruff, 133 Wis. 555, 113 N. W. 973 (1907).

United States.—Gunter v. Gunter, 174 Fed. 933, 98 C. C. A. 545 (1909); Varley Duplex Magnet Co. v. Ostheimer, 159 Fed. 655, 86 C. C. A. 523 (1908); Woolsey v. Haynes, 165 Fed. 391, 91 C. C. A. 341 (1908); Anderson v. United States, 152 Fed.

Nor is it material, in this connection, whether the assertions are

87, 81 C. C. A. 311 (1907); *Staunton v. Goshorn*, 94 Fed. 52, 36 C. C. A. 75 (1899).

One cannot produce his own declarations in evidence, though not interested at the time. *White v. Green*, 50 N. C. 47 (1857).

Abandonment of homestead.—Upon such an issue evidence is held admissible after death of a claimant of declarations by him indicating his intention in regard to returning, though they are self-serving. *Keller v. Lindow* (Tex. Civ. App. 1911), 133 S. W. 304.

Absolute deed a mortgage.—Declarations of a grantor subsequent to the execution of an absolute deed which tend to show that it was in fact a mortgage are self-serving and inadmissible. *Kidd v. McCracken* (Tex. Civ. App. 1911), 134 S. W. 839.

Addenda to a deed, made some time after its registration, which was the chief evidence of delivery, tending to show non-delivery have been regarded as self-serving and therefore inadmissible. *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606, 53 So. 812 (1910).

Agency.—Self-serving statements, consisting of communications between principal and agent or between the agent and subagent, are not admissible on behalf of the principal.

Iowa.—*Gough v. Loomis*, 123 Iowa, 642, 99 N. W. 295 (1904); *Watters v. McGreary*, 111 Iowa, 538, 82 N. W. 949 (1900).

Michigan.—*Snyder v. Patton & Gibson Co.*, 143 Mich. 350, 106 N. W. 1106, 12 Det. Leg. 1041 (1906).

Missouri.—*Royle Mining Co. v. Fidelity & Casualty Co. of New York* (App. 1912), 142 S. W. 438.

Wisconsin.—*Kellogg Lumber & M. Co. v. Webster Mfg. Co.*, 140 Wis. 341, 122 N. W. 737 (1909); *Glassner v. Johnston*, 133 Wis. 485, 113 N. W. 977 (1907).

United States.—*Boatmen's Bank v. Trower Bros. Co.*, 171 Fed. 964 (1909).

Thus, a communication between attorney and client, made in the absence of the adverse party, cannot be used by the client in his own favor. *Cohen v. Harris*, 61 Fla. 137, 54 So. 905 (1911).

An act may imply a declaration and, so regarded, be rejected as self-serving. Thus, the question being as to whether a sale of furniture was conditional or unconditional, a mortgage thereof given by a purchaser was properly excluded as being merely self-serving. *Lazarovich v. Tatilbum*, 103 Me. 285, 69 Atl. 275 (1907).

Bankruptcy schedules are not regarded as self-serving declarations. *In re Strang*, 166 Fed. 779 (1908).

Lis Mota.—A reasonable probability that a controversy will arise regarding the subject-matter may be sufficient to exclude a declaration by a party as self-interested. *In re Strang*, 166 Fed. 779 (1908).

Municipalities.—The rule applies to statements by municipalities. *Webber v. Gillies*, 112 N. Y. Suppl. 397 (1908); *Board of Comr's of Lake County v. Keene Five Cents Sav. Bank*, 108 Fed. 505, 47 C. C. A. 464, 110 Fed. 79, 49 C. C. A. 31 (1901).

Oath of a taxpayer.—Statements therein that all his property is included in his assessment statement have been considered as self-serving. *Morse v. Stanley County*, 26 S. D. 313, 128 N. W. 153 (1910).

Post litem motam.—A declaration does not necessarily become self-serving because made *post litem motam* or even after the institution of a suit in connection with which it is beneficial to the declarant, *Texas Mach. & Supply Co. v. Ayers Ice Cream Co.* (Tex. Civ. App. 1912), 150 S. W. 750, although at such a time the tendency to make a self-serving declaration

oral or in writing.³ The extrajudicial declaration, in favor of the declarant, does not become admissible as part of the con-

would undoubtedly be greater. *Phoenix Ins. Co. v. Jacobs*, 23 Ind. App. 509, 55 N. E. 778 (1899); *Mott v. Detroit, G. H. & M. R. Co.*, 120 Mich. 127, 79 N. W. 3, 6 Det. Leg. N. 87 (1899).

Partnership cannot be established by a statement from one claiming to be a partner to the defendants in which the existence of a partnership is alleged, it being merely a self-serving declaration. *Viele v. McLean*, 200 N. Y. 260, 93 N. E. 468 (1910), *reversing* 128 App. Div. 910, 112 N. Y. Suppl. 1149 (1908). See also *Shaw v. Jones, Newton & Co.*, 133 Ga. 446, 66 S. E. 240 (1909); *Graham v. Swann*, 148 Ky. 608, 147 S. W. 11 (1912); *Keim & McMillan Hardware Co. v. Williams*, 154 Mo. App. 716, 136 S. W. 1 (1911); *Franklin v. Hoadley*, 101 N. Y. Suppl. 374, 115 App. Div. 538 (1906); *Mathiasen v. Barkin*, 70 N. Y. Suppl. 770, 62 App. Div. 614 (1901). Nor are the declarations of a retiring partner admissible after the dissolution of a firm to show a continuance of the partnership, though it is decided that they may be received for the purpose of showing that the plaintiff at the time of making a sale to them supposed the partnership was still in existence and that they were dealing with the firm. *Southwick & Wheelock v. McGovern*, 28 Iowa 533 (1870). While this is true, however, it is competent for a partner to testify directly to the existence of a partnership, and where *prima facie* proof is thus made of its existence the declarations of the *prima facie* partners will be received in evidence against each other. *Franklin v. Hoadley*, 115 App. Div. (N. Y.) 538, 101 N. Y. Suppl. 374 (1906). Drafts drawn upon alleged partners in their firm name at various times up to within a month previous to the date

in question and marked paid have been admitted as tending to prove the fact of a partnership. *Lellman v. Mills*, 15 Wyo. 149, 87 Pac. 985 (1906). Articles of co-partnership are also admissible in evidence to establish the existence of a partnership in an action against third persons by whom such existence is denied. *Dorough v. Harrington & Sons*, 148 Ala. 305, 42 So. 557 (1906).

Probative force.—Where the statement comes to the tribunal in a blended form, while the self-serving part of the declaration is to be considered as well as the unfavorable part, it need not be given the same credit. *State v. Romeo* (Utah, 1912), 128 Pac. 530.

Sales of personal property.—Conversations, letters, telegrams, or other communications between the sellers of personal property or between the sellers and their agents or between the sellers and third persons without the knowledge of the buyers is inadmissible against the buyer in an action on a breach of warranty, as self-serving declarations. *Hitz v. Warner*, 47 Ind. App. 612, 93 N. E. 1005 (1911).

Self-serving declarations or letters by an accused are never admissible when not *res gestae*. *Hughes v. State* (Tex. Cr. App. 1912), 149 S. W. 173.

Self-serving statements by the decedent are incompetent in favor of his personal representative. They are no more competent in behalf of the executor than they would be in behalf of the decedent, if living. *Jackson Baptist Church v. Comb's Ex'r*, 130 Ky. 255, 113 S. W. 119 (1908).

3. *Alabama.*—*Gulf Red Cedar Co. v. Cranshaw*, 169 Ala. 606, 53 So. 812 (1910) (deed); *Alexander v. Handley*, 96 Ala. 220, 11 So 390

versation or correspondence with the declarants' witness⁴ with the

(1891); *Smith v. Flagg*, 46 Ala. 624 (1871); *Gordon v. Clapp*, 38 Ala. 357 (1862).

California.—*Rogers v. Schulenburg*, 111 Cal. 281, 43 Pac. 899 (1896); *Bedell v. Scoggins*, 107 Cal. xvii, 40 Pac. 954 (1895); *Nicholson v. Tarpey*, 70 Cal. 608, 12 Pac. 778 (1886).

Colorado.—*Lowe v. Donnelly*, 36 Colo. 292, 85 Pac. 318 (1906).

Florida.—*Mills v. Joiner*, 20 Fla. 479 (1884).

Georgia.—*Williams v. English*, 64 Ga. 546 (1879); *Alston v. Grantham*, 26 Ga. 374 (1858).

Illinois.—*Bocker v. Hess*, 34 Ill. App. 332 (1889); *Sullivan v. Niehoff*, 27 Ill. App. 421 (1888); *Adams Express Co. v. Boskowitz*, 107 Ill. 660 (1883); *Aiken v. Hodge*, 61 Ill. 436 (1871). See also *Chicago v. McKechney*, 205 Ill. 372, 68 N. E. 954 (1903), *reversing* 91 Ill. App. 442 (1899); *West Chicago St. R. Co. v. Lieserowitz*, 197 Ill. 607, 64 N. E. 718 (1902), *affirming* 99 Ill. App. 591 (1901).

Indiana.—*Scobey v. Armington*, 5 Ind. 514 (1854).

Iowa.—*Dillivan v. German Sav. Bank*, 124 N. W. 350 (1910) (letters); *Corbel v. Beard*, 92 Iowa 360, 60 N. W. 636 (1894); *Ross v. Loomis*, 64 Iowa 432, 20 N. W. 749 (1884); *State v. Elliott*, 15 Iowa 72 (1863).

Kentucky.—*Howard v. Dietrick*, 9 Ky. L. Rep. (abstract) 441 (1887); *Talbot v. Talbot's Representatives*, 2 J. J. Marsh, 3 (1829); *Hart v. Smith*, 2 A. K. Marsh 301 (1820).

Louisiana.—*Drake v. Hays*, 27 La. Ann. 256 (1875); *Flower v. O'Connor*, 7 La. 198 (1834); *Morton v. Rils*, 5 La. 413 (1833).

Maine.—*Handly v. Call*, 30 Me. 9 (1849); *Emerson v. Harmon*, 14 Me. 271 (1837).

Maryland.—*Knight v. House*, 29

Md. 194, 96 Am. Dec. 515 (1868); *Hagan v. Hendry*, 18 Md. 177 (1861); *Green v. Sprogle*, 16 Md. 579 (1860). See also *Duvall v. Hambleton & Co.*, 98 Md. 12, 55 Atl. 431 (1903).

Massachusetts.—*Troy v. Rudnick*, 198 Mass. 563, 85 N. E. 177 (1908); *Wallace v. Story*, 139 Mass. 115, 29 N. E. 224 (1885); *Holmes v. Flanders*, 134 Mass. 147 (1883); *Whitney v. Houghton*, 125 Mass. 451 (1878).

Michigan.—*Radley v. Seider*, 99 Mich. 431, 58 N. W. 366 (1894); *Kehrig v. Peters*, 41 Mich. 475, 2 N. W. 801 (1879). See also *National Lumberman's Bank v. Miller*, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623 (1902).

Minnesota.—*Griffin v. Bristle*, 39 Minn. 456, 40 N. W. 523 (1888).

Mississippi.—*Presley v. Quarries*, 31 Miss. 151 (1856).

Missouri.—*Crockett v. Althouse*, 35 Mo. App. 404 (1889); *North Missouri R. Co. v. Wheatley*, 49 Mo. 136 (1871); *McLean v. Rutherford*, 8 Mo. 109 (1843).

New Hampshire.—*Howard v. Hunt*, 57 N. H. 467 (1876); *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753 (1860); *Bailey v. Woods*, 17 N. H. 365 (1845); *Gordon v. Shurtliff*, 8 N. H. 260 (1836).

New York.—*Mason v. Corbin*, 88 Hun 540, 34 N. Y. Suppl. 773, 68 N. Y. St. Rep. 707 (1895); *McMaster v. Smith*, 42 Hun 652, 3 N. Y. St. 481 (1886); *Eggleston v. Columbia Turnpike Road*, 82 N. Y. 278 (1880). See also *Mowbray v. Gould*, 83 App. Div. 255, 82 N. Y. Suppl. 102 (1903); *Havens v. Gilmour*, 83 App. Div. 84, 82 N. Y. Suppl. 511 (1903); *Simmon v. Bloomingdale*, 39 Misc. 847, 81 N. Y. Suppl. 499 (1903).

North Carolina.—*Ward v. Hatch*, 26 N. C. 282 (1844); *Green v. Harris*, 25 N. C. 210 (1842); *Jenkins v. Cockerham*, 23 N. C. 309 (1840).

adverse party⁵ or his messenger,⁶ because elicited on cross-exami-

See also *Newberry v. Norfolk, etc., R. Co.*, 133 N. C. 45, 45 S. E. 356 (1903).

Pennsylvania.—*Smith v. Eyre*, 161 Pa. St. 115, 28 Atl. 1005 (1894); *Tisch v. Utz*, 142 Pa. St. 186, 21 Atl. 808 (1891); *Cain v. Cain*, 140 Pa. St. 144, 21 Atl. 309 (1891).

South Carolina.—*Ring v. Hunting-ton*, 1 Mill. Const. 162 (1817).

Texas.—*Speer v. Allen* (Civ. App. 1911), 135 S. W. 231; *Texas Brokerage Co. v. John Barkley & Co.*, 49 Tex. Civ. App. 632, 109 S. W. 1001 (1908) (telegram); *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760 (1895); *Schwarzhoff v. Necker*, 1 Posey Unrep. Cas. 325 (1880).

Vermont.—*Penniman v. Patchin*, 6 Vt. 325 (1834).

Virginia.—*Witz v. Osburn*, 83 Va. 227, 2 S. E. 33 (1887); *Scott v. Shelor*, 28 Gratt. 891 (1877); *Fulton's Ex'rs v. Gracey*, 15 Gratt. 314 (1859).

Washington.—*McNicol v. Collins*, 30 Wash. 318, 70 Pac. 753 (1902).

Wisconsin.—*Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638 (1893); *McKesson v. Sherman*, 51 Wis. 303, 8 N. W. 200 (1881); *Carlyle v. Plumer*, 11 Wis. 96 (1860).

United States.—*Edwards v. Bates County*, 117 Fed. 526 (1902); *Teller v. Patten*, 20 How. 125, 15 L. ed. 831 (1857).

A self-serving statement does not become proof of the facts asserted by being made in writing. *Fletcher v. Kidder* (Cal. 1912), 127 Pac. 73; *Seever v. Cleveland Coal Co.* (Iowa 1912), 138 N. W. 793 (letter); *Heard v. Clegg* (Tex. Civ. App. 1912), 144 S. W. 1145 (letter).

Pleadings.—The result is the same where the declaration is made in the course of pleadings.

Alabama.—*New v. Young*, 148 Ala. 253, 41 So. 523 (1906).

California.—*Krullman Salz & Co. v. Superior Court of California*, 15 Cal. App. 276, 114 Pac. 589 (1911).

Illinois.—*Sanitary Dist. of Chicago v. Pearce*, 110 Ill. App. 592 (1903).

North Carolina.—*Hochfield v. Southern R. Co.*, 150 N. C. 419, 64 S. E. 181, 134 Am. St. Rep. 945 (1909).

Pennsylvania.—*Borough of Kittaning v. Kittaning Consol. N. G. Co.*, 26 Pa. Super Ct. 355 (1904).

South Dakota.—*Seim v. Krause*, 13 S. D. 530, 83 N. W. 583 (1900).

Texas.—*Gamble v. Martin* (Tex. Civ. App. 1912), 151 S. W. 327.

Wisconsin.—*Hesser-Milton-Renahan Coal Co. v. La Crosse Fuel Co.*, 114 Wis. 654, 90 N. W. 1094 (1902).

Wills.—Statements contained in a will may be self-serving. *Tyler v. Wright*, 164 Mich. 606, 130 N. W. 205, 18 Det. Leg. N. 54 (1911); *Hitt v. Hitt*, 150 Mo. App. 631, 131 S. W. 369 (1910).

Entries.—In the absence of special circumstances, mere entry on a book of account does not render a self-serving unsworn statement admissible.

Kentucky.—*Mattingly v. Shortell*, 120 Ky. 52, 85 S. W. 215, 27 Ky. L. Rep. 426 (1905).

Michigan.—*Hodges v. Detroit Electric Light, etc., Co.*, 109 Mich. 547, 67 N. W. 564 (1896).

New York.—*Shook v. Fox*, 126 App. Div. 565, 110 N. Y. Suppl. 951 (1908).

Vermont.—*Coolidge v. Taylor*, 80 Atl. 1038 (1911).

United States.—*Rosenthal v. McGraw*, 138 Fed. 721, 71 C. C. A. 277 (1905). Even the fact that the entry is upon a book of records is not conclusive in favor of admissibility. *Edwards v. Bates County*, 117 Fed. 526 (1902) (minute book of railroad company).

4. *State v. Elliott*, 15 Iowa 72

nation⁷ or on account of any similar connection with a judicial proceeding. The irrelevancy of a self-serving statement being inherent, it is equally inadmissible when offered by the representatives⁸ of the declarant or by strangers to him on their own

(1863); *McNicol v. Collins*, 30 Wash. 318, 70 Pac. 753 (1902).

A physician testifying for his patient cannot state what the latter has told him as to the cause of his injuries. *Chicago, etc., R. Co. v. Donworth*, 203 Ill. 192, 67 N. E. 797 (1903), *reversing* 105 Ill. App. 400 (1901).

5. *Collins v. Todd*, 17 Mo. 537 (1853); *Viele v. McLean*, 200 N. Y. 260, 93 N. E. 468 (1910), *reversing* 112 N. Y. Suppl. 1149, 128 App. Div. 910 (1908); *Holm v. Shay*, 124 N. Y. Suppl. 1020, 140 App. Div. 176 (1910); *Grant v. Pratt, etc.*, 87 N. Y. App. Div. 490, 84 N. Y. St. Rep. 1135 (1903); *Havens v. Gilmour*, 83 App. Div. 84, 82 N. Y. Suppl. 511 (1903); *Varley Duplex Magnet Co. v. Ostheimer*, 159 Fed. 655, 86 C. C. A. 523 (1908).

Even the latter's comments do not necessarily render admissible the self-serving statement. *Braley v. Braley*, 16 N. H. 426 (1844); *Duysters v. Crawford*, 69 N. J. L. 614, 55 Atl. 823 (1903).

A letter is not rendered admissible against a party by sending it to him. *Howard v. Anderson*, 162 Ill. App. 256 (1912); *A. Booth & Co. v. Steffey*, 150 Ill. App. 584 (1909); *Abel v. National Reserve Bank*, 149 App. Div. 710, 134 N. Y. Suppl. 379 (1912); *Varley Duplex Magnet Co. v. Ostheimer*, 159 Fed. 655, 86 C. C. A. 523 (1908).

The question whether the declaration of a party in interest made in the absence of the adverse party, *Drake Coal Co. v. Croze* (Mich. 1911), 130 N. W. 355, 18 Det. Leg. N. 18; *First Nat. Bank v. Pearce* (Tex. Civ. App. 1910), 126 S. W. 285; *Johnson & Moran v. Bu-*

chanan (Tex. Civ. App. 1909), 116 S. W. 875, is admissible, is governed by the facts of each case. *Johnston v. Spoonheim*, 19 N. D. 191, 123 N. W. 830, 41 L. R. A. (N. S.) 1 n. (1909).

Admissions.—Except for purposes of impeachment and when they form a part of the *res gestae*, conversations had out of the presence of the party sought to be affected have been held incompetent. *Elgin J. & E. Ry. Co. v. Lawlor*, 132 Ill. App. 280 (1907), *affirmed* 229 Ill. 621, 82 N. E. 407.

6. *Artcher v. McDuffie*, 5 Barb. (N. Y.) 147 (1849).

7. *Dickson v. Grissom*, 4 La. Ann. 538 (1849).

8. *California*.—*Bedell v. Scoggins*, 107 Cal. xvii, 40 Pac. 954 (1895); *Stephenson v. Hawkins*, 67 Cal. 106, 7 Pac. 198 (1885); *Fischer v. Bergson*, 49 Cal. 294 (1874). And see *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. 35 (1903).

Connecticut.—*Ramsbottom v. Phelps*, 18 Conn. 278 (1847).

District of Columbia.—*Nieman v. Mitchell*, 2 App. D. C. 195 (1894).

Georgia.—*Lewis v. Adams*, 61 Ga. 559 (1878); *Royston v. Royston*, 29 Ga. 82 (1859); *Straffin v. Newell, T. U. P. Charlt.* 172 (1808).

Illinois.—*Tewkesbury v. Beckwith*, 46 Ill. App. 323 (1892); *Avery v. Moore*, 34 Ill. App. 115 (1889), *affirmed* in 133 Ill. 74, 24 N. E. 606 (1890); *Gibson v. Gibson*, 15 Ill. App. 328 (1884).

Indiana.—*Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709 (1893); *Harcourt v. Harcourt*, 89 Ind. 104 (1883); *Bristor v. Bristor*, 82 Ind. 276 (1882).

Iowa.—*Luke v. Koenen*, 120 Iowa

account.⁹ That the declarant is dead, furnishes no ground for admitting the evidence.¹⁰ Nor is, in a sense, the circumstance important that the communication is an official one, e. g., made by a railroad conductor to his superior officer, in accordance with the regulations of the company.¹¹

103, 94 N. W. 278 (1903); *Wilson v. Patrick*, 34 Iowa 362 (1872).

Kentucky.—*Cryer v. McGuire*, 148 Ky. 100, 146 S. W. 402 (1912); *Ware v. Bennett*, 143 Ky. 743, 137 S. W. 532 (1911); *Penn v. Fightmaster*, 17 S. W. 334, 13 Ky. L. Rep. 449 (1891).

Maryland.—*Blackburn v. Beall*, 21 Md. 208 (1863); *Edelin v. Sanders*, 8 Md. 118 (1855); *Brooks v. Dent*, 1 Md. Ch. 523 (1850). See also *Duvall v. Hambleton & Co.*, 98 Md. 12, 55 Atl. 431 (1903).

Massachusetts.—*Fellows v. Smith*, 130 Mass. 378 (1881); *Baxter v. Knowles*, 12 Allen 114 (1866).

Michigan.—*Van Fleet v. Van Fleet*, 50 Mich. 1, 14 N. W. 671 (1883); *Ward v. Ward*, 37 Mich. 253 (1877); *Wilson v. Wilson*, 6 Mich. 9 (1858).

Mississippi.—*Whitfield v. Whitfield*, 40 Miss. 352 (1866).

Missouri.—*Criddle's Adm'r v. Criddle*, 21 Mo. 522 (1855).

Nebraska.—*Bennett's Estate v. Taylor*, 96 N. W. 669 (1903).

New Jersey.—*Wilson v. Terry*, 71 N. J. Eq. 785, 65 Atl. 983 (1907), *affg.* 70 N. J. Eq. 231, 62 Atl. 310 (1905).

New York.—*Root v. Borst*, 142 N. Y. 62, 36 N. E. 814 (1894); *Hayden v. Pierce*, 71 Hun 593, 25 N. Y. Suppl. 55, 55 N. Y. St. Rep. 117, *affirmed* 144 N. Y. 512, 39 N. E. 638 (1893); *Lowery v. Erskine*, 113 N. Y. 52, 20 N. E. 588 (1889). See also, *Griffin v. Train*, 90 App. Div. 16, 85 N. Y. Suppl. 686 (1904), *affirming* 40 Misc. 290, 81 N. Y. Suppl. 977 (1903).

Pennsylvania.—*Stewart's Estate*, 3 Pa. Dist. 747, 15 Pa. Co. Ct. Rep. 380 (1893); *Serfass v. Serfass*, 14 Pa. Co. Ct. Rep. 97 (1891); *Miller's Appeal*, 100 Pa. St. 568, 45 Am. Rep. 394 (1882).

Texas.—*Schmidt v. Huff* (Sup. 1892), 19 S. W. 131; *Solomon v. Huey*, 1 Posey Unrep. Cas. 265 (1880).

Vermont.—*Barber's Adm'r v. Bennett*, 62 Vt. 50, 19 Atl. 978 (1889).

Virginia.—*Masters v. Varner's Ex'rs*, 5 Gratt. 168, 50 Am. Dec. 114 (1848).

Washington.—*Reese v. Murnan*, 5 Wash. 373, 31 Pac. 1027 (1892).

West Virginia.—*Crother's Adm'rs v. Crothers*, 40 W. Va. 169, 20 S. E. 927 (1895).

Wisconsin.—*Jilsum v. Stebbins*, 41 Wis. 235 (1876).

Non-delivery of a deed.—Declarations of a deceased grantor will not be received for the purpose of establishing this fact in favor of his heirs or privies. *Napier v. Elliott* (Ala. 1912), 58 So. 435.

9. *California*.—*Poorman v. Miller*, 44 Cal. 269 (1872).

Massachusetts.—*Ware v. Brookhouse*, 7 Gray 454 (1856).

New Hampshire.—*South Hampton v. Fowler*, 54 N. H. 197 (1874).

New York.—*Dewey v. Goodenough*, 56 Barb. 54 (1865).

Texas.—*Gilbert v. Odum*, 69 Tex. 670, 7 S. W. 510 (1888).

Wisconsin.—*Lehman v. Sherger*, 68 Wis. 145, 31 N. W. 733 (1887).

England.—*Stothert v. James*, 1 C. & K. 121, 47 E. C. L. 121 (1843).

10. *Gunter v. Gunter*, 174 Fed. 933, 98 C. C. A. 545 (1909).

Declarations of a deceased partner as to his being the sole owner of the business are inadmissible. *Letson v. Hall* (Ala. App. 1912), 58 So. 740.

11. *Conner v. Seattle*, 56 Wash. 310, 105 Pac. 634, 25 L. R. A. (N. S.) 930 n. (1909).

The rule naturally has no power to exclude hearsay statements relevant for some other reason.¹² Thus, by virtue of the canon under which completeness is required,¹³ one whose opponent has proved part of the conversation with him will be at liberty to supplement this testimony by showing the balance of the conversation so far as relevant, although the new evidence consists in part of self-serving statements.¹⁴ The evidence has occasionally been admitted, as an administrative matter, on account of a forensic necessity shown by the proponent.¹⁵ In general, however, self-serving narrative statements not competent as admissions are to be rejected.¹⁶

§ 2735. (*Relevancy of Hearsay; Subjective Relevancy; Absence of controlling Motive to misrepresent; Self-interest*); Statements by Agents.—What a principal cannot do in this connection for himself, his agent will not be permitted to do in the former's behalf. The unsworn statements of an agent made in favor of the principal cannot be used by the latter as evidence of the facts asserted in them.¹ This is true even where the agent is

12. *Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (1903); *Missouri, etc., R. Co. v. Schilling* (Tex. Civ. App. 1903), 75 S. W. 64 (1903).

13. §§ 488, 495, 541.

14. *Crosbie v. Leary*, 6 Bosw. (N. Y.) 312 (1860).

Subsequent letters.—A party cannot introduce in his own behalf letters written subsequent to one offered by his opponent, under the rule that, where part of a letter or document or conversation is received, the whole may come in for purpose of explanation, which rule has been extended to admit prior letters referred to in the letter admitted. *Varley Duplex Magnet Co. v. Ostheimer*, 159 Fed. 655, 86 C. C. A. 523 (1908).

A letter, if self-serving, may not be received although the communication to which it is in reply is deemed admissible. *Stiff v. Havens* (R. I. 1908), 69 Atl. 553.

If no part of an original letter is helpful or necessary to the under-

standing of the answer thereto, then the original letter is not within any exception to the general rule which precludes a party from supporting his case by giving evidence of his own sayings. *Schwarzschild & Sulzberger Co. v. Pfaelzer*, 133 Ill. App. 346 (1907).

15. *Willis v. Mackey*, 15 Ky. L. Rep. 815 (1894); *Applegate v. McClung*, 3 A. K. Marsh. (Ky.) 304 (1821); *Darby v. Rice*, 2 Nott & M. (S. C.) 596 (1820); *Wells Fargo & Co. Express v. Bilkiss*, (Tex. Civ. App. 1911) 136 S. W. 798; *Jones v. Robertson*, 2 Munf. (Va.) 187 (1811).

16. *Drake Coal Co. v. Croze*, (Mich. 1911) 130 N. W. 355, 18 Det. Leg. N. 18.

§ 2735-1. Alabama.—*Warten v. Strane*, 82 Ala. 311, 8 So. 231 (1886); *Dickerson v. Hodges*, 1 Port, 99 (1834).

Georgia.—*Gray v. Phillips*, 88 Ga. 199, 14 S. E. 205 (1891).

Illinois.—*Chicago v. McKechney*,

dead.² Thus, the terms of a contract made by a deceased agent³ or the fact that he rescinded one⁴ cannot be proved by his report of the transaction made to his principal. No additional relevancy is gained by the fact that the declaration is in writing. Letters of an agent to his principal cannot be used by the latter as proof of the facts which they assert as against a third person.⁵ Nor is the form of agency significant. What shall be deemed to constitute a relation of agency is a matter of substantive law with which the rules of evidence have no primary concern. Whatever may be the nature of this relationship, so created, the rule which excludes the statements of the agent favorable to his principal will continue to apply. The favorable extrajudicial statements of one co-party⁶ cannot be used by the other as evidence in his own favor.

205 Ill. 372, 68 N. E. 954 (1903), reversing 91 Ill. App. 442 (1899).

Indiana.—Franklin County v. Bunting, 111 Ind. 143, 12 N. E. 151 (1887); Ricketts v. Harvey, 78 Ind. 152 (1881).

Louisiana.—Peytavin v. Maurin, 2 La. 480 (1831).

Massachusetts.—Hutchinson v. Nay, 183 Mass. 355, 67 N. E. 601 (1903).

Mississippi.—Nye v. Grubbs, 8 Sm. & M. 643 (1847).

Missouri.—Sira v. Wabash R. Co., 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386 (1893); Procter v. Loomis, 35 Mo. App. 482 (1889).

New Hampshire.—Low v. Connecticut, etc., R. Co., 46 N. H. 284 (1865).

New York.—Garnsey v. Rhodes, 138 N. Y. 461, 34 N. E. 199 (1893), affirming 63 Hun 632, 18 N. Y. Suppl. 484 (1892). See also Mowbray v. Gould, 83 App. Div. 255, 82 N. Y. Suppl. 102 (1903) (advice of attorney); Havens v. Gilmour, 83 App. Div. 84, 82 N. Y. Suppl. 511 (1903); Simmon v. Bloomingdale, 39 Misc. 847, 81 N. Y. Suppl. 499 (1903); Thyll v. New York, etc., R. Co., 84 N. Y. Suppl. 175 (1903), modified because of want of objection,

in 92 App. Div. 513, 87 N. Y. Suppl. 345 (1904).

Oregon.—Jones v. Kearns, 11 Oreg. 280, 3 Pac. 685 (1883).

Pennsylvania.—Moulton v. O'Bryan, 17 Pa. Super. Ct. 593 (1901); Harrington v. Bronson, 161 Pa. St. 296, 29 Atl. 30 (1894).

South Carolina.—Wardlaw v. Hammond, 9 Rich. L. 454 (1856).

Tennessee.—Jenkins v. Picket, 9 Yerg. 480 (1836).

Texas.—Shiner v. Abbey, 77 Tex. 1, 13 S. W. 613 (1890); Morris v. Balkham, 75 Tex. 111, 12 S. W. 970, 16 Am. St. Rep. 874 (1889); Half v. Curtis, 68 Tex. 640, 5 S. W. 451 (1887).

Vermont.—Upham & Clay v. Wheelock, 36 Vt. 27 (1863).

2. Hall v. Hall, 34 Ind. 314 (1870); Havens v. Gilmour, 83 App. Div. 84, 82 N. Y. Suppl. 511 (1903).

3. Warten v. Strane, 82 Ala. 311, 8 So. 231 (1886).

4. Dickerson v. Hodges, 1 Port. (Ala.) 99 (1834).

5. U. S. v. Barker, 24 Fed. Cas. No. 14,520, 4 Wash. C. C. 464, affirmed 12 Wheat. 559, 6 L. ed. 728 (1824).

6. Hutchins v. Childress, 4 Stew. & P. (Ala.) 34 (1833); Brainerd v.

Similarly in the case of a co-partner.⁷ Guardian and ward,⁸ principal and surety,⁹ husband and wife¹⁰ and other persons similarly related stand in the same position. For the same reasons an employer is not at liberty to use, as evidence in his own favor, the extrajudicial statements of an employee.¹¹ Nor can unsworn statements of the officers of a corporation be used by the latter as evidence of the facts asserted.¹²

Brackett, 33 Me. 580 (1851); Nye v. Grubbs, 8 Sm. & M. (Miss.) 643 (1847); Willis v. Gay, 48 Tex. 463, 26 Am. Rep. 328 (1878).

7. Graham v. Henderson, 35 Ind. 195 (1871); Bird v. Lanius, 7 Ind. 615 (1856).

8. Keele v. Cunningham, 2 Heisk. (Tenn.) 288 (1871); McMillion v. First National Bank (Tex. Civ. App. 1912), 145 S. W. 300.

9. Williams v. State, 89 Ind. 570 (1883); Ricketts v. Harvey, 78 Ind. 152 (1881); Thompson v. Chaffee, 39 Tex. Civ. App. 567, 89 S. W. 285 (1905).

10. *Michigan*.—Stahler v. Clark, 155 Mich. 26, 118 N. W. 605, 15 Det. Leg. N. 834 (1908); National Lumberman's Bank v. Miller, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623, 9 Det. Leg. N. 435 (1902).

New York.—Griffin v. Train, 90 App. Div. 16, 85 N. Y. Suppl. 686 (1904), *affirming* 40 Misc. 290, 81 N. Y. Suppl. 977 (1903).

North Carolina.—Saunders v. Ferrell, 23 N. C. 97 (1840).

Pennsylvania.—Conley v. Bentley, 87 Pa. St. 40 (1878); Musser v. Gardner, 66 Pa. St. 242 (1870); Parvin v. Capewell, 45 Pa. St. 89 (1863); Kline's Appeal, 39 Pa. St. 463 (1861).

Texas.—Torrey v. Cameron, 73 Tex. 583, 11 S. W. 840 (1889).

Utah.—Corporation of the Members of the Church of Jesus Christ of Latter-Day Saints v. Watson, 25 Utah 45, 69 Pac. 531 (1902).

11. *California*.—Dennis v. Belt, 30 Cal. 247 (1866).

Illinois.—West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607, 64 N. E. 718 (1902), *affirming* 99 Ill. App. 591 (1902); Henderson v. Miller, 36 Ill. App. 232 (1889); American Merchants' Union Express Co. v. Gilbert, 57 Ill. 468 (1870).

Kentucky.—Shelbyville Water & L. Co. v. McDade, 122 Ky. 639, 92 S. W. 568, 29 Ky. L. Rep. 119 (1906).

New York.—Jackson v. Walsh, 3 Johns. 226 (1808).

West Virginia.—Vale v. Suiter & Dunbar, 58 W. Va. 353, 52 S. E. 313 (1905).

Statements of an employee characterizing acts done by him and constituting a part of them will frequently be received against the employer, Fredenthal v. Brown & McCabe, 52 Ore. 33, 95 Pac. 1114 (1908), provided they are within the scope of his authority. Union Naval Stores Co. v. Pugh, 156 Ala. 369, 47 So. 48 (1908); Davis v. Gwinn, 162 Ill. App. 72 (1911); Lowden v. Wilson, 233 Ill. 340, 84 N. E. 245 (1908); Conklin v. Consolidated Ry. Co., 196 Mass. 302, 82 N. E. 23 (1907); Quannah, A. & P. Ry. Co. v. Galloway, (Tex. Civ. App. 1911) 140 S. W. 368.

12. American Pig-Iron Storage-Warrant Co. v. German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21 (1900); Low v. Connecticut, etc., R. Co., 46 N. H. 284 (1865); Buffalo Coal Creek M. Co. v. Troendle, 99 S. W. 622, 30 Ky. L. Rep. 740 (1907).

§ 2736. (*Relevancy of Hearsay; Subjective Relevancy; Absence of controlling Motive to misrepresent; Self-interest*); *Statements by Privies*.—As with the agents of a party, so with his privies. The extrajudicial assertive statements of the latter cannot be used by him on his own behalf as evidence of the facts asserted. Thus, the owner of property cannot use the favorable hearsay statements of a predecessor in interest,¹ although it should chance that these declarations have been brought to the attention of the opposing party.² The phrase "as evidence of the facts asserted" must be carefully observed in this connection. Viewed as facts in themselves, as tending to establish, in a circumstantial manner, the fact and nature of a *claim*,³ or other *res gestae* or probative fact, the unsworn statements of one in privity to a party⁴ or his agent⁵ are unquestionably competent. The line is a narrow one rendered very hard to trace in certain cases by reason, in part, of the fact that the distinction on which it is based has no real existence in the nature of things but is an attempt arbitrarily to segregate the inference of its truth from the other inferences to which the existence of a statement logically gives rise.

§ 2737. *Form of Hearsay*.—In respect to form, hearsay statements may properly be regarded in one of two ways. The rule

§ 2736-1. *Georgia*.—Turner v. Tubersing, 67 Ga. 161 (1881); Shaw v. McDonald, 21 Ga. 395 (1857).

Illinois.—Gullett v. Otey, 19 Ill. App. 182 (1885).

Indiana.—Tobin v. Young, 124 Ind. 507, 24 N. E. 121 (1890).

Iowa.—Neeb v. McMillan, 92 Iowa 200, 60 N. W. 612 (1894).

Maryland.—Johnson v. Frisbie, 29 Md. 76, 96 Am. Dec. 508 (1868).

Massachusetts.—Lawrence v. Wilson, 160 Mass. 304, 35 N. E. 858 (1894); Blake v. Everett, 1 Allen 248 (1861).

Mississippi.—Coppage v. Barnett, 34 Miss. 621 (1857).

New York.—Healy v. Malcolm, 77 App. Div. 69, 78 N. Y. Suppl. 1043 (1902) (assignor of contract); Garigue v. Loescher, 3 Bosw. 578 (1858).

North Carolina.—Griffin v. Tripp, 53 N. C. 64 (1860). See also New-

berry v. Norfolk, etc. R. Co., 133 N. C. 45, 45 S. E. 356 (1903) (declaration of assignor).

Texas.—Weaver v. Ashcroft, 50 Tex. 427 (1878).

Utah.—Lumm v. Howells, 27 Utah 80, 74 Pac. 432 (1903) (vendor of personal property).

Vermont.—Putnam v. Fisher, 52 Vt. 191, 36 Am. Rep. 746 (1879).

Virginia.—Hodnett's Adm'r v. Pace's Adm'r, 84 Va. 873, 6 S. E. 217 (1888).

United States.—Stockley v. Cissna, 119 Fed. 812, 56 C. C. A. 224 (1902).

England.—Stothert v. James, 1 C. & K. 121, 47 E. C. L. 121 (1843).

2. Manwaring v. Griffing, 5 Day. (Conn.) 56 (1813).

3. § 2600.

4. §§ 2600, 2605, 2606.

5. § 2606.

of exclusion applies indifferently to them all. As distinguished from each other by the nature of their source, unsworn statements in their assertive capacity may be treated as composite or individual.

Composite hearsay may be defined as a compound or blended extrajudicial declaration of an indeterminate number of people so mingled that the separate voices can no longer be distinguished.

Individual hearsay, on the contrary, may be regarded as an extrajudicial statement shown to have been made by a particular person or set of persons. So far as classified by means of the vehicle through which the utterance is presented to the tribunal they may be conveniently considered as being oral, printed or written.

§ 2738. (*Form of Hearsay*); Composite Hearsay.—Composite hearsay, as above defined, usually presents itself to the tribunal, with increasing vagueness as Reputation, Rumor or Tradition.¹ Considering them in this order, it becomes necessary to examine, with great brevity, circumstances under which reputation has been considered relevant and so entitled to admissibility and those under which it is not so regarded.

§ 2739. (*Form of Hearsay; Composite Hearsay*); Reputation; When admissible.—With the question one of consequence, it might be difficult to determine whether the existence of a reputation should properly be treated as independently relevant, probative as a fact on account of its mere existence, or, on the contrary,

§ 2738-1. Individual expressions of opinion, though persistent and harmonious, do not constitute refutation. *Mattice v. Wilcox*, 71 Hun (N. Y.) 435, 24 N. Y. Suppl. 1060, 54 N. Y. St. Rep. 902, *affirmed* 147 N. Y. 624, 42 N. E. 270 (1893). It is not established by the "understanding" which a witness has as to a given fact. *Williams v. Taylor*, 1 Bibb (Ky.) 41 (1808). If evidence of reputation be otherwise admissible, the circumstance that certain private interests are also involved will not suffice to exclude it. *Reg. v. Bedfordshire*, 3 C. L. R. 442, 6 Cox C. C.

505, 4 E. & B. 535, 1 Jur. (N. S.) 203, 24 L. J. Q. B. 81, 3 Wkly. Rep. 205, 82 E. C. L. 535 (1855); *Morewood v. Wood*, 14 East 327 note, 12 Rev. Rep. 537 (1811). Thus, evidence of reputation or tradition will be received as to the position of a boundary line between two parishes or manors, although certain of the deceased declarants possessed private rights of common which might be enlarged by the effect of their own statements. *Nicholls v. Parker*, 14 East 331 note, 12 Rev. Rep. 542 (1811). And see *Freeman v. Phillips*, 4 M. & S. 486, 16 Rev. Rep. 524 (1816).

as hearsay asserting the reality of the thing alleged to exist.¹ There is really no true distinction between the inference of truth from the fact of a statement and any other inference logically arising from the same fact which would justify a radical difference in their judicial treatment.² In connection with reputation, as with direct assertions of intention, the attempted distinction of procedure, which would admit all other relevant inferences while excluding the equally logical one of truth hopelessly breaks down. It is perceived that the true test for the admissibility of a statement, judicial or extrajudicial, whether viewed as a fact or regarded as asserting something is simply relevancy. Naturally, the circumstances under which a given statement may be probatively relevant of the truth of the facts asserted may differ widely from those under which a different inference may logically arise. The circumstances may call for a distinct administrative treatment. But to exclude, by rule of procedure, one among several equally logical inferences, regardless of what may be the consequence to the rights of the proponent or to the interest of the community in the due administration of justice is quite a different matter.

Waiving, therefore, this preliminary question, it is necessary to consider under what circumstances the existence of a given reputation is probatively relevant to the truth of the facts which it asserts? Apparently, this is exhibited whenever the nature of the subject matter and the other circumstances attending the formation and promulgation of the reputation are such as to make it probable that by thorough discussion and the prevalence of an interest vigorously to combat any mistake on the subject, the truth has presumably been reached. The inference apparently is that the reputation never would have continued in its ultimate form had it failed to state the actual reality.³ Especially in connection

§ 2739-1. The propriety of the latter view has been suggested. *Boone v. Purnell*, 28 Md. 607, 626, 92 Am. Dec. 713 (1868).

2. § 2580.

3. *Connecticut*.—*Noyes v. Ward*, 19 Conn. 250 (1848); *Wooster v. Butler*, 13 Conn. 309 (1839).

New Hampshire.—*Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476 (1883).

Texas.—*Nelson v. State*, 1 Tex. App. 41 (1876).

Virginia.—*Ralston v. Miller*, 3 Rand. 44, 15 Am. Dec. 704 (1824).

England.—*Reg. v. Bedfordshire*, 3 C. L. R. 442, 6 Cox C. C. 505, 4 E. & B. 535, 1 Jur. (N. S.) 208, 24 L. J. Q. B. 81, 3 Wkly. Rep. 205, 82 E. C. L. 535 (1855); *Carr v. Mostyn*, 5 Exch. 69, 19 L. J. Exch. 249 (1850); *Pim v. Curell*, 6 M. & W. 234 (1840); *Barraclough v. Johnson*, 8 A. & E. 99, 2 Jur. 839, 7 L. J. Q. B. 172, 3 N. & P. 233, 35 E. C. L.

with declarations as to matters of public and general interest, elsewhere treated,⁴ does the existence of a reputation in its assertive capacity gain in probative force in this way.⁵

§ 2740. (Form of Hearsay; Composite Hearsay; Reputation; When admissible); Administrative Position of Reputation.—Like hearsay in many other forms,¹ reputation in its assertive capacity is considered, from an administrative point of view, as secondary evidence. The direct testimony of witnesses, cognizant of their own knowledge as to the existence of the facts asserted being primary evidence, the existence of a reputation to the same effect may be shown when evidence of the higher grade is unattainable² and proof of the fact is reasonably essential to the case of the proponent.

Corroboration.—As in other cases where secondary evidence is employed to establish a balance in case the primary evidence is inconclusive or fails to establish a decided preponderance,³ the existence of reputation may be proved for the purpose of corroborating testimony previously given.⁴

499 (1838); *Drinkwater v. Porter*, 7 C. & P. 181, 32 E. C. L. 562 (1835); *Brett v. Beales*, M. & M. 416, 22 E. C. L. 553 (1829); *Weeks v. Sparke*, 1 M. & S. 679, 686, 14 Rev. Rep. 546, per Lord Ellenborough (1813).

4. §§ 2790 *et seq.*

5. Reputation may be more probative than a mere unsworn statement. The fact that the statements on a matter of general interest have been so uniform, reiterated, and dominant against all counter statements as to create a general reputation throughout the community may well give rise to an inference that the fact is as asserted." 16 Cyc. p. 1209.

The reasoning has not seemed convincing to Lord Ellenborough.—"I confess myself at a loss fully to understand upon what principle, even in matters of public right, reputation was ever deemed admissible evidence. It is said, indeed, that upon questions of public right, all are interested, and must be presumed conversant with them; and that is the distinction

taken between public and private rights; but I must confess I have not been able to see the force of the principle on which that distinction is founded so clearly as others have done, though I must admit its existence; and it has not been controverted in argument to-day, that in the case of public rights reputation is to be received in evidence." *Weeks v. Sparke*, 1 M. & S. 679, 686, 14 Rev. Rep. 546 (1813), per Lord Ellenborough.

§ 2740-1. § 2711.

2. *Stevens v. San Francisco, etc.*, R. Co., 100 Cal. 554, 35 Pac. 165 (1893).

Where direct proof of a fact is accessible, it cannot ordinarily be proved by showing the reputation in a community to that effect. Thus, that a given person resides at a particular place cannot be established by reputation. *Abel v. State*, 90 Ala. 631, 8 So. 760 (1890).

3. §§ 473, 476.

4. *Rizer v. James*, 26 Kan. 221 (1881).

§ 2741. (Form of Hearsay; Composite Hearsay; Reputation; When admissible); Matter of public and general interest.

— The interest which members of the community affected possess in their common rights is so great that judicial administration has assumed that it is sufficient to insure such general discussion and mutual correction as will make a reputation on the subject probatively relevant to the truth of that which it asserts. So far as individual hearsay is concerned the admissibility of extrajudicial declarations by inhabitants of a community, who have since deceased, regarding matters of public and general interest constitutes a recognized exception to the rule against hearsay.¹ Where the hearsay statements are composite, e. g., are in the form of a reputation, the same administrative considerations apply,² although the criticisms of Lord Ellenborough³ gain in cogency in connection with reputation as to public rights when viewed in their assertive capacity. It is not difficult to perceive that in case of the united assertion of a public right, conflicting opinion is apt to avoid free expression by reason of its unpopularity; that correction of the prevailing opinion, to be at all effective, must be both early and insistent and that the mere unchallenged reputation of a popular claim, even by those who would individually profit by its establishment may be taken as creating a certain validity for a claim, however ill-founded at the beginning. However this may be, the existence of public rights, such as those in bridges,⁴ ferries,⁵ highways⁶

§ 2741-1. §§ 2790 et seq.

2. *Morse v. Whitcomb*, 54 Oregon 412, 102 Pac. 788, rehearing denied, 103 Pac. 775, 135 Am. St. Rep. 832 (1909).

Common or general reputation is admissible to show a fact in which the public have an interest or which directly affects the mass of the people in a locality. *Morse v. Whitcomb*, 54 Oregon 412, 102 Pac. 788, rehearing denied, 103 Pac. 775, 135 Am. St. Rep. 832 (1909); *Wilson v. Maddock*, 5 Oregon 480, 481 (1875).

3. § 2739.

4. *Reg. v. Bedfordshire*, 3 C. L. R. 442, 6 Cox C. C. 505, 4 E. & B. 535, 1 Jur. (N. S.) 208, 24 L. J. Q. B. 81, 3 Wkly. Rep. 205, 82 E. C. L. 535 (1855).

5. *Pim v. Curell*, 6 M. & W. 234 (1840).

6. *Connecticut*.—*Noyes v. Ward*, 19 Conn. 250 (1848).

New Hampshire.—*Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476 (1883).

Oregon.—*Morse v. Whitcomb*, 54 Oregon 412, 102 Pac. 788, rehearing denied, 103 Pac. 775, 135 Am. St. Rep. 832 (1909).

Rhode Island.—*Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732 (1885).

Virginia.—*Ralston v. Miller*, 3 Rand. 44, 15 Am. Dec. 704 (1824).

England.—*Barraclough v. Johnson*, 8 A. & E. 99, 2 Jur. 839, 7 L. J. Q. B. 172, 3 N. & P. 233, 35 E. C. L. 499 (1838).

Maps as evidence of reputation.—

and the like⁷ may be established by the existence of a reputation in the community in favor of the right.

§ 2742. (Form of Hearsay; Composite Hearsay; Reputation; When admissible); Subjective Relevancy.—While judicial administration properly insists upon the establishment of an objective relevancy between the reputation and the existence of some probative or *res gestae* fact, it has found it impossible, for obvious reasons to enforce a similar requirement as to subjective relevancy. The actual declarants in case of a reputation regarding matters of public and general interest being unidentified, administration cannot well demand that the proponent show that they possessed adequate knowledge and were free from a controlling motive to misrepresent. No showing need even be made to the effect that the speakers were not personally interested in establishing the fact that they were assisting to create. Thus, if a reputation as to a boundary be otherwise competent, the fact that some of the declarants may have had a private interest to the same effect is not regarded as fatal to admissibility.¹ The reputation as to parish or manorial boundaries is, therefore, perfectly good evidence, if otherwise admissible, though the effect of crediting the reputation as stating the truth of the matter would be to confer upon the declarants who are assisting to establish the reputation itself, or some of them, rights of common or other valuable privileges.² Unquestionably, lack of subjective relevancy tends strongly to diminish the probative force of this class of evidence.

On a question whether or not a road was a public highway prior to the English Highway Act of 1835, maps which were made before that date and which were recognized and used in such a way as to amount to declarations by deceased persons having competent knowledge of facts regarding the existence of the highway have been admitted as evidence of reputation in respect to the highway. *Vyner v. Wirral Rural District Council*, 7 L. G. R. 628 (1909).

7. *Carnarvon v. Villebois*, 13 M. & W. 313, 14 L. J. Exch. 233 (1844) (free warrens); *Drinkwater v. Porter*, 7 C. & P. 181, 32 E. C. L. 562

(1835) (public landings); *Blackett v. Lowes*, 2 M. & S. 495, 15 Rev. Rep. 324 (1814) (profits a prendre, wood); *Morewood v. Wood*, 14 East 327 note, 12 Rev. Rep. 397 (1811) (profits a prendre).

§ 2742-1. *Reg. v. Bedfordshire*, 3 C. L. R. 442, 6 Cox C. C. 505, 4 E. & B. 535, 1 Jur. (N. S.) 203, 24 L. J. Q. B. 81, 3 Wkly. Rep. 205, 82 E. C. L. 535 (1855); *Morewood v. Wood*, 14 East 327 note, 12 Rev. Rep. 537 (1791).

2. *Nicholls v. Parker*, 14 East 331 note, 12 Rev. Rep. 542 (1805). See also *Freeman v. Phillips*, 4 M. & S. 486, 16 Rev. Rep. 524 (1816).

Ante litem motam.—The probative force of reputation is greatly increased should it appear to have arisen *ante litem motam*.³ Judicial administration has endeavored to assure the disinterestedness of the community in which a given reputation has arisen, by requiring that the reputation should have been shown to arise before any controversy developed on the subject.⁴

§ 2743. (*Form of Hearsay; Composite Hearsay; Reputation; When admissible*); Public Rights; Customs.—Among matters of public and general interest none are more important than those public rights and duties enjoyed by or imposed on members of the community, taken as a whole. The existence of such rights and obligations may accordingly be established by reputation employed in its assertive capacity. Among common liabilities that of paying tolls¹ seems typical. A fair illustration of general community rights is furnished by those of common.² In the same way, the existence of general public customs affecting the entire community whether the latter are ecclesiastical³ manorial,⁴ parochial⁵ or municipal⁶ may be established, especially when ancient, by reputation.⁷

Municipal incorporation.—In certain of the New England states the fact of municipal incorporation, e. g., that of a town⁸ or parish⁹ may be proved by showing a reputation to that effect.

3. Reid v. Reid, 17 N. J. Eq. 101 (1864).

4. Reid v. Reid, 17 N. J. Eq. 101 (1864).

§ 2743-1. Brett v. Beales, M. & M. 416, 22 E. C. L. 553 (1829).

2. Dunraven v. Llewellyn, 15 Q. B. 791, 13 Jur. 1089, 19 L. J. Q. B. 388, 69 E. C. L. 791 (1850); Pritchard v. Powell, 10 Jur. 154, 15 L. J. Q. B. 166 (1846); Weeks v. Sparke, 1 M. & S. 679, 14 Rev. Rep. 546 (1813); Davies v. Lewis, 2 Chit. 535, 18 E. C. L. 774 (1787).

3. Carr v. Mostyn, 5 Exch. 69, 19 L. J. Exch. 249 (1850).

4. Barnes v. Mawson, 1 M. & S. 77, 14 Rev. Rep. 395 (1813); Doe v. Sisson, 12 East 62 (1810); Carnarvon v. Villebois, 14 L. J. Exch. 233, 13 M. & W. 313 (1810).

5. Stead v. Heaton, 4 T. R. 669 (1792).

6. Stead v. Heaton, 4 T. R. 669 (1792).

7. **Business customs**.—General business customs, of such a nature as presumably to have been within the purview of the parties to a contract should, it is said, be proved directly by evidence and not by opinion or reputation. Standard Paint Co. v. San Antonio Hardware Co., (Tex. Civ. App. 1911) 136 S. W. 1150.

8. Bow v. Allenstown, 34 N. H. 351, 69 Am. Dec. 489 (1857); New Boston v. Dunbarton, 12 N. H. 409 (1841); Londonderry v. Andover, 28 Vt. 416 (1856).

9. Dillingham v. Snow, 5 Mass. 547 (1809).

§ 2744. (Form of Hearsay; Composite Hearsay; Reputation; When admissible); Boundaries.—Among subjects of public and general interest in connection with which judicial administration assumes that a correct public opinion will evolve from the conflict of interests and mutual correction is that of the location and landmarks¹ of public boundaries,² such as of counties,³ manors,⁴ parishes⁵ and the like. Such facts, therefore, may be proved by reputation. In certain sections of the United States, the same evidence is received by judicial administration in case of

§ 2744-1. *Ford v. Lacy*, 2 F. & F. 354 (1861).

The location of a river which forms part of a public boundary may be established by reputation. *Ford v. Lacy*, 2 F. & F. 354 (1861).

2. Arkansas.—*De Loney v. State*, 88 Ark. 311, 115 S. W. 138 (1908).

California.—*Lay v. Neville*, 25 Cal. 545 (1864) (county).

Dakota.—*McCall v. U. S.*, 1 Dak. 320, 46 N. W. 608 (1876) (territory).

Massachusetts.—*Drury v. Midland R. Co.*, 127 Mass. 571 (1879) (county).

Texas.—*Nelson v. State*, 1 Tex. App. 41 (1876) (county); *Cox v. State*, 41 Tex. 1 (1874) (county).

Washington.—*Inmon v. Pearson*, 47 Wash. 402, 92 Pac. 279 (1907).

England.—*Doe v. Sleeman*, 9 Q. B. 298, 10 Jur. 568, 15 L. J. Q. B. 338, 58 E. C. L. 298 (1846) (manor); *Plaxton v. Dare*, 10 B. & C. 17, 5 M. & R. I. 8 L. J. K. B. (O. S.) 98, 21 E. C. L. 10 (1829) (parish); *Nicholls v. Parker*, 14 East 331 note, Rev. Rep. 542 (1805) (parish or manor). See also, *Ford v. Lacy*, 2 F. & F. 354 (1861) (county); *Beaufort v. Swansea*, 3 Exch. 413 (1849) (manor); *Freeman v. Phillips*, 4 M. & S. 486, 16 Rev. Rep. 524 (1816); *Doe v. Richards*, Peake Add. Cas. 180, 4 Rev. Rep. 901 (1798) (manor).

This is especially true where the boundary is an ancient one. *De Loney v. State*, 88 Ark. 311, 115 S. W. 138 (1908).

“That boundaries may be proved by hearsay testimony, is a rule well settled; and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Land marks are frequently formed of perishable materials, which pass away with the generation in which they were made. By the improvement of the country, and from other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries; but such testimony must be pertinent, and material to the issue between the parties. If it have no relation to the subject, or if it refer to a fact which is immaterial to the point of inquiry, it ought not to be admitted.” *Boardman v. Reed*, 6 Pet. (U. S.) 328, 8 L. ed. 415 (1832), per Mr. Justice McLean.

3. *Ford v. Lacy*, 2 F. & F. 354 (1861).

4. *Beaufort v. Swansea*, 3 Exch. 413 (1849); *Doe v. Sleeman*, 9 Q. B. 298, 10 Jur. 568, 15 L. J. Q. B. 338, 58 E. C. L. 298 (1846); *Doe v. Richards*, Peake Add. Cas. 180, 4 Rev. Rep. 901 (1799).

5. *Plaxton v. Dare*, 10 B. & C. 17, 5 M. & R. 1, 8 L. J. K. B. (O. S.) 98, 21 E. C. L. 18 (1829); *Nicholls v. Parker*, 14 East 331 note, 12 Rev. Rep. 542 (1805).

private boundaries. This most frequently happens where there is a *nexus*, some sort of quasi connection, between the public and private boundary. Thus, should it happen that the line of a private estate *coincides* with that of the municipality, or a single line constitutes the boundary of a large number of estates, as may occur when lands are laid out in large tracts or under a government survey, a question of public interest may well be presented in locating a private boundary. In such cases, the existence of a well-defined, uncontroverted reputation may be received as proof of the facts which it asserts,⁶ especially where the boundary is an ancient one⁷ or the reputation has arisen among persons possessing marked advantages for obtaining accurate knowledge on the subject.⁸

§ 2745. (Form of Hearsay; Composite Hearsay; Reputation; When admissible); Personal Facts affecting Community.

— Certain facts, though not strictly relating to public rights or duties, may deeply affect the community at large. If so, by a parity of reasoning, reputation as to them is admissible, although their primary relation is to a particular individual rather than to the entire community. Judicial administration feels justified in assuming that matters of such common interest will be generally and conscientiously discussed and that by reason of the free interchange of views, a trustworthy reputation on the subject may be developed. Such a reputation will be received in evidence in proof of the facts which it asserts. Community, for example, recognizes that it possesses a vested interest in the good morals of all its citizens,¹ e, g., their habit of sobriety,² of truth-telling and

6. *Montgomery v. Lipscomb*, 105 Tenn. 144, 58 S. W. 306 (1900) (tree).

7. *Clark v. Hills*, 67 Tex. 141, 152, 2 S. W. 356 (1886).

Judicial administration may well recognize in the necessity shown by the proponent for the reception of such evidence a sufficient ground for admitting it. *Daggett v. Willey*, 6 Fla. 482 (1855); *McCausland v. Fleming*, 63 Pa. St. 36 (1869).

8. *Shutte v. Thompson*, 15 Wall. (U. S.) 151, 21 L. ed. 123 (1872).

Here, as elsewhere, this forensic ne-

cessity should be exhibited to the court whenever the admission of secondary evidence is being sought. § 2740.

§ 2745-1. **Gaming house.** — Evidence is not, however, admissible to show that it was common knowledge in the community that a certain house in process of erection was intended to be used when completed for gaming purposes. *McRae v. Casan*, 15 N. M. 496, 110 Pac. 574 (1910).

2. *Newdeck v. Grand Lodge A. O. U. W.*, 61 Mo. App. 97 (1894). See,

the observance of other moral standards of conduct.³ In a conspicuous degree, the proper performance of official duty by those public officers or quasi-public or professional persons such as sheriffs,⁴ or surveyors,⁵ who come into immediate contact with the people at large will be taken to be a matter of general concern and discussion, as will also existence of facts affecting the general wealth of the community, whether a given set of citizens has been incorporated,⁶ and the like. In certain communities the fact of *race* is one of general importance and discussion. It may, therefore, be proved by reputation.⁷ Facts of genealogy while recognized as affecting the members of the particular family to such an extent as to warrant judicial administration in assuming that a family reputation regarding pedigree is probably trustworthy⁸ as being the result of discussion and mutual correction, are not regarded as of sufficient general and public interest to warrant the reception of the community reputation upon the subject.⁹ A single genealogical fact, that of marriage, stands in such close relations to the moral welfare of the community as to constitute an exception to this practice of restricting reputation to the family in case of the facts of pedigree. Marriage, when established by circumstantial or secondary evidence, may be proved in part, by general reputation in the community.¹⁰

also, *Stevens v. San Francisco, etc.*, R. Co., 100 Cal. 554, 35 Pac. 165 (1893).

It has, on the contrary, been held that reputation is not admissible to determine whether an insured person had become intemperate, or had been intoxicated within a certain period. *Knapp v. Brotherhood of American Yeomen*, (Iowa 1910) 126 N. W. 336. To the contrary effect, see *Stevens v. San Francisco, etc.*, R. Co., 100 Cal. 554, 35 Pac. 165 (1893).

3. *Taylor v. Horsey*, 5 Harr. (Del.) 131 (1849) (negro trader).

4. *Holt v. Jarvis, Draper* (U. C.) 190 (1830) (deputy).

5. *Smay v. Smith*, 1 Penr. & W. (Pa.) 1 (1829).

6. *Fleener v. State*, 58 Ark. 98, 23 S. W. 1 (1893); *People v. Ah Sam*, 41 Cal. 645 (1871); *State v. Thomp-*

son, 23 Kan. 338, 33 Am. Rep. 165 (1879); *People v. Davis*, 21 Wend. (N. Y.) 309 (1839); *Dennis v. People*, 1 Park. Cr. R. (N. Y. 469 (1854). A contrary ruling has been made. *Trice v. State*, 2 Head (Tenn.) 591 (1859).

7. *Stewart v. Profit*, (Tex. Civ. App. 1912) 146 S. W. 563.

8. §§ 2942 *et seq.*

9. It has been held, however, that the general reputation and common report in the neighborhood is admissible to prove the relationship of parent and child. *Wallace v. Wallace*, 137 N. Y. Suppl. 43 (1912).

10. *Alabama*.—*Bynon v. State*, 117 Ala. 80, 23 So. 640, 67 Am. St. Rep. 163 (1897). And see, *Williams v. State*, 44 Ala. 24 (1870).

California.—*In re Ruffino*, 116 Cal. 304, 48 Pac. 127 (1897).

Liquor nuisance.—On a proceeding for the illegal sale of intoxicating liquors, especially those brought for maintaining a liquor nuisance, it may be shown that a given building has the reputation in the community of being a place at which intoxicat-

Colorado.—Poole v. People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245 (1898).

District of Columbia.—Jennings v. Webb, 8 App. Cas. 43 (1896).

Georgia.—Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190n. (1907).

Illinois.—Land v. Land, 206 Ill. 288, 68 N. E. 1109, 99 Am. St. Rep. 171 (1903); *In re Maher's Estate*, 204 Ill. 25, 68 N. E. 159 (1903); Manning v. Spurck, 199 Ill. 447, 65 N. E. 342 (1902); McKenna v. McKenna, 73 Ill. App. 64 (1897), *affirmed* 180 Ill. 577, 54 N. E. 641 (1899); Myatt v. Myatt, 44 Ill. 473 (1867).

Indiana.—Nossaman v. Nossaman, 4 Ind. 648 (1853).

Iowa.—Hager v. Brandt, 111 Iowa 746, 82 N. W. 1016 (1900).

Kentucky.—Caldwell v. Williams, 118 S. W. 932 (1909).

Louisiana.—Powers v. Charlmurry's Ex'rs, 35 La. Ann. 630 (1883); Blasini v. Succession of Blasini, 30 La. Ann. 1388 (1878); Holmes v. Holmes, 6 La. 463, 26 Ann. Dec. 482 (1834).

Maryland.—Boone v. Purnell, 28 Md. 607, 626, 92 Am. Dec. 713 (1868).

Massachusetts.—Newburyport v. Boothbay, 9 Mass. 414 (1812).

Michigan.—Hoffman v. Simpson, 110 Mich. 133, 67 N. W. 1107 (1896); Peet v. Peet, 52 Mich. 464, 18 N. W. 220 (1884).

Mississippi.—Henderson v. Car-gill, 31 Miss. 367 (1856); Stevenson v. McReary, 12 Sm. & M. 9, 51 Am. Dec. 102 (1849).

Montana.—Soyer v. Great Falls Water Co., 15 Mont. 1, 37 Pac. 838 (1894).

Nebraska.—Sorensen v. Sorensen, 68 Nebr. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455 (1903).

New Jersey.—Stevens v. Stevens, 56 N. J. Eq. 488, 38 Atl. 460 (1898).

New York.—Matter of Schmidt, 42 Misc. 463, 87 N. Y. Suppl. 428, 15 N. Y. Ann. Cas. 1 (1904); Matter of Brush, 25 App. Div. 610, 49 N. Y. Suppl. 803 (1898); Degnan v. Degnan, 63 Hun 630, 17 N. Y. Suppl. 883, 43 N. Y. St. Rep. 646 (1892); Newton v. Southworth, 43 Hun 639, 7 N. Y. St. 130 (1887); Chamberlain v. Chamberlain, 71 N. Y. 423 (1887); Christie's Estate, Tuck. Surr. 81 (1869); Grotgen v. Grotgen, 3 Bradf. Surr. 373 (1855); Tummalty v. Tummalty, 3 Bradf. Surr. 369 (1855); Matter of Taylor, 9 Paige 611 (1842); Hicks v. Cochran, 4 Edw. Ch. 107 (1842); Rose v. Clark, 8 Paige 574 (1841); Jackson v. Claw, 18 Johns. 346 (1820).

Pennsylvania.—Com. v. Haylow, 17 Pa. Super. Ct. 541 (1901); Hines Estate, 10 Pa. Super. Ct. 124, 44 Wkly. Notes Cas. 109 (1899); Durning v. Hastings, 183 Pa. St. 210, 28 Atl. 627 (1897); Staiger's Estate, 7 Pa. Dist. 351 (1897); King's Estate, 9 Kulp. 58 (1897); Janney's Estate, 2 Pa. Dist. 145, 12 Pa. Co. Ct. 550 (1892); Brice's Estate, 11 Phil. 98 (1875).

Rhode Island.—State v. Tillinghast, 25 R. I. 391, 56 Atl. 181 (1903); Williams v. Herrick, 21 R. I. 401, 43 Atl. 1036, 79 Am. St. Rep. 809 (1899).

South Carolina.—Allen v. Hall, 2 Nott & McC. 114, 10 Am. Dec. 578 (1819).

Texas.—Chapman v. Chapman, 16

ing liquors may be obtained in violation of law.¹¹ In view of the well-known difficulty of obtaining more reliable proof from unimpeachable witnesses, the practical necessity of resorting to this class of evidence seems obvious, while the relevancy to the issue of the existence of the reputation seems in view of the circumstances out of which it may reasonably be assumed to have arisen, equally clear.

§ 2746. (Form of Hearsay; Composite Hearsay); Reputation; When not admissible.—Facts which are of purely private interest and are not likely to arouse in a general community such an interest as to lead to discussion and mutual correction cannot be proved by reputation.¹ Thus the nature of rights in private

Tex. Civ. App. 382, 41 S. W. 533 (1897).

Utah.—Riddle v. Riddle, 26 Utah 268, 72 Pac. 1081 (1903).

Virginia.—Eldred v. Eldred, 97 Va. 606, 34 S. E. 477 (1899); Francis v. Francis, 31 Gratt. 283 (1879).

United States.—Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568 (1902).

England.—*In re Shephard*, 1 Ch. 456, 73 L. J. Ch. 401, 90 L. T. Rep. (N. S.) 249 (1904); Fox v. Bearblock, 17 Ch. D. 429, 45 J. P. 648, 50 L. J. Ch. 489, 44 L. T. Rep. (N. S.) 508, 29 Wkly. Rep. 661 (1881); *In re Dysart Peerage*, 6 App. Cas. 489 (1881); De Thoren v. Atty. Gen., 1 App. Cas. 686 (1876); Lyle v. Elwood, L. R. 19 Eq. 98, 44 L. J. Ch. 164, 23 Wkly. Rep. 157 (1875); Campbell v. Campbell, L. R. 1 H. L. Sc. 182 (1867); Goodman v. Goodman, 5 Jur. (N. S.) 902, 28 L. J. Ch. 745 (1858).

Canada.—Robb v. Robb, 20 Ont. 591 (1890); Wright v. Skinner, 17 U. C. C. P. 317 (1866); Doe v. Breakey, 2 U. C. Q. B. 349 (1846).

Declarations of a man of his having been married to a woman are admissible in connection with evidence of reputation to that effect and of cohabitation between them to raise a presumption of a ceremonial marriage and to supplement evidence of

such a marriage. *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822 (1909).

Negroes.—The rule applies to negroes. *Scoggins v. State*, 32 Ark. 205 (1877); *Green v. Norment*, 5 Mackey (D. C.) 80 (1886); *Stover v. Boswell's Heirs*, 3 Dana (Ky.) 232 (1835); *Long v. Barnes*, 87 N. C. 329 (1882); *State v. Whitford*, 86 N. C. 636 (1882).

11. *Ostendorf v. State*, (Okla. Cr. App. 1912) 128 Pac. 143. "The general reputation of a house in its neighborhood is the result of the conduct of the person who keeps it, and there is no injustice in holding such person responsible for this reputation. In fact in cases of this kind the reputation of the house is its advertisement, and is a source of profit to its keeper." *Carroll v. State*, 4 Okl. Cr. 242, 246, 111 Pac. 1022 (1910).

§ 2746-1. *Alabama.*—Schlaff v. Louisville, etc. R. Co., 100 Ala. 377, 14 So. 105 (1893). See also, *Ramsey v. Smith*, 138 Ala. 333, 35 So. 325 (1903).

Georgia.—*Carrie v. Cumming*, 26 Ga. 690 (1859); *Foster v. Brooks*, 6 Ga. 287 (1849).

Iowa.—*Cobleigh v. McBride*, 45 Iowa 116 (1876).

property² the quality³ and other incidents of property, real or personal, individually owned cannot be shown by a general reputation in the community.

§ 2747. (Form of Hearsay; Composite Hearsay; Reputation; When not admissible); Facts of Personal interest.—

Facts of personal history¹ cannot be established by reputation, especially where the fact is one assisting to constitute the right or liability asserted and where strict proof is consequently required by judicial administration.² Such circumstances in the life of an individual may form, indeed, a very engrossing topic of conversation. They fail, however, to arouse that permanent interest which the community feels in the things which concern itself and do not exhibit the abounding and recurring vitality which alone makes the existence of a general reputation a probative fact. That one

Maine.—Boies v. McAllister, 12 Me. 308 (1835).

Massachusetts.—Goddard v. Pratt, 16 Pick. 412 (1835).

Missouri.—Thompson v. Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552 (1889).

New Hampshire.—Heath v. West, 26 N. H. 191 (1852).

New York.—Long v. Taylor, 29 Hun 127 (1883); Eastman v. Caswell, 8 How. Pr. 75 (1873).

North Carolina.—Cox v. Brookshire, 76 N. C. 314 (1877).

Pennsylvania.—Pidcock v. Potter, 68 Pa. St. 342, 8 Am. Rep. 181 (1871); McCullough v. Montgomery, 7 Serg. & R. 17 (1821).

Tennessee.—Hart v. Reynolds, 1 Heisk. 208 (1870).

Texas.—Nations v. Love (Civ. App. 1894), 26 S. W. 232; McKinney v. Bradbury, Dall. Dig. 441 (1841).

United States.—Hinds v. Keith, 57 Fed. 10, 6 C. C. A. 231 (1893); Bennett v. Adams, 3 Fed. Cas. No. 1,316, 2 Cranch C. C. 551 (1825).

Secondary evidence.—Reputation in the community, being circumstantial or secondary evidence, must, to warrant judicial administration in sanctioning its reception, be shown both to be necessary and relevant.

Medley v. Williams, 7 Gill & J. (Md.) 61 (1835).

2. The right to profits *a prendre* in allodial lands cannot be shown by reputation. *Barnes v. Mawson*, 1 M. & S. 77, 14 Rev. Rep. 397 (1813).

3. *Chalmers v. Whittemore*, 22 Minn. 305 (1875) (slate in given quarry).

§ 2747-1. *Middlesworth v. Nixon*, 2 Mich. 425, 57 Am. Dec. 136 (1852) (elected to office); *Litchfield Iron Co. v. Bennett*, 7 Cow. (N. Y.) 234 (1827) (elected to office); *Ferguson v. Wright*, 113 N. C. 537, 18 S. E. 691 (1893) (residence).

2. **Age in statutory rape.**—Accordingly, in criminal proceedings for the offence of rape alleged to have been committed upon a female child under the age of consent, and in case of similar offences, the fact of the age of the prosecutrix, being a constituent of the liability, cannot be established by reputation. *Cowden v. State*, (Tex. Cr. App. 1912) 150 S. W. 779. Nor does the existence of a conflict in the testimony of witnesses as to the age of the prosecutrix authorize this mode of proof. *Tate v. State*, (Tex. Cr. App. 1912) 150 S. W. 781.

doctor was guilty of unprofessional conduct³ while a second was unskilful in his treatment of the sick;⁴ that an avaricious neighbor is in the habit of taking usury;⁵ that a person is poor or has no income;⁶ that a certain woman is being kept as a mistress⁷ or is a prostitute⁸ and another is a good housekeeper;⁹—these, and a vast number of similar facts, may prove at times interesting topics of conversation. The animated and sustained interest on which alone a probative reputation may be predicated, can, however, scarcely be assumed to exist. Still less can more transitory facts, as that one resides in a given place,¹⁰ is engaged in a particular business¹¹ or was elected to a certain office¹² be taken to possess this all-important quality.

Even the existence of such a public relation as may suffice to attract general discussion to a matter which in its nature is essentially private has not seemed to judicial administration to warrant receiving evidence of reputation on the subject. That a certain man was a householder¹³ owns¹⁴ or is in possession of¹⁵ property,¹⁶

3. *Bradbury v. Bardin*, 34 Conn. 452 (1867).

4. *Clark v. Com.*, 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029 (1901).

5. *Cox v. Brookshire*, 76 N. C. 314 (1877).

6. *Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110 (1907).

7. *Carrie v. Cumming*, 26 Ga. 690 (1859). See also *Overton v. White*, 117 Mo. App. 576, 93 S. W. 363 (1906).

8. *St. Louis & S. F. R. Co. v. Smith*, 34 Tex. Civ. App. 612, 79 S. W. 340 (1904). See also *Golden v. Gartleman*, 159 Ill. App. 338 (1911) (reputation as to chastity held inadmissible).

9. *Long v. Taylor*, 29 Hun (N. Y.) 127 (1883).

10. *East Tennessee, etc., R. Co. v. Thompson*, 94 Ala. 636, 10 So. 280 (1891); *State Bank v. Seawell*, 18 Ala. 616 (1851); *Pitts v. Burroughs*, 6 Ala. 733 (1844); *Blue v. Peter*, 40 Kan. 701, 20 Pac. 442 (1889); *Ferguson v. Wright*, 113 N. C. 537, 18 S. E. 691 (1893).

11. *Supreme Lodge Knights and Ladies of Honor v. Baker*, 163 Ala. 518, 50 So. 958 (1909) (railroad clerk).

12. *Middlesworth v. Nixon*, 2 Mich. 425, 57 Am. Dec. 136 (1852); *Litchfield Iron Co. v. Bennett*, 7 Cow. (N. Y.) 234 (1827).

13. *Eastman v. Caswell*, 8 How. Pr. (N. Y.) 75 (1853); *Watterson v. Fuellhart*, 169 Pa. St. 612, 32 Atl. 597 (1895); *Middlebury Bank v. Rutland*, 33 Vt. 414 (1860).

14. *Strother v. McFarland*, (Mo. App. 1912) 148 S. W. 988 (ownership of carriage).

15. *Benje v. Creagh*, 21 Ala. 151 (1852); *Luttrell v. Whitehead*, 121 Ga. 699, 49 S. E. 691 (1905); *Wendell v. Abbott*, 45 N. H. 349 (1864).

16. *Alabama*.—*Central R., etc. Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353 (1884).

California.—*Berniaud v. Beecher*, 76 Cal. 394, 18 Pac. 598 (1888).

Connecticut.—*South School Dist. v. Blakeslie*, 13 Conn. 227 (1839).

Maryland.—*Johnson v. Turner*, 22 Atl. 1103 (1891).

real,¹⁷ or personal,¹⁸ has not been deemed sufficient to warrant the reception of a general reputation in the community on the subject. Evidence of reputation is also inadmissible to establish title to a private right of way.¹⁹

New Hampshire.—Wendell v. Abbott, 45 N. H. 349 (1864).

South Carolina.—Sexton v. Hollis, 26 S. C. 231, 1 S. E. 893 (1886).

Vermont.—Canfield v. Hard, 58 Vt. 217, 2 Atl. 136 (1885).

Virginia.—Taliaferro v. Pryor, 12 Gratt. 277 (1855).

The evidence has been made competent by statute. Wilson v. Maddock, 5 Oreg. 480 (1875).

Modus.—The existence of a modus as to the payment of tithes, though possessing a clear public interest, cannot be shown by reputation. Lonsdale v. Heaton, Younge 58 (1830).

17. *Alabama*.—Owen v. Moxom, 167 Ala. 615, 52 So. 527 (1910); Davis v. Arnold, 143 Ala. 228, 39 So. 141 (1905); Goodson v. Brothers, 111 Ala. 589, 20 So. 443 (1895).

Arkansas.—Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405 (1908) (understood).

California.—Batcheller v. Whittier, 12 Cal. App. 262, 107 Pac. 141 (1910).

Georgia.—Heatley v. Long, 135 Ga. 153, 68 S. E. 783 (1910); Berry v. Osborne, 15 Ga. 194 (1854).

Kentucky.—Arthur v. Humble, 140 Ky. 56, 130 S. W. 958 (1910).

Maryland.—Medley v. Williams, 7 Gill & J. 61 (1835).

Massachusetts.—Green v. Chelsea, 24 Pick. 71 (1835).

Michigan.—Campau v. Dewey, 9 Mich. 381 (1861); Stockton v. Williams, 1 Dougl. 546 (1845).

Pennsylvania.—Sample v. Robb, 16 Pa. St. 305 (1851).

South Carolina.—Hiers v. Risher, 54 S. C. 405, 32 S. E. 509 (1898).

Texas.—Carlisle v. Gibbs (Civ. App. 1909), 123 S. W. 216; Carlisle

v. Gibbs, 44 Tex. Civ. App. 189, 98 S. W. 192 (1906).

Wisconsin.—Fowler v. Schafer, 69 Wis. 23, 32 N. W. 292 (1887).

England.—Doe v. Thomas, 14 East 323, 12 Rev. Rep. 533 (1811). See also, Urket v. Coryell, 5 Watts & S. 60 (1842).

By statute.—The rule has been made otherwise, there being a disputable presumption that one is the owner of property from common reputation of his ownership. Morse v. Whitcomb, 54 Oreg. 412, 102 Pac. 788, 135 Am. St. Rep. 832 (1909).

Acreage not provable by reputation.—The number of acres in a given tract cannot be proved by common reputation. Busbee v. Thomas, (Ala. 1912) 57 So. 587.

Liquor nuisance.—The ownership of premises alleged to be customarily resorted to for obtaining spirituous liquors sold in violation of law, or constituting a liquor nuisance, cannot, upon proceedings for enforcing the liquor law, be established by reputation. Minter v. State, (Tex. Cr. App. 1912) 150 S. W. 783.

18. *Rawles v. James*, 49 Ala. 183 (1872); *Corley v. State*, 28 Ala. 22 (1856); *Whitsett v. Slater*, 23 Ala. 626 (1853); *McCoy v. Odom*, 20 Ala. 502 (1852); *Moore v. Jones*, 13 Ala. 296 (1848); *Schooler v. State*, 57 Ind. 127 (1877); *Stevens v. Deering*, 6 S. D. 200, 60 N. W. 739 (1894); *Jones v. Jennings*, 10 Humphr. 428 (1850). Compare, *Drumm-Flato Commission Co. v. Gerlach Bank*, 107 Mo. App. 426, 81 S. W. 503 (1904).

19. *Nashville, C. & St. L. Ry. Co. v. Karthaus*, 150 Ala. 633, 43 So. 791 (1907) (always understood); *Twinning v. Goodwin*, 83 Conn. 500, 77 Atl. 953, 22 Am. & Eng. Ann. Cas. 845 (1910).

Nor can the existence of a contract to marry, which is presumably a matter of private concern, be established by reputation.²⁰ After a great lapse of time, however, and after those who could have testified of their own knowledge are dead the general opinion of those where a man lived and was known for years that he served as a soldier in a certain war has been admitted as tending to show the fact of such service.²¹

§ 2748. (*Form of Hearsay; Composite Hearsay; Reputation; When not admissible*); Financial Condition.—How far the fact of a man's financial condition may be proved by reputation is more nearly a debatable question. Reputation, however, is, in general, regarded as untrustworthy evidence for this purpose.¹

§ 2749. (*Form of Hearsay; Composite Hearsay; Reputation; When not admissible*); Mental Condition.—The mental

20. *Hinckley v. Jewett*, 86 Neb. 464, 125 N. W. 1086 (1910).

21. *Allen v. Halsted*, 39 Tex. Civ. App. 324, 87 S. W. 754 (1905).

§ 2748-1. *Alabama*.—*Stewart v. McMurray*, 82 Ala. 269, 3 So. 47 (1886); *Walker v. Forbes*, 25 Ala. 139, 60 Am. Dec. 498 (1854); *Lawson v. Orear*, 7 Ala. 784 (1845); *Montgomery Branch Bank v. Parker*, 5 Ala. 731 (1843).

Georgia.—*Phillips v. Bullard*, 58 Ga. 256 (1877).

Illinois.—*Graff v. Brown*, 85 Ill. 89 (1877).

Indiana.—*Reed v. Thayer*, 9 Ind. 157 (1857).

Massachusetts.—*Bliss v. Johnson*, 162 Mass. 323, 38 N. E. 446 (1894).

Michigan.—*Bodine v. Simmons*, 38 Mich. 682 (1878).

Minnesota.—*Hahn v. Penney*, 62 Minn. 116, 63 N. W. 843 (1895).

Missouri.—*Conover v. Berdine*, 69 Mo. 125, 33 Am. Rep. 496 (1878).

Pennsylvania.—*Watterson v. Fuelhart*, 169 Pa. St. 612, 32 Atl. 597 (1895).

Vermont.—*Middlebury Bank v. Rutland*, 33 Vt. 414 (1860).

United States.—*Hinds v. Keith*, 57 Fed. 10, 6 C. C. A. 231 (1893).

England.—*Higham v. Ridgway*, 10 East 109, 10 Rev. Rep. 235 (1808).

Insolvency.—A fact so interesting and notorious as insolvency may in some cases be proved by reputation. *Downs v. Rickards*, 4 Del. Ch. 416 (1872); *Griffith v. Parks*, 32 Md. 1 (1869). It has occasionally been felt to be safe to receive such evidence when the fact is collaterally relevant, the evidence being rejected when insolvency or other financial condition is a material fact in the *res gestae*, properly so-called. *Graff v. Brown*, 85 Ill. 89 (1877); *Holten v. Lake County*, 55 Ind. 194 (1876). Other judicial administrators have declined to recognize any such distinction. *Bodine v. Simmons*, 38 Mich. 682 (1878); *Angell v. Rosenbury*, 12 Mich. 241 (1864); *Burr v. Willson*, 22 Minn. 206 (1875); *Nininger v. Knox*, 8 Minn. 140 (1863); *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241 (1888) (direct evidence being first produced).

capacity of a person, his being sane¹ or insane,² strong-minded³ or the reverse cannot be proved by showing a general reputation in the community to that effect.

§ 2750. (Form of Hearsay; Composite Hearsay; Reputation; When not admissible); Physical Condition.—The existence of a particular physical condition exhibited by a certain member of a community stands in the same position. That a person, for example, is extremely ill¹ cannot be proved by showing that he is commonly reputed to be so. Even the more serious fact that he has been permanently disabled is not regarded as provable in this way.² Similarly it is not permissible to show that a person's hearing was not a subject of general discussion³ or to introduce reputation as to the condition of a person's health at the time of making application to become a member of a beneficial association.⁴

§ 2751. (Form of Hearsay; Composite Hearsay; Reputation; When not admissible); Relations of a business Nature.—Though the community is, in a certain sense, interested in the transaction of commercial business, the private relations of individuals cannot be assumed to provoke the careful and persistent discussion out of which a trustworthy community reputation can alone arise. Thus, that one is an agent for¹ or a partner with²

§ 2749-1. *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. Rep. 181 (1871).

2. *Connecticut*.—*State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89 (1880).

Georgia.—*Brinkley v. State*, 58 Ga. 296 (1877); *Choice v. State*, 31 Ga. 424 (1860); *Foster v. Brooks*, 6 Ga. 287 (1849).

Indiana.—*Walker v. State*, 102 Ind. 502, 1 N. E. 856 (1885).

Massachusetts.—*Townsend v. Pepperell*, 99 Mass. 40 (1868).

North Carolina.—*State v. Coley*, 114 N. C. 879, 19 S. E. 705 (1894).

Texas.—*Womble v. State*, 39 Tex. Cr. 24, 44 S. W. 827 (1898); *Ellis v. State*, 33 Tex. Cr. R. 86, 24 S. W. 894 (1894).

3. *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552 (1889).

§ 2750-1. *Mosser v. Mosser*, 32 Ala. 551 (1858).

2. *Chicago, etc., A. & R. Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381 (1886).

3. *Union Pac. Ry. Co. v. Hammerlund*, 70 Kan. 888, 79 Pac. 152 (1905).

4. *Home Circle Soc. No. 1 v. Shelton*, (Tex. Civ. App. 1904) 81 S. W. 84.

§ 2751-1. *Central R. & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353 (1884); *Trowbridge v. Wheeler*, 1 Allen (Mass.) 162 (1861); *McGregor v. Hudson*, (Tex. Civ. App. 1895) 30 S. W. 489.

2. *Alabama*.—*Central R. & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353 (1884); *Humes v. O'Bryan, etc.*, 74 Ala. 64 (1883).

another or stands in some particular business or social³ relation with other persons does not constitute a matter of public or general interest.

§ 2752. (*Form of Hearsay; Composite Hearsay*); Rumor.—

Passing from reputation to rumor, a downward step, in proving capacity, is taken. Should the relevant fact be the existence of the rumor itself; in other words, should the evidentiary fact be independently relevant rather than employed as proof of the thing asserted, it is, of course, admissible.¹ To prove, however, the true existence of the fact which it alleges, rumor will not be received by judicial administration.² Thus, where a certain reason for doing

Kentucky.—Graham v. Swan, 148 Ky. 608, 147 S. W. 11 (1912); Bell v. Daugherty, 30 Ky. L. Rep. 853, 99 S. W. 922 (1907).

Massachusetts.—Goddard v. Pratt, 16 Pick. 412 (1835).

Texas.—White v. Whaley, 1 White and Wilson Civ. Cas. Ct. App. § 101 (1881).

Vermont.—Hicks v. Cram. 17 Vt. 449 (1845).

3. Eastman v. Caswell, 8 How. Pr. (N. Y.) 75 (1853) (householder); Watterson v. Fuellhart, 169 Pa. St. 612, 32 Atl. 597 (1895) (householder); Middlebury Bank v. Rutland, 33 Vt. 414 (1860) (householder).

§ 2752-1. Governor v. Campbell, 17 Ala. 566 (1850).

2. *Alabama*.—Whitsett v. Slater, 23 Ala. 626 (1853); See also, Ramsey v. Smith, 138 Ala. 333, 35 So. 325 (1903).

Idaho.—Miller v. Village of Mul-lan, 17 Idaho 28, 104 Pac. 660 (1909).

Illinois.—Johnson v. Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883 (1885).

Indiana.—Milford School Town v. Powner, 126 Ind. 528, 26 N. E. 484 (1891).

Iowa.—Welch v. Norton, 73 Iowa 721, 36 N. W. 758 (1888); Ashcraft v. De Armond, 44 Iowa 229 (1876) (insanity).

Kansas.—Blue v. Peter, 40 Kan. 701, 20 Pac. 442 (1889).

Kentucky.—Powers v. Com., 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494, 24 Ky. L. R. 1007, 1086, 1350 (1902).

Maryland.—Sprigg v. Moale, 28 Md. 497, 92 Am. Dec. 698 (1868).

Massachusetts.—Blaisdell v. Bickum, 139 Mass. 250, 1 N. E. 231 (1885).

Missouri.—Bradley v. Modern Woodmen, 146 Mo. App. 428, 124 S. W. 69 (1910).

New Hampshire.—Prescott v. Hayes, 43 N. H. 593 (1862).

North Carolina.—Hopkins v. Hopkins, 132 N. C. 25, 43 S. E. 506 (1903).

Oregon.—Gettins v. Hennessey, 120 Pac. 369 (1912).

Pennsylvania.—Lancaster County Nat. Bank v. Moore, 78 Pa. St. 407, 21 Am. Rep. 24 (1875).

Texas.—McLane v. Elder (Civ. App. 1893), 23 S. W. 757 (insanity).

Vermont.—Dodge v. Stacy, 39 Vt. 558 (1867).

Common talk.—In an action on a fire policy in which it is claimed, as a defence, that the fire was caused by the plaintiff, the question to a witness who has testified in support of such defence, whether certain matters were common talk about the town calls for hearsay and is prop-

an act is deemed to be relevant, it cannot be so established.³ Where the existence of the fact to be proved has no legal or logical bearing, i. e., no constituent or probative connection, on or with the issue, an additional administrative reason for rejecting the evidence of rumor is furnished.⁴

§ 2753. (Form of Hearsay; Composite Hearsay); Tradition.

— Among composite forms of hearsay, tradition would seem to be as far above rumor, in a probative sense, as it is below reputation. However this may be, and such generalizations are rather misleading than helpful, tradition is seldom received by judicial administration as proving the truth of the fact which it asserts.¹ In case, however, of matters of public and general interest,² e. g., the location of an ancient public boundary³ for administrative reasons elsewhere stated⁴ the evidence is received.

§ 2754. (Form of Hearsay); Printed.— Viewing hearsay according to the form of the vehicle in which it is presented to the tribunal, the unsworn statement is oral, printed or written. Oral hearsay calls for no comment. In its more permanent form of

erly excluded. *Palatine Ins. Co., Limited, etc., v. Santa Fe Mercantile Co.*, 13 N. M. 241, 82 Pac. 363 (1905).

Harmless error.— The administrative objection to receiving rumor as proof of the facts asserted being that it is irrelevant, its reception may properly be deemed harmless error in the absence of special circumstances. *Milford School Town v. Powner*, 126 Ind. 528, 26 N. E. 484 (1891).

3. Governor v. Campbell, 17 Ala. 566 (1850); *Bradley v. Modern Woodmen of America*, 146 Mo. App. 428, 124 S. W. 69 (1910) (leaving home).

4. On an action for fraudulently misrepresenting the quantity of land in a parcel sold by the defendant to plaintiff by the acre, evidence of common rumors concerning the quantity of the land, and of street talk about the size of the farm, was deemed incompetent and inadmissi-

ble to rebut the conclusions of fraud arising from the positive misrepresentations of defendant. *Starkweather v. Benjamin*, 32 Mich. 305 (1875).

§ 2753-1. *Coughlin v. Poulson*, 2 MacArthur (D. C.) 308 (1875) (mental state); *McKinnon v. Bliss*, 21 N. Y. 206 (1860); *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808 (1881); *Cline v. Catron*, 22 Gratt. (Va.) 378 (1872).

Ownership of land.— Family tradition as to the ownership of land is inadmissible to establish title to it. *Cline v. Catron*, 22 Gratt. (Va.) 378 (1872).

2. Wooster v. Butler, 13 Conn. 309 (1831); *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489 (1857); *McKinnon v. Bliss*, 21 N. Y. 206 (1860).

3. De Loney v. State, 88 Ark. 311, 115 S. W. 138 (1908).

4. § 2741.

being in print, it invites the observation, of particular importance when standard treatises on history, the exact sciences or other subjects¹ are offered in evidence.² A hearsay statement, an extrajudicial declaration used as proof of the facts asserted, is none the less objectionable to the rule under consideration because it is in printed form. In its statement, the rule excluding hearsay makes no exception in favor of books,³ however meritorious, or of standard treatises of recognized authority. Its exclusion is applied equally as rigorously to such a learned treatise on a medical⁴ or

§ 2754-1. §§ 2528 *et seq.*

2. The administrative expedient of permitting the judge to examine such treatises for himself in the exercise of his executive function for obtaining certainty in matters of common knowledge assists to relieve the work of courts from the otherwise almost intolerable inconvenience of the situation so created. § 698.

3. *Georgia*.—Myers v. State, 97 Ga. 76, 25 S. E. 252 (1895).

Indiana.—Hamilton v. Shoaff, 99 Ind. 63 (1884).

Kansas.—Maier v. Randolph, 33 Kan. 340, 6 Pac. 625 (1885) (stock-book).

Michigan.—Hamilton Provident, etc. Soc. v. Northwood, 86 Mich. 315, 49 N. W. 37 (1891).

New York.—Brown v. Newell, 116 N. Y. Suppl. 965, 132 App. Div. 548 (1909) *affirmed*, 200 N. Y. 501, 93 N. E. 1117 (1910).

Texas.—Aldenhoven v. State, 42 Tex. Cr. R. 6, 56 S. W. 914 (1900) (medical directory).

4. *California*.—Baily v. Kruetzmenn, 141 Cal. 519, 75 Pac. 104 (1904); Gallagher v. Market St. R. Co., 67 Cal. 13, 6 Pac. 869, 51 Am. Rep. 680 note (1885); People v. Wheeler, 60 Cal. 581, 44 Am. Rep. 70 (1882).

Illinois.—Chicago City R. Co. v. Douglass, 104 Ill. App. 41 (1902); Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 678 (1884).

Massachusetts.—Com. v. Marzyn-

ski, 149 Mass. 68, 21 N. E. 228 (1889); Com. v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401 (1875).

Michigan.—Fox v. Peninsular White Lead, etc. Works, 84 Mich. 676, 48 N. W. 203 (1891).

Mississippi.—Tucker v. Donald, 60 Miss. 460, 45 Am. Rep. 416 (1882).

Rhode Island.—State v. O'Brien, 7 R. I. 336 (1862).

Texas.—Gulf, C. & S. F. Ry. Co. v. Farmer (Civ. App. 1908), 108 S. W. 729; Wright v. State (Cr. App. 1898), 44 S. W. 513.

Wisconsin.—Kreuziger v. Chicago, etc. R. Co., 73 Wis. 158, 40 N. W. 657 (1888).

Canada.—Brown v. Sheppard, 13 U. C. Q. B. 178 (1856).

"Under common-law procedure it was not competent to read books of science to a jury as evidence, because the statements therein contained were not only wanting in the sanctity of an oath, but were made by one who was not present and was not liable to cross-examination. For that reason they were excluded, notwithstanding the opinion under oath of scientific men, that they were books of authority." Gallagher v. Market Street Ry. Co., 67 Cal. 13, 15, 6 Pac. 869, 56 Am. Rep. 713 (1885), per McKee, J.

"Where books are thus offered, they are in effect used as evidence, and the substantial objection is, that they are statements wanting the sanction of an oath; and the state-

other scientific⁵ or technical subject as to a newspaper,⁶ magazine

ment thus proposed, is made by one not present, and not liable to cross-examination. If the same author were cross-examined, and called to state the grounds of his opinion, he might himself alter or modify it, and it would be tested by a comparison with the opinions of others. Medical authors, like writers in other departments of science, have their various and conflicting theories, and often sustain and defend them with ingenuity. But as the whole range of medical literature is not open to persons of common experience, a passage may be found in one book favorable to a particular opinion, when perhaps the same opinion may have been vigorously contested, and perhaps triumphantly overthrown, by other medical authors, but authors whose works would not be likely to be known to counsel or client, or to court or jury. Besides, medical science has its own nomenclature, its technical terms and words of art, and also common words used in a peculiar manner, distinct from their received meaning, in the general use of the language. From these and other causes, a person not versed in medical literature, though having a good knowledge of the general use of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author. Whereas, a medical witness would not only give the fact of his opinion, and the grounds on which it is formed, with the sanction of his oath, but would also state and explain it in language intelligible to men of common experience." *Ashworth v. Kittridge*, 12 Cush. (Mass.) 193, 194 (1853), per Shaw, C. J.

"The book offered to be read to the jury was not admissible as evidence. No evidence, in the nature of parol testimony, could properly pass to them except under the sanction of

an oath; and upon this ground, books of science are excluded, notwithstanding the opinion of scientific men that they are books of authority, and valuable as treatises. Scientific men are admitted to give their opinions as experts, because given under oath; but the books which they write, containing them, are, for want of such oath, excluded." *State v. O'Brien*, 7 R. I. 336, 338 (1862), per Brayton, J.

The United States medical dispensatory has been rejected when offered as evidence of the facts contained in it. *Boehringer v. A. B. Richards Medicine Co.*, 9 Tex. Civ. App. 284, 29 S. W. 508 (1894).

Opinions contained in medical treatises cannot be brought to the attention of the jury by quoting from the books and having a medical witness testify as to whether he agrees with them, and, if not, in what respect he differs from them. *Gulf, C. & S. F. Ry. Co. v. Farmer*, (Tex. Civ. App. 1908) 108 S. W. 729.

5. *Kreuziger v. Chicago, etc., R. Co.*, 73 Wis 158, 40 N. W. 657 (1888).

See also, §§ 2547 *et seq.*

A page from a scientific book on inks is hearsay and should not be received in evidence. Where, however, the trial was before a court without a jury and the evidence related merely to the genuineness of a memorandum the sole value of which was to corroborate other evidence sufficient in itself to sustain the judgment, an error in the admission of such evidence was held not to require a reversal. *Brown v. Newell*, 132 App. Div. 548, 116 N. Y. Suppl. 965 (1909), *affirmed* 200 N. Y. 501, 93 N. E. 1117 (1910).

6. *Child v. Sun Mut. Ins. Co.*, 3 Sandf. (N. Y.) 26 (1849); *Gettins v. Hennessey*, (Or. 1912) 120 Pac. 369; *Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 50 Tex. Civ. App. 420, 110 S. W. 978 (1908); *Hamachek*

or periodical, or other ephemeral publication of a less learned character.⁷

§ 2755. (*Form of Hearsay; Printed*); Independent Relevancy.

— To warrant this exclusion the printed statement of a standard treatise must be offered as evidence of the fact which it asserts. Should the proponent tender it as the basis of some other inference than that it is true, the hearsay rule has no application. A familiar illustration of such independent relevancy is furnished where, on an issue as to the novelty of a particular patent, statements from standard treatises may be received to show the previously acquired knowledge¹ on the subject, i. e., “the state of the art.”²

§ 2756. (*Form of Hearsay*); Written.— Considered as hearsay, an unsworn statement which is in writing is as much within the rule under consideration as one which is oral.¹ Nor is the

v. Duvall, 135 Wis. 108, 115 N. W. 634 (1908).

Trade papers are within the rule. Johnson County Savings Bank v. Walker, 80 Conn. 509, 69 Atl. 15 (1908).

7. Stagg & Conrad v. St. Jean, 29 Mont. 288, 74 Pac. 740 (1903) (catalogue); Norfolk & W. Ry. Co. v. Bell, 104 Va. 836, 52 S. E. 700 (1906).

Catalogues issued by a manufacturer containing a list of articles produced by him and depicting their various merits will not be received in evidence as proof of their contents, being within the exclusion of the hearsay rule. Thus, where the question was as to the heating capacity of a hot-air plant, the refusal to receive the manufacturer's catalogue in evidence for the purpose of establishing such fact was regarded as proper on appeal. Stagg & Conrad v. St. Jean, 29 Mont. 288, 74 Pac. 740 (1903).

Time tables and atlases are held inadmissible. Brandow v. Atchinson T. & S. F. R. Co., 134 Mo. App. 89, 114 S. W. 540 (1908).

§ 2755-1. § 2667.

2. Brown v. Piper, 91 U. S. 37, 23 L. ed. 200 (1875).

§ 2756-1. *Alabama*.—Grey v. Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729 (1876).

California.—San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 Pac. 999 (1909); Bell v. Staacke, 141 Cal. 186, 74 Pac. 774 (1903).

Connecticut.—Abel v. Fitch, 20 Conn. 90 (1849).

Georgia.—Myers v. State, 97 Ga. 76, 25 S. E. 252 (1895); See also, Anderson v. Brown, 72 Ga. 713 (1884).

Illinois.—Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515 (1903) (consideration stated in deed); Fisher v. Meek, 38 Ill. 92 (1865).

Louisiana.—Morgan v. Yarborough, 13 La. 74, 33 Am. Dec. 553 (1850); See also, New Orleans v. Maufre, 111 La. 927, 35 So. 981 (1904).

Maine.—Rich v. Hayes, 97 Me. 293, 54 Atl. 724 (1903); Capen v. Crowell, 63 Me. 455 (1874).

Massachusetts.—Prescott v. Ward, 10 Allen 203 (1865).

Michigan.—Diel v. Kellogg, 128 N. W. 420, 17 Det. Leg. N. 891

formality or deliberate character of the writing administratively considered as of consequence in this connection. Temporary,

(1910); *Stabler v. Clark*, 155 Mich. 26, 118 N. W. 605, 15 Det. Leg. N. 834 (1908) (diary).

Minnesota.—*Detherage v. Petruschke*, 106 Minn. 20, 118 N. W. 153 (1908).

Mississippi.—*Illinois Cent. R. Co. v. Langdon*, 71 Miss. 146, 14 So. 452 (1893).

Missouri.—*Meriwether v. Quincy, O. & K. C. R. Co.*, 128 Mo. App. 647, 107 S. W. 434 (1908); *Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145 (1895); *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474 (1892) (letters).

New Hampshire.—*Hutchins v. Berry*, 75 N. H. 416, 75 Atl. 650 (1910).

New York.—*Mautner v. Brody*, 120 N. Y. Suppl. 734 (1910); *Phillips v. Lindner*, 61 Hun 488, 16 N. Y. Suppl. 367; 41 N. Y. St. Rep. 295 (1891); *Davis v. Willis*, 57 Hun 200, 10 N. Y. Suppl. 883, 32 N. Y. St. Rep. 529 (1890); *McIlhargy v. Chambers*, 117 N. Y. 532, 23 N. E. 561 (1889); *Smith v. McArthur*, 52 Hun 613, *Silv. Supreme* 354, 5 N. Y. Suppl. 303, 24 N. Y. St. Rep. 711, *affirmed* 123 N. Y. 662, 26 N. E. 750 (1889) (letters); *Macauley v. Palmer*, 2 *Silv. Supreme* 245, 6 N. Y. Suppl. 402 (1888); *Carney v. Downey*, 41 Hun 637, 2 N. Y. St. Rep. 707 (1886); *Milbank v. Dennistown*, 10 Bosw. 382 (1863) (letters); *Garrigue v. Loescher*, 3 Bosw. 578 (1858).

Ohio.—*Roberts v. Briscoe*, 44 Ohio St. 596, 10 N. E. 61 (1887); *Pugh v. Holliday*, 3 Ohio St. 284 (1854).

Pennsylvania.—*Bowser v. Cravener*, 56 Pa. St. 132 (1867); *Beach v. Wheeler*, 24 Pa. St. 212 (1855) (letters); *Galloway v. Ogle*, 2 Binn. 468 (1810).

South Carolina.—*State v. Easterling*, 1 Rich. L. 310 (1845).

Texas.—*Quigley v. Gulf C. & S.*

F. Ry. Co. (Civ. App. 1912), 142 S. W. 633; *Fletcher v. First Nat. Bank* (Civ. App. 1910), 126 S. W. 936; *League v. Williamson*, 33 Tex. Civ. App. 647, 77 S. W. 435 (1903) (recitals in deed); *Gaither v. Hanrick*, 69 Tex. 92, 6 S. W. 619 (1887); *Trevino v. Trevino*, 54 Tex. 261 (1881) (letters); *Moke v. Fellman*, 17 Tex. 367, 67 Am. Dec. 656 (1856) (letters).

Vermont.—*Stannard v. Smith*, 40 Vt. 513 (1868).

An inventory of a loss prepared by the insured or his agents in accordance with the terms of a policy of insurance against loss by fire will not be received in proof of the facts asserted therein being regarded, in so far as it is offered for such a purpose, as hearsay. *Melancon v. Phoenix Ins. Co.*, 116 La. 324, 40 So. 713 (1906).

Date.—A document is not necessarily proof that it was executed on the day of its date. *Pugh v. Holliday*, 3 Ohio St. 284 (1854).

Deposition.—“If a deposition contain mere hearsay of a fact upon which hearsay is not evidence, it cannot be received as proof of that fact.” *Page v. Parker*, 40 N. H. 47 (1860).

Physican's certificates have been excluded. *Tate v. Wabash R. Co.*, 159 Mo. App. 475, 141 S. W. 459 (1911); *Dunkin v. City of Hoquiam*, 56 Wash. 47, 105 Pac. 149 (1909).

Recitals of a deed or other document are hearsay as against persons not parties thereto. *Holinger v. Phillips*, 140 Ill. App. 317 (1908) (consideration); *Meriwether v. Quincy O. & K. C. R. Co.*, 128 Mo. App. 647, 107 S. W. 434 (1908); *Bugg v. Seay*, 107 Va. 648, 60 S. E. 89, 122 Am. St. Rep. 877 (1908).

Statements in a notice of personal injury to the effect that others had

ephemeral writings such as letters,² are as fully subject to the rule

informed the claimant of the fact that some persons had been injured at the same place a night or two before are hearsay and inadmissible in an action for damages caused by such injury. *City and County of Denver v. Perkins*, 50 Colo. 159, 114 Pac. 484 (1911).

2. *Alabama*.—*Lehman v. Shiver*, 129 Ala. 318, 29 So. 698 (1901); *Mobile, etc. R. Co. v. Worthington*, 95 Ala. 598, 10 So. 839 (1891); *David v. David's Adm'r*, 66 Ala. 139 (1880); *Pearson v. Darrington*, 32 Ala. 227 (1858).

Arkansas.—*Owen v. Jones*, 14 Ark. 502 (1854).

California.—*Bell v. Staacke*, 141 Cal. 186, 74 Pac. 774, *rev'g* on rehearing 70 Pac. 472 (1903); *Bell v. Staacke*, 141 Cal. 186, 74 Pac. 774 (1903).

District of Columbia.—*Moore v. Langdon*, 2 Mackey 127, 47 Am. Rep. 262 (1882).

Georgia.—*Johnson County Savings Bank v. W. L. Richardson & Son*, 9 Ga. App. 466, 71 S. E. 757 (1911); *Hickson v. Bryan*, 75 Ga. 392 (1885).

Illinois.—*Kiick v. Boost*, 145 Ill. App. 411 (1908); *Laughlin v. Inman*, 138 Ill. App. 40 (1907); *Capen v. De Steiger Glass Co.*, 105 Ill. 185 (1883); *Illinois Cent. R. Co. v. Cobb*, 72 Ill. 148 (1874); *Hardin v. Gouveneur*, 69 Ill. 140 (1873); *Fisher v. Meek*, 38 Ill. 92 (1865).

Indiana.—*George v. Hurst*, 31 Ind. App. 660, 68 N. E. 1031 (1903).

Kentucky.—*Provident Sav. Life Assur. Soc. v. Whayne's Adm'r*, 93 S. W. 1049, 29 Ky. L. Rep. 160 (1906); *Chelf v. Isaac*, 6 Ky. L. Rep. (abstract) 739 (1885); *Morton v. Smith*, 4 T. B. Mon. 313 (1827).

Kansas.—*Simpson v. Smith*, 27 Kan. 565 (1882).

Louisiana.—*Garrett v. Morgan*, 11 Rob. 447 (1845); *Crocker v. Ainslie*, 5 Mart. (O. S.) 524 (1818).

Maine.—*Hunter v. Randall*, 69 Me. 183 (1879); *Capen v. Crowell*, 63 Me. 455 (1874); *Sargent v. Wording*, 46 Me. 464 (1859). But see, *Roach v. Learned*, 37 Me. 110 (1854).

Maryland.—*Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427 (1902); *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125 (1869). See also, *Black v. Westminster First Nat. Bank*, 96 Md. 399, 54 Atl. 88 (1903).

Massachusetts.—*Rice v. James*, 193 Mass. 458, 79 N. E. 807 (1907); *Brooks v. Acton*, 117 Mass. 204 (1875); *Prescott v. Ward*, 10 Allen 203 (1865); *Jones v. Stevens*, 5 Metc. 373 (1842). See also, *Hutchinson v. Nay*, 183 Mass. 355, 67 N. E. 601 (1903).

Michigan.—*Culver v. Smith*, 131 Mich. 359, 91 N. W. 608 (1902); *Zeigler v. Henry*, 77 Mich. 480, 43 N. W. 1018 (1889).

Minnesota.—*Peck v. Snow*, 47 Minn. 398, 50 N. W. 470 (1891).

Missouri.—*Oak Lawn Sugar Co. v. Sparks Bros. Mule Co.*, 159 Mo. App. 496, 141 S. W. 698 (1911); *Probert v. Girard Inv. Co.* (App. 1911), 137 S. W. 41; *Marshall Medicine Co. v. Chicago & A. R. Co.*, 26 Mo. App. 455, 104 S. W. 478 (1907); *Smith v. Jefferson Bank*, 120 Mo. App. 527, 97 S. W. 247 (1906); *Hammer v. Crawford* (App. 1906), 93 S. W. 348.

Montana.—*Davis v. Blume*, 1 Mont. 463 (1872).

New Jersey.—*Backes v. Movsovieh*, 82 N. J. L. 44, 81 Atl. 497 (1911); *Duysters v. Crawford*, 69 N. J. L. 614, 55 Atl. 823 (1903).

New York.—*Holm v. Shay*, 140 App. Div. 176, 124 N. Y. Suppl. 1020 (1910); *Central Bureau of Engraving v. Schmidt-Wilckes Electric Co.*, 107 N. Y. Suppl. 219 (1907); *Riddell v. Jenkins*, 109 App. Div. 463, 95 N. Y. Suppl. 702 (1905); *People v. Fitz-*

against hearsay as are also telegrams³ or loose memoranda.⁴

gerald, 156 N. Y. 253, 50 N. E. 846 (1898); *Clarkson v. Dunning*, 51 Hun 644, 4 N. Y. Suppl. 430, 22 N. Y. St. Rep. 73 (1889); *Hildreth v. Shepard*, 65 Barb. 265 (1873); *Burnham v. Thurman*, 34 N. Y. Super. Ct. 536 (1872); *Darling v. Miller*, 54 Barb. 149 (1869).

North Carolina.—*Simmons v. Mann*, 92 N. C. 12 (1885); *Churchill v. Lee*, 77 N. C. 341 (1877).

Pennsylvania.—*Foehr v. New York Short Line R. Co.*, 40 Pa. Super. Ct. 7 (1909); *Longenecker v. Hyde*, 6 Binn. 1 (1813); *Morris v. Vanderen*, 1 Dall. 64, 1 L. ed. 38 (1782).

South Carolina.—*Graff v. Caldwell*, 8 Rich. L. 129 (1855).

South Dakota.—*In re McClellan's Estate*, 20 S. D. 408, 107 N. W. 681 (1906), modified on rehearing 111 N. W. 540 (1907).

Texas.—*Western Union Telegraph Co. v. Bradford*, 41 Tex. Civ. App. 281, 91 S. W. 818 (1906); *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760 (1895); *Hanrick v. Dodd*, 62 Tex. 75 (1884).

Vermont.—*McCargan v. Langlois*, 83 Vt. 104, 74 Atl. 489 (1909).

Wisconsin.—*Befay v. Wheeler*, 84 Wis. 135, 53 N. W. 1121 (1893); *Anderson v. Fetzer*, 75 Wis. 562, 44 N. W. 838 (1890).

United States.—*Consolidated Grocery Co. v. Hammond*, 175 Fed. 641, 99 C. C. A. 195 (1910); *Security Trust Co. v. Robb*, 142 Fed. 78, 73 C. C. A. 302 (1906); *Southern Express Co. v. Todd*, 56 Fed. 104, 5 C. C. A. 432 (1893); *Conard v. New York Atlantic Ins. Co.*, 1 Pet. 386, 7 L. ed. 189 (1828).

Canada.—*Moffit v. Canadian Pac. Ry. Co.*, 2 Alta. R. 483 (1910).

Reading of letters.—Evidence of one as to the contents of a letter written by his employer to a third person is inadmissible where his knowledge is based merely on the fact that he

had heard the letter read, prior to the mailing of it. *Lacy v. Meador* (Ala. 1911), 54 So. 161.

3. *Alabama*.—*East Tennessee, etc. R. Co. v. Thompson*, 94 Ala. 636, 10 So. 280 (1891).

Arkansas.—*Fordyce v. McCants*, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296 (1889).

Illinois.—*Woods v. Toledo, St. L. & W. R. Co.*, 159 Ill. App. 209 (1910).

Missouri.—*Smith v. Jefferson Bank*, 120 Mo. App. 527, 97 S. W. 247 (1906).

Texas.—*Texas Brokerage Co. v. Barkley*, 49 Tex. Civ. App. 632, 109 S. W. 1001 (1908); *International, etc. R. Co. v. Startz*, 97 Texas 161, 77 S. W. 1, reversing (Tex. Civ. App. 1903) 74 S. W. 1118 (1903).

4. *Idaho*.—*Hannah v. Vensel*, 19 Idaho 796, 116 Pac. 115 (1911).

Michigan.—*Merritt v. Westerman*, 165 Mich. 535, 131 N. W. 66 (1911).

Missouri.—*Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145 (1895).

New York.—*Ridgeley v. Johnson*, 11 Barb. (N. Y.) 527 (1851).

Oregon.—*Keller v. Bley*, 15 Ore. 429, 15 Pac. 705 (1887).

Pennsylvania.—*Galloway's Lessee v. Ogle*, 2 Binn. (Pa.) 468 (1810).

See also, *Griffin v. Train*, 90 N. Y. App. Div. 16, 85 N. Y. Suppl. 686 (1904) affirming 40 Misc. 290, 81 N. Y. Suppl. 977 (1903); *Diamond v. Wheeler*, 80 App. Div. 58, 80 N. Y. Suppl. 416 (1903).

A memorandum by a surrogate's clerk upon the back of a petition in an application for letters testamentary is hearsay evidence and properly excluded. *Twaddell v. Weidler*, 96 N. Y. Suppl. 90, 109 App. Div. 444 (1903), affirmed 186 N. Y. 601, 79 N. E. 1117 (1906).

Memoranda by a party in a notebook in his favor do not constitute substantive evidence of the facts stated as against the other party to

In other respects, as is well-known, judicial administration very properly places marked reliance upon documents. The permanence of the medium through which the statement comes to the tribunal, its lack of ambiguity with its consequent controversy, well warrant a greatly increased credibility to that accorded oral statements backed only by the fickle tenure of slippery memory. The parties, having these and similar considerations in mind are apt to make certain formal and constituent documents, agreements, contracts and the like, the definite preappointed repository of their final intention and the substantive law, recognizing the desire and object of the party, provides that the contents of such document must be proved so far as practicable, by the primary evidence⁵ of the document itself⁶ and also, under what is commonly spoken of as Parol Evidence Rule,⁷ that, in actions between the parties based on the instrument its contents shall not be modified or varied by extrinsic evidence. Finally, the legislature, recognizing the obvious advantages of a written form of statement has seen fit very generally to provide that certain important transactions, such as the making of wills, the transfer of lands, and the like, shall be in writing. Such administrative, procedural or statutory provisions in favor of writings in no way apply to extrajudicial statements when viewed as proof of the facts asserted.

§ 2757. (Form of Hearsay; Written); Extrajudicial, self-serving Statements.—Should the extrajudicial statement be self-serving, i. e., in the interest of the declarant, an additional administrative reason is furnished for its rejection.¹ This reason

the transaction. They are regarded as merely self-serving; *Haneter v. Marty*, (Wis. 1912) 137 N. W. 761.

5. § 464 *et seq.*

6. Best on Ev., (Chamberlayne's 3d Amer. ed.) p. 215.

7. Best on Ev., (Chamberlayne's 3d Amer. ed.) p. 220.

§ 2757-1. *Alabama*.—*Boring v. Williams*, 17 Ala. 510 (1850) (pleading); *Sorrell v. Craig*, 15 Ala. 789 (1849); *Gayle v. Bishop*, 14 Ala. 552 (1848); *Cawsey v. Driver*, 13 Ala. 818 (1848) (pleading).

Florida.—*Belote v. O'Brien's*

Adm'r, 20 Fla. 126 (1883) (pleading).

Georgia.—*Howard v. Savannah, etc. R. Co.*, 84 Ga. 711, 11 S. E. 452 (1890); *Daniel v. Johnson*, 29 Ga. 207 (1859) (pleading).

Illinois.—*Hunter v. Harris*, 131 Ill. 482, 23 N. E. 626 (1890) (affidavit); *Mestling v. Hughes*, 89 Ill. 389 (1878) (affidavit); *Dobbins v. Hanchett*, 20 Ill. App. 396 (1886) (affidavit).

Indiana.—*Louisville, etc. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197 (1887) (affidavit); *In-*

is a preliminary one and seems intrinsically conclusive. Self-interest is regarded as furnishing a controlling motive to misrepresent. Subjective relevancy being absent, the unsworn declaration is rejected as irrelevant. Except, therefore, under exceptional circumstances, as where a declarant, having full and exclusive knowledge of the facts, has verified his statement contained in an answer in chancery, in which case the same is received after

diana Cent. R. Co. v. Gulick, 19 Ind. 83 (1862) (affidavit).

Kansas.—*Johnson v. Johnson*, 44 Kan. 666, 24 Pac. 1098 (1890) (affidavit).

Kentucky.—*Clarke v. Robinson*, 5 B. Mon. 55 (1844) (pleading); *Francis v. Hazlerig*, 1 A. K. Marsh. 93 (1817) (petition).

Louisiana.—*Merritt v. Wright*, 19 La. Ann. 91 (1867).

Maryland.—*Mitchell v. Dall*, 2 Harr. & G. 159 (1828).

Massachusetts.—*Corcoran v. Bat-chelder*, 147 Mass. 541, 18 N. E. 420 (1888); *Stevens v. Beals*, 10 Cush. 291, 57 Am. Dec. 108 (1852) (pleading).

Mississippi.—*Johnson v. Stone*, 69 Miss. 826, 13 So. 858 (1892) (pleading).

Missouri.—*Davidson v. Peck*, 4 Mo. 438 (1836) (pleading).

Nebraska.—*Green v. Morse*, 57 Nebr. 391, 77 N. W. 925, 73 Am. St. Rep. 518 (1899) (pleading); *Johnson v. Plum Creek First Nat. Bank*, 28 Nebr. 792, 45 N. W. 161 (1890) (affidavit).

New Hampshire.—*Howley v. Whipple*, 48 N. H. 487 (1869) (pleading).

New York.—*Lieberman v. Third Ave. R. Co.*, 25 Misc. 704, 55 N. Y. Suppl. 677 (1899) (pleading).

Ohio.—*Cincinnati M. E. Church v. Wood*, 5 Ohio 283 (1831) (pleading).

Pennsylvania.—*Kann v. Bennett*, 223 Pa. 36, 72 Atl. 342 (1909); *Bel-las v. Lloyd*, 2 Watts 401 (1834).

Rhode Island.—*Bowen v. White*, 26 R. I. 68, 58 Atl. 252 (1904).

South Carolina.—*Thomasson v. Kennedy*, 3 Rich. Eq. 440 (1851) (pleading).

Tennessee.—*McDowell v. Turney*, 5 Sneed, 225 (1858) (petition); *Jones v. Davidson*, 2 Sneed, 447 (1854) (pleading).

Texas.—*Masterson v. Jordan* (Civ. App. 1893), 24 S. W. 549 (1893) (affidavit); *Howard v. Parks*, 1 Tex. Civ. App. 603, 21 S. W. 269 (1892) (pleading).

United States.—*Woolsey v. Haynes*, 165 Fed. 391, 91 C. C. A. 341 (1908).

Letters of an agent to his principal written in the interest of the latter may constitute self-serving declarations within the meaning of the rule. *Porter v. Parks*, 2 Hun (N. Y.) 654, 5 Thomp. & C. 683 (1874).

Letters of an attorney to a client, after the termination of his employment as to his claim against her for services and otherwise which were not of such a character as reasonably to impose upon her the duty to reply thereto and refute the claims, will not be received being self-serving declarations. *Curtsinger v. McGown*, (Tex. Civ. App. 1912) 149 S. W. 303.

Non-performance of a contract cannot be shown by a letter written by defendant to plaintiff alleging, and specifying wherein there had been, non-performance of the contract on which the latter is suing. *Idaho Gold Coin Min. & M. Co. v. Colorado Iron Works*, 49 Colo. 66, 111 Pac. 553 (1910).

his death *ex necessitate rei*,² such an extrajudicial statement is not admissible in favor of the speaker³ as proof of the facts asserted, nor can his estate, in the event of his decease, receive the benefit of it.⁴

§ 2758. (Form of Hearsay; Written); Judicial Statements; Affidavits; Pleadings.—That the true objection to the reception in evidence of hearsay statements is due to irrelevancy based upon lack of cross-examination is shown by the fact that where the sanction of an oath is present but the statement has not been tested by an adverse interest, the declaration continues to be rejected. Although the untested statement be a judicial one, made under oath in the course of court proceedings, it is to be excluded. The rigor of this prohibition will not be relaxed although the sworn assertive statements, as in case of an affidavit,¹ or an answer to interroga-

2. Culbertson v. Matson, 11 Mo. 493 (1848).

3. Georgia.—Howard v. Savannah, etc. R. Co., 84 Ga. 711, 11 S. E. 452 (1890); Dickinson v. Solomons, 26 Ga. 684 (1858).

Illinois.—St. Louis, etc. R. Co. v. Thomas, 85 Ill. 464 (1877).

Indiana.—Schenck v. Sithoff, 75 Ind. 485 (1881).

Kentucky.—Miller v. Wilson, 3 Ky. L. Rep. 688 (1882); Mississippi Valley L. Ins. Co. v. Neyland, 9 Bush. 430 (1872).

New York.—Newhall v. Appleton, 102 N. Y. 133, 6 N. E. 120 (1866); La Farge v. Kneeland, 7 Cow. 456 (1827).

4. Connecticut.—Rowland v. Philadelphia, etc. R. Co., 63 Conn. 415, 28 Atl. 102 (1893).

Maryland.—Drury v. Conner, 6 Harr. & J. 288 (1824) (pleading).

New York.—McKinnon v. Bliss, 21 N. Y. 206 (1860).

North Carolina.—Austin v. King, 91 N. C. 286 (1884).

South Carolina.—Thomasson v. Kennedy, 3 Rich. Eq. 440 (1851) (pleading).

Texas.—Masterson v. Jordan (Civ. App. 1893), 24 S. W. 549 (affidavit).

§ 2758-1. Alabama.—Owen v. Pee-

bles, 42 Ala. 338 (1868); Brown v. Steele, 14 Ala. 63 (1848).

Arkansas.—Smith v. Feltz, 42 Ark. 355 (1883).

Georgia.—Fleming v. Shepherd, 83 Ga. 338, 9 S. E. 789 (1889).

Indiana.—Louisville, etc. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 572, 16 N. E. 197 (1887).

Iowa.—Jones v. Jones, 20 Iowa 388 (1866).

Kansas.—Ft. Scott v. Elliott, 68 Kan. 805, 74 Pac. 609 (1903).

Kentucky.—Grayble v. Froman, 1 A. K. Marsh. 140 (1813).

Louisiana.—Pontz v. Jones, 21 La. Ann. 726 (1869).

Mississippi.—Hyatt v. Leslie, 10 So. 672 (1891).

Missouri.—Patterson v. Fagan, 38 Mo. 70 (1866).

Montana.—Bean v. Missoula Lumber Co., 40 Mont. 31, 104 Pac. 869 (1909).

New Jersey.—Dare v. Ogden, 1 N. J. L. 91 (1791).

New York.—Forrest v. Forrest, 6 Duer 102 (1856).

Pennsylvania.—Borough of Kittanning v. Kittanning Consol. Natural Gas Co., 26 Pa. Super. Ct. 355 (1904).

Rhode Island.—Tucker v. South Kingstown, 5 R. I. 558 (1859).

tories,² remain, in many instances, on file among the papers in the case.³ The same rule is applicable in the case of certificates,⁴ depositions in early law⁵ disclosures of trustees,⁶ pleadings⁷ and other

South Carolina.—*Suber v. Chandler*, 36 S. C. 344, 15 S. E. 426 (1891).

Texas.—*Rice v. Ragan* (Civ. App. 1910), 129 S. W. 1148.

West Virginia.—*Peterson v. Ankrum*, 25 W. Va. 56 (1884).

England.—*R. v. Taylor, Skinner* 403 (1694).

An affidavit, speaking generally, fails to remove the bar of the hearsay rule. *United Surety Co. v. Summers*, 110 Md. 95, 72 Atl. 775 (1909).

2. *Barry v. Galvin*, 37 How. Pr. (N. Y.) 310 (1866). *In re Barnett*, 2 Fed. Cas. No. 1,024, 3 Pittsb. Rep. 559 (1868).

3. *Quinn v. Rawson*, 5 Ill. App. 130 (1879); *Manny v. Stockton*, 34 Ill. 306 (1864).

4. *Iowa*. *Sypher v. Savery*, 39 Iowa 258 (1874).

Maine.—*Sutherland v. Kittridge*, 19 Me. 424 (1841).

Ohio.—*Gaylord v. Case*, 5 Ohio Dec. (Reprint) 413, 5 Am. L. Rep. 494, 1 Cinc. L. Bul. 382 (1877).

Pennsylvania.—*D'Homergue v. Morgan*, 3 Whart. 26 (1838). See also, *Paull v. Mackey*, 3 Watts 110 (1834).

Texas.—*Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015 (1892).

United States.—*Beale v. Pettit*, 2 Fed. Cas. No. 1,158, 1 Wash. C. C. 241 (1805).

5. **Early depositions.**—On early trials for treason, a serious grievance of the accused was the introduction of depositions, so-called, not always reinforced by the actual production of the witness himself. *Lilburne's Trial*, 4 How. St. Tr. 1269, 1401 (1649); *Raleigh's Trial*, 2 How. St. Tr. 16, 18 (1603); *Abington's Trial*, 1 How. St. Tr. 1142, 1148 (1586). No opportunity for cross-examination being thus afforded to the de-

fendant, his interests were seriously prejudiced. As against the mischiefs of the hearsay rule, the presence of an oath was felt to afford but slight protection. This abuse was later sought in vain to be corrected by statute providing that the defendant should have a right to confront his accusers. St. 5 Edw. VI, c. 12, § 22 (1553).

See also, St. 1 & 2 P. & M. c. 10, § 11 (1554).

Though the practice was changed later, under the increasing force of the hearsay rule, and the witness was required to appear in support of his deposition, the true administrative character of hearsay when relevant as secondary evidence is recognized in the rulings which admit the deposition alone where a suitable forensic necessity for using it can be shown, e. g., where the declarant is dead, beyond seas, or the like. *Lord Morley's Case*, Kel. 55, 6 How. St. Tr. 770 (1666) (dead, unable to travel, or eloiined by defendant); *Mordant's Trial*, 5 How. St. Tr. 907, 922 (1658) (escaped prisoner); *Dabley's Case*, Clayt. 62 (1638) (dead); *Anon. Godb.* 326 (1629); *Fortescue & Coake's Case*, Godb. 193 (1613) (dead); *Tomlinson v. Croke*, 2 Rolle's Abr. 687, pl. 3 (1612) (dead); *Raleigh's Trial*, 2 How. St. Tr. 1, 16, 18 (1603); *Udall's Trial*, 1 How. St. Tr. 1271, 1283 (1590) (beyond seas). See, also, *Browne's History of Maryland*, 84; *Proprietor v. Keith*, Pa. Colon. Cas. 117, 124 (1692) (extremity of the weather); *Mass. Revised Laws and Liberties*, Whitmore's Ed., "Witnesses," § 2 (1660).

6. *Puffer v. Graves*, 26 N. H. 256 (1853).

7. *Arkansas*.—*Gould v. Tatum*, 21 Ark. 329 (1860).

writings, instruments or documents of a like nature.⁸

Waiver.—An affidavit may be received to affect a party if he has agreed that if it is made he will be bound by it.⁹

§ 2759. (*Form of Hearsay; Written*); Mercantile Hearsay.—

A probative force thus denied to judicial statements¹ will scarcely be conceded to declarations which arise in course of commercial transactions.² It is settled that in the absence of special circum-

California.—Krullman, Salz & Co. v. Superior Court, 15 Cal. App. 276, 114 Pac. 589 (1911).

Florida.—Belote v. O'Brian's Adm'r, 20 Fla. 126 (1883) (bill of particulars).

Kentucky.—Hart v. Smith, 2 A. K. Marsh. 301 (1820).

New York.—Quinn v. Neeson, 21 N. Y. Suppl. 106, 48 N. Y. St. Rep. 570 (1892).

Pennsylvania.—Kann v. Bennett, 223 Pa. 36, 72 Atl. 342 (1909).

Conditional admissibility.—If the competency of a statement in the pleadings is dependent upon the decision of a question of construction, it is proper to receive the statement and permit the jury to deal with it in accordance with the construction they may adopt. *Thompson v. Wright*, 22 Ga. 607 (1857). Reading of pleading as such to the jury does not make its assertions evidence in the case. *Cole's Adm'r's v. Perry*, 7 Tex. 109 (1851).

Scope of rule.—Naturally, the most usual application of this rule is in connection with civil proceedings at common law.

Kentucky.—Hays v. Earls, 77 S. W. 706, 25 Ky. L. Rep. 1299 (1903).

Missouri.—Davidson v. Peck, 4 Mo. 438 (1836).

New York.—Ames v. Hurlbutt, 17 How. Pr. 185 (1859).

Pennsylvania.—Payne v. Bennet, 2 Watts, 427 (1834).

South Carolina.—Thomasson v. Kennedy, 3 Rich. Eq. 440 (1851).

Tennessee.—Jones v. Davidson, 2 Sneed, 447 (1854); Oppenheimer v.

Edney, 9 Humphr. 385 (1848).

Pleadings in equity are, however, equally within it.

Drury v. Conner, 6 Harr. & J. (Md.) 288 (1824); *Newell v. Newell*, 34 Miss. 385 (1857); *Bien v. Weatherspoon*, 1 How. (Miss.) 28 (1834); *Culbertson v. Matson*, 11 Mo. 493 (1848); *Blair v. Caldwell*, 3 Mo. 249 (1834); *Cincinnati M. E. Church v. Wood*, 5 Ohio 283 (1831).

Special proceedings stand in the same position in this respect. *Jordan v. Thompson*, 67 Ala. 469 (1880) (application for administration).

Bankruptcy schedules and the petition for discharge are not admissible in evidence in an action by the trustee in bankruptcy against a third person to whom it is claimed an unlawful preference was given by the bankrupt. *Taylor v. Nichols*, 134 N. Y. App. Div. 787, 119 N. Y. Suppl. 1042 (1909). See, also, *Allen Kingston Motor Car Co. v. Consol. Nat. Bank of City of New York*, 129 N. Y. Suppl. 1070, 145 App. Div. 294 (1911).

8. *Withers v. The El Paso*, 24 Mo. 204 (1857).

9. *Hurd v. Pendrigh*, 2 Hill. (N. Y.) 502 (1842).

§ 2759-1. § 2758.

2. *Illinois Cent. R. Co. v. Langdon*, 71 Miss. 146, 14 So. 452 (1893); *McIlhargy v. Chambers*, 117 N. Y. 532, 23 N. E. 561 (1889); *Crease v. Parker*, 6 Fed. Cas. No. 3,376, 1 Cranch. C. C. 448 (1807). See also, *International, etc. R. Co. v. Startz*, 97 Tex. 167, 77 S. W. 1, *reversing*, (Tex. Civ. App. 1903) 74 S. W. 1118.

stances extrajudicial statements contained in accounts of sales,³ books of account,⁴ receipts⁵ and similar forms of mercantile writing are, so far as relates to the truth of the facts asserted, simply hearsay.

§ 2760. (Form of Hearsay; Written); Official Statements.—

Aside from the relevancy of regularity, as to which some attention is to be given hereafter,¹ an extrajudicial statement does not acquire admissibility from the fact that it is recorded or on file in some public office or registry.² The records kept by municipal corporations³ stand in a similar administrative position as do also

3. Personal knowledge.—Where a witness is possessed of personal knowledge that certain accounts of sales of cattle handed him by commission merchants state the correct weights and prices at which the cattle were sold, the accounts of sales will not be rejected as hearsay. *St. Louis & S. F. Ry. Co. v. Lane*, (Tex. Civ. App. 1909) 118 S. W. 847.

4. Connecticut.—*Buchnam v. Barnum*, 15 Conn. 67 (1842).

Illinois.—*Boyd v. Yerkes*, 25 Ill. App. 527 (1887).

Iowa.—*Boulton v. Goshen First Nat. Bank*, 46 Iowa 273 (1877); *Sypher v. Savery*, 39 Iowa 258 (1874).

Pennsylvania.—*Juniata Bank v. Brown*, 5 Serg. & R. 226 (1819).

Wisconsin.—*Minton v. Underwood Lumber Co.*, 79 Wis. 646, 48 N. W. 857 (1891).

5. Connecticut.—*British American Ins. Co. v. Wilson*, 77 Conn. 559, 60 Atl. 293 (1905).

Georgia.—*Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258 (1855).

Illinois.—*Central Warehouse Co. v. Sargeant*, 40 Ill. App. 438 (1891).

Kentucky.—*Bryan v. Buford*, 7 J. J. Marsh. 335 (1832); *Combs v. Brashears*, 6 J. J. Marsh. 631 (1831).

Louisiana.—*Farias v. De Lizardi*, 4 Rob. 407 (1843). But see, *Malehaux v. Lefebvre*, 4 Mart. (N. S.) 489 (1826).

Massachusetts.—*Silverstein v. O'Brien*, 165 Mass. 512, 43 N. E. 496 (1896).

Missouri.—*Doherty v. Doherty* 115 Mo. App. 481, 134 S. W. 1112 (1911); *Pritchard v. Hooker*, 114 Mo. App. 605, 90 S. W. 415 (1905).

Pennsylvania.—*Cutbush v. Gilbert*, 4 Serg. & R. 551 (1818).

West Virginia.—*Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47 (1892).

§ 2760-1. § 3051 *et seq.*

2. Official registration.—Admissibility is not secured for a self-serving extrajudicial statement by the fact that it has been recorded or placed on file in an official registry. *Gilbert v. Odum*, 69 Tex. 670, 7 S. W. 510 (1888). See, also, *Spohr v. Chicago*, 206 Ill. 441, 69 N. E. 515 (1903); *New Orleans v. Manfre*, 111 La. 927, 35 So. 981 (1904); *League v. Williamson*, (Tex. Civ. App. 1903) 77 S. W. 435; *Stockley v. Cissna*, 119 Fed. 812, 5 C. C. A. 324 (1902).

3. Shumway v. Leakey, 67 Cal. 458, 8 Pac. 12 (1885); *Lynn v. Troy*, 57 Hun (N. Y.) 590, 10 N. Y. Suppl. 594, 32 N. Y. St. Rep. 497 (1890); *Hoffman v. New York Cent., etc. R. Co.*, 46 N. Y. Super. Ct. 526, *affirmed* 87 N. Y. 25, 41 Am. Rep. 337 (1880).

Municipal records are hearsay as to collateral statements therein. *New*

those of private associations.⁴ Therefore the written or printed reports of public officials⁵ or boards,—as the board of

York Metropolitan L. Ins. Co. v. Anderson, 79 Md. 375, 29 Atl. 606 (1894); Morrow v. Vernon Tp., 35 N. J. L. 490 (1872).

Where the statement of the record has been authorized by the person against whom it is offered or he is shown to be otherwise connected with the making of it, the declaration may be admissible upon other principles. Shumway v. Leakey, 67 Cal. 458, 8 Pac. 12 (1885); Lynn v. Troy, 57 Hun (N. Y.) 590, 10 N. Y. Suppl. 594, 32 N. Y. St. Rep. 497 (1890).

Common council minutes are regarded as mere hearsay when made in reference to its action upon a subject matter over which it has no jurisdiction. So where a common council is composed of two boards which cannot lawfully act jointly in regard to certain matters, a joint meeting in respect to any of such matters is not a meeting of the common council and a record of its doings is excluded as hearsay. Harris v. Ansonia, 73 Conn. 359, 47 Atl. 672 (1900).

Fire company records kept under the regulations of a city fire department and made by the captain of the company from a memorandum made by another person, the captain not being at the fire, are hearsay and inadmissible to prove the origin of the fire. Over v. Dehne, 38 Ind. App. 427, 75 N. E. 664 (1905), petition for rehearing denied 38 Ind. App. 427, 76 N. E. 883 (1906).

4. Connecticut Mut. L. Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. ed. 294 (1876) (lodge of Odd Fellows).

Hospital records the correctness of which is not established by the persons who made them are regarded as hearsay. Levy v. Mott Iron Works, 143 N. Y. App. Div. 7, 127 N. Y. Suppl. 506 (1911). Where the records in a hospital were kept by one

who had no personal knowledge of the facts entered, but recorded them from memoranda handed to him by an attending physician they were held to be inadmissible. Delaney v. Framingham Gas F. & P. Co., 202 Mass. 359, 88 N. E. 773 (1909).

Hospital registers containing records of the diseases with which a particular patient is afflicted will not be received for the purpose of establishing the nature of the disease with which a particular patient was suffering. Price v. Standard Life & Acc. Ins. Co., 90 Minn. 264, 95 N. W. 1118 (1903).

"Temperature charts," or as they are sometimes termed "bedside notes" taken at a hospital in reference to the physical condition of a patient who is confined there are inadmissible. Griebel v. Brooklyn Heights R. Co., 184 N. Y. 528, 76 N. E. 1096 (1906), *affirming* 95 App. Div. 214, 88 N. Y. Suppl. 767 (1904).

Weather conditions cannot be shown by a record of observations of temperature and rainfall voluntarily made and not preserved by any requirement of law or regulation of the weather bureau or verified by the person making them. Monarch Mfg. Co. v. Omaha, C. B. & S. Ry. Co., 127 Iowa 511, 103 N. W. 493 (1905).

5. Cook v. U. S., 138 U. S. 157, 11 S. Ct. 268, 34 L. ed. 906 (1891).

Grand jury report.—In an action to rescind the license of a theatre the report of a grand jury regarding its unsafe condition will not be received. Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899 (1904).

Sheriff's return.—The sheriff's return upon a summons issued to the defendant is merely an *ex parte* unsworn statement and is inadmissible as hearsay to establish the fact that the defendant was, at the time of

health,⁶ committees of the legislature⁷ and the like are, so far as relates to the direct probative effect of the statements contained in them as establishing the truth of the facts asserted, treated simply as hearsay.

For still stronger administrative reasons, the unsworn statements contained on the record books of private corporations⁸ or in the official reports of their officers⁹ are rejected under the present rule, even when probatively relevant, objectively and subjectively.

§ 2761. (Form of Hearsay; Written; Official Statements); Admissions.—Under ordinary administrative principles, while the declarant, his privies or representatives may not be able to use the declarations of a public or private entry in his behalf, these assertions may be used against them. Should it appear, for example, as has been said, that the party against whom a hearsay statement is offered has authorized the making of it¹ or is otherwise connected with its existence in some way which the substan-

service in possession of a certain mine. *Haywood v. Dering Coal Co.*, 145 Ill. App. 506 (1908).

6. *Montezuma v. Minor*, 73 Ga. 484 (1884) (health).

7. *Gatling v. Newell*, 9 Ind. 572 (1857) (committee on agriculture).

Congressional committee report.—Report of a Congressional committee on Indian affairs finding fraud on the part of certain persons in acquiring title to Indian lands is not admissible in behalf of one who alleges he signed the note as surety to show fraudulent intent on the part of the makers of the note. *State Nat. Bank v. Levy*, 141 Mo. App. 288, 125 S. W. 542 (1910).

8. *Allen Kingston Motor Car Co. v. Consol. Nat. Bank of City of New York*, 129 N. Y. Suppl. 1070, 145 App. Div. 294 (1911).

Express office records.—Records of an express office will not be received to show what is stated therein in reference to a package of which an agent is charged with the theft, there being no proof as to whom the records were made by or their cor-

rectness. *McConico v. State*, (Tex. Cr. App. 1911) 133 S. W. 1047.

Railroad records showing the time trains passed a station on a certain day are to be rejected as hearsay where the person offering them has no knowledge of their correctness and it is not shown that the appearance of those who made the records can not be procured. *Cathey v. Missouri K. & T. Ry. Co.*, (Tex. Civ. App. 1910) 124 S. W. 217. *Compare Firemen's Ins. Co. v. Seaboard Air Line Ry.*, 138 N. C. 42, 50 S. E. 452, 107 Am. St. Rep. 517 (1905).

Report of an engineer containing the result of his observations in the inspection of a building in the course of erection is inadmissible whether unsworn or supported by a voluntary affidavit. *United Surety Co. v. Summers*, 110 Md. 95, 72 Atl. 775 (1909).

9. *St. Louis, etc., R. Co. v. Maddox*, 18 Kan. 546 (1877); *Glenn v. Liggett*, 47 Fed. 472, *reversed* 51 Fed. 381, 2 C. C. A. 286 (1891) (treasurer).

§ 2761-1. *Shumway v. Leakey*, 67 Cal. 458, 8 Pac. 12 (1885).

tive law recognizes ² it may be received against him as his admission.

In this way, much of the learning relating to the effect, as against stockholders, of the entries made by corporation officers upon the books of the company may readily become relevant. Its consideration, however, seems to lie outside the scope of the present treatise.

² *Lynn v. Troy*, 57 Hun (N. Y.) 590, 10 N. Y. Suppl. 594, 32 N. Y. St. Rep. 497 (1890).

CHAPTER XXXIX.

HEARSAY AS SECONDARY EVIDENCE; DECLARATIONS AGAINST INTEREST.

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§ 2762. **Hearsay as Secondary Evidence.**— Before the paralyzing influence of the doctrine of *stare decisis*, as properly applicable to the administrative practise relating to the laws of evidence, had hardened, most unwisely, as it would seem,¹ the plastic creation of administrative exceptions to the hearsay rule into a rigid exclusion of all extrajudicial statements not then considered admissible it was recognized that the true administrative position of hearsay, when relevant, was that of secondary evidence.² The right of the proponent to prove his case³ was regarded as paramount, the administrative duty of the court to insist upon production of primary evidence⁴ being deemed a subsidiary one. The inherent weakness of hearsay as proof of what it asserts was no modern discovery. So obvious a circumstance could not well be overlooked. The earlier administrative stage of the development of the law of evidence, which preceded the distinctively procedural and to which we owe the creation of these so-called “exceptions” to the rule against hearsay, fully understood that the declarations of persons who could testify of their own knowledge regarding the existence of a fact was primary evidence as compared to an extrajudicial statement by one not sworn as a witness and who could not be tested by cross-examination. The extrajudicial assertion was treated, therefore, as secondary evidence, which, under the required conditions of showing its necessity and its objective and subjective relevancy, the proponent was at liberty to produce for what it was worth. In other words, this stage of legal growth was by no means of the opinion that because the light which could be thrown upon the path along which the court and jury must travel in order to arrive at the truth, was somewhat faint, the proper course was to shut it off entirely. That was the drastic expedient adopted by the period of rigid procedure and embodied in the anomalous rule absolutely excluding hearsay, however necessary or relevant, unless some specific exception could be shown for receiving it.

§ 2763. (*Hearsay as Secondary Evidence*); **Sporadic Attempts at such a general Rule.**— Before considering these “exceptions” in detail, it may be interesting to notice that what seems to be the sound administrative principle, that hearsay, when

§ 2762-1. §§ 172, 1618, n. 2.

2. § 2711.

3. §§ 334 *et seq.*

4. §§ 464 *et seq.*

shown to be necessary and relevant,¹ should be received as secondary evidence, had already, on the advent of a more rigidly procedural treatment of the subject, obtained considerable recognition by the courts of the United States. The influence of such a judicial feeling is still manifest.² In this view, while the testimony, under oath, of the declarant is admittedly a primary grade of proof,³ the reception of a report of his unsworn statement is permitted as a secondary grade of evidence. In these jurisdictions should the court become satisfied that the primary evidence is unattainable⁴ because the declarant is dead⁵ outside the jurisdiction,⁶ or that the evidence cannot, for some other reason, be procured⁷ the report of his extrajudicial statement may be received.⁸ If no

§ 2763-1. While the existence of relevancy would seem rather a condition of the application of the hearsay exclusion than an essential element of the statements admissible as an exception to that rule, the judicial habit of regarding it from the latter point of view seems inveterate.

2. "It is objected that, however impressive the declaration of a man of character may be, even without his oath, yet the law admits the word of no one in evidence without oath. The general rule certainly is so; but subject to relaxation, in cases of necessity, or extreme inconvenience." *Garwood v. Dennis*, 4 *Binn.* (Pa.) 314, 328 (1811), per *Tilghman*, C. J.

3. *Alabama*.—*Powell v. Governor*, 9 *Ala.* 36 (1846); *Glover v. Millings*, 2 *Stew. & P.* 28 (1832).

Georgia.—*Printup v. Mitchell*, 17 *Ga.* 558, 63 *Am. Dec.* 258 (1855); *Martin v. Atkinson*, 7 *Ga.* 228, 50 *Am. Dec.* 403 (1849).

Illinois.—*Jameson v. Conway*, 10 *Ill.* 227 (1848).

Massachusetts.—*Brown v. Mooers*, 6 *Gray* 451 (1856); *Orrok v. Commonwealth Ins. Co.*, 21 *Pick.* 456, 32 *Am. Dec.* 271 (1839).

Missouri.—*Patterson v. Fagan*, 38 *Mo.* 70 (1866).

New York.—*Jones v. East Soc.*

Rochester M. E. Church, 21 *Barb.* 161 (1855).

North Carolina.—*Rowland v. Rowland*, 24 *N. C.* 61 (1841).

Texas.—*Tillman v. Wetsel* (Civ. App. 1895), 31 *S. W.* 433.

Wisconsin.—*McGoon v. Irvin*, 1 *Pinn.* 526, 44 *Am. Dec.* 409 (1845).

4. *Gould v. Smith*, 35 *Me.* 513 (1853); *Peterson v. Ankrom*, 25 *W. Va.* 56 (1884).

5. *Maryland*.—*Smith v. Wood*, 31 *Md.* 293 (1869).

Massachusetts.—*Townsend v. Pepperell*, 99 *Mass.* 40 (1868); *Barrett v. Wright*, 13 *Pick.* 45 (1832).

Michigan.—*Stockton v. Williams*, *Walk. Ch.* 120 (1843).

Texas.—*Primm v. Stewart*, 7 *Tex.* 178 (1851).

Canada.—*Lyons v. Laskey*, 5 *Montreal Q. B.* 5 (1889).

6. *Udall's Case*, 1 *How. St. Tr.* 1271 (1590).

7. *Furman v. Coe*, 1 *Caines Cas.* (N. Y.) 96 (1804) (could not have testified before); *Griffith v. Sauls*, 77 *Tex.* 630, 14 *S. W.* 230 (1890) (physically incapacitated).

8. "Hearsay is uniformly holden incompetent to establish any specific fact which is in its nature susceptible of being proved by witnesses who can speak from their own knowledge." *Page v. Parker*, 40 *N. H.* 47, 60 (1860), per *Fowler*, J.

administrative Necessity appear for receiving the secondary grade, the production of the primary is insisted on.⁹ In other words, the rule against hearsay is accorded "full force and virtue." In case the element of *Relevancy* is lacking, neither the rule against hearsay nor any other special procedural exclusion need be invoked.¹⁰ Irrelevant statements, judicial or extrajudicial, are not evidence.

No *administrative principle* could justify the numerous exceptions to the rule against hearsay, shortly to be considered, without at the same time warranting the establishment of some general rule such as is temperately announced in the foregoing cases.¹¹

§ 2764. (*Hearsay as Secondary Evidence*); Exceptions to Hearsay Rule.—The hardship and injustice of the rule excluding the oral or written declarations of third persons as hearsay were in many cases early recognized by the courts. By such exclusion the proponent, whose right to prove his case is paramount, was frequently deprived of the only available evidence by which

9. *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456, 32 Am. Dec. 271 (1839); *Earle v. Clute*, 2 Abb. Dec. (N. Y.) 1, 1 Keyes (N. Y.) 36 (1864).

10. § 2722.

11. "Now, it might well have been that our law, like the law of some other countries, should have admitted as evidence the declarations of persons who are dead in all cases where they were made under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, whether in writing or oral, made by deceased persons, are not admissible in evidence at all. But so inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying and intolerable injustice, that a large

number of exceptions have been made to the general rule. * * * Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favor of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favor. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases." *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 240, 45 L. J. P. & Adm. 49, 34 L. T. Rep. (N. S.) 372, 24 Wkly. Rep. 860 (1876), per Jessel, M. R..

he could establish or maintain his legal rights. Attention was soon attracted to this situation and the substitution of sound reason, in judicial administration, resulted in a relaxation from a strict application of this rule. Gradually exceptions thereto began to creep in, it being apparent that, unless strict adherence thereto was departed from, the proponent would in many cases be deprived of substantial justice by reason of his failure to prove his case by the best evidence obtainable, and that the true objective of all rules of evidence, the attainment of truth, would be cast aside by the failure to create an exception. The foundation of the exception in each case is necessity. When this is established and the administrative requirement of subjective relevancy has been satisfied a declaration may then become admissible under one of the recognized exceptions, the three principal ones of which have been spoken of as first, an exception of a declaration accompanying an act; secondly, of a declaration against interest; and thirdly, of a declaration made by a person in the course of business, one which it was his duty to make.¹

§ 2765. (*Hearsay as Secondary Evidence*); *Exceptions to Hearsay Rule*); Subordinate Exceptions.—In addition to what have been spoken of as the three principal exceptions just referred to,¹ there are several others, some of which have been classified as subordinate ones. Among these, declares Jessel, M. R., “first is the proof of matters of public and general interest, one might say of quasi-historical interest, not actually historical, where we admit the declarations of persons who may from their positions be fairly presumed to have had knowledge on the subject. In the next place, we admit evidence which is in its nature very weak indeed, that is in matters of pedigree, where we admit declarations of deceased members of a family, on its being shown that the persons were members of the family.”² In these cases also to warrant the admission of an extrajudicial declaration the requirements of necessity and subjective relevancy must of course be satisfied.

§ 2764-1. *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 240, 45 L. J. P. & Adm. 49, 34 L. T. Rep. (N. S.) 372, 24 Wkly. Rep. 860 (1876), per Jessel, M. R.

§ 2765-1. § 2764.

2. *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 240, 45 L. J. P. & Adm. 49, 34 L. T. Rep. (N. S.) 372, 24 Wkly. Rep. 860 (1876).

§ 2766. (*Hearsay as Secondary Evidence*); *Exceptions to Hearsay Rule; Subordinate Exceptions*); Statements of Testator regarding Contents of lost Will.—Although the decision in *Sugden v. Lord St. Leonards*¹ was commented upon and, to a certain extent it may be said, questioned, in later judicial utterances² as going to the extreme limit yet the rule is at the present day frequently enunciated that declarations of a testator are admissible to prove the contents of a will shown to have been lost.³ Undoubtedly, however, this broad statement should be subject to some qualification such as that the will can not be proved solely by the declarations of the testator.⁴ Neither its execution⁵ nor

§ 2766-1. *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 203, 45 L. J. P. D. & Adm. 49, 34 L. T. Rep. (N. S.) 372, 24 Wkly. Rep. 60 (1876).

2. *Atkinson v. Morris*, L. R. (1897) Prob. 40.

"I do not desire to be understood as dissenting from the judgment of the majority of the Court of Appeal in *Sugden v. Lord St. Leonards*, (1) upon this point. I have expressed the doubts which I entertain; all I desire is to leave the question open should it hereafter come before your Lordships' House for decision." *Woodward v. Goulstone*, 11 App. Cas. 469, 480, 51 J. P. 307, 56 L. J. P. D. & Adm. 1, 55 L. T. Rep. (N. S.) 790, 35 Wkly. Rep. 337 (1886), per Herschell, L. C.

3. *Alabama*.—*Conoly v. Gayle*, 61 Ala. 116 (1878) (loss should be established before proof of contents is received).

Illinois.—*Matter of Page*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395 (1886) (in event of loss admissible).

Indiana.—*McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336 (1895).

Kansas.—*Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738 (1900).

Kentucky.—*Muller v. Muller*, 108 Ky. 511, 56 S. W. 802, 22 Ky. L. Rep. 207 (1900) (after proof of loss).

New Jersey.—*Davenport v. Davenport*, 67 N. J. Eq. 320, 58 Atl. 535 (1904).

Washington.—*In re Harris' Estate*, 10 Wash. 555, 39 Pac. 148 (1895) (admissible in the absence of a controlling statute to the contrary).

United States.—*Southworth v. Adams*, 22 Fed. Cas. No. 13,194, 11 Biss. 256 (1882).

Ireland.—*Flood v. Russell*, L. R. 29 Ir. 91 (1891); *Matter of Ball*, L. R. 25 Ir. 556 (1890).

Contra, *Fuentes v. Gaines*, 25 La. Ann. 85 (1873).

4. *Williams v. Miles*, 68 Nebr. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383, 4 Ann. Cas. 306 (1903) (cannot be proved solely by declarations of testator).

5. *Matter of Russell*, 33 Hun, 271 (1884); *Grant v. Grant*, 1 Sandf. Ch. (N. Y.) 235 (1844); *Clark v. Morton*, 5 Rawle (Pa.) 235, 28 Am. Dec. 667 (1835). *Compare*, *Buchanan v. Rollings* (Civ. App. 1909), 122 S. W. 962.

"There is no case to be found which goes to the length of saying that statements made by a testator to the effect that he has executed a will are admissible evidence in substitution for the proper and regular evidence of the fact of the execution of the will conformably to and with the formalities enjoined by the Wills Act." *Atkinson v. Morris*, L. R. (1897), Prob. 40, 48, per Lord Russell, C. J.

existence⁶ can be thus established in the absence of some other proof. It should be borne in mind, however, that in the case of a lost will secondary evidence alone is obtainable in order to prove its execution and contents, the latter of which can in a great majority of the cases only be established by the declarations of the testator. The rule, therefore, in this class of cases would seem to be that where substantial evidence has been introduced tending to show that a will was duly executed and that it has been lost, such declarations in respect to the contents will be received in corroboration of the other evidence.⁷

§ 2767. (*Hearsay as Secondary Evidence*); *Exceptions to Hearsay Rule*); *Other Enumerations*.—Among other instances in which exceptions have been made besides those we have already enumerated is that which permits of the introduction of dying declarations. Owing to the circumstances under which unsworn statements of this character were made a credit peculiarly distinctive is given to such utterances. Spontaneous exclamations are also among those which are received by the courts. Here the controlling element is spontaneity and not so much the fact that the declaration accompanies an act; that the statement is instinctive or automatic without opportunity for deliberation or misrepresentation tends to render it admissible as assertive of the truth. Extrajudicial statements in the form of reputation are also in some cases received, being spoken of as exception to the hearsay rule. Other instances are sometimes referred to as particular exceptions to this rule. It would seem, however, that they come within some one of those which we have already enumerated.

6. *In re Kennedy*, 167 N. Y. 163, 60 N. E. 442, 6 Prob. Rep. Ann. 661 (1901); *Grant v. Grant*, 1 Sandf. Ch. (N. Y.) 235 (1844).

7. *Indiana*.—*Inlow v. Hughes*, 38 Ind. App. 375, 76 N. E. 763 (1906) (the opinion in this case contains a lengthy review of the English and American decisions).

Kentucky.—*Chisholm v. Ben*, 7 B. Mon. 408 (1847).

Michigan.—*In re Estate of Lambie*, 97 Mich. 49, 56 N. W. 223 (1893) (to corroborate); *Hope's Appeal*, 48 Mich. 518, 12 N. W. 682 (1882) (to corroborate).

Missouri.—*Mann v. Balfour*, 187 Mo. 290, 86 S. W. 103 (1904).

Nebraska.—*Clark v. Turner*, 50 Nebr. 290, 69 N. W. 843, 38 L. R. A. 433 (1897) (cannot be proved solely by testator's declarations).

New Hampshire.—*Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591 (1895) (admissible to corroborate direct testimony as to execution and contents).

New York.—*Hatch v. Sigman*, 1 Dem. Surr. 519 (1883).

England.—*In re Ripley*, 4 Jur. (N. S.) 342, 1 Swab. & Tr. 68, 6 Wkly. Rep. 460 (1858).

§ 2768. (*Hearsay as Secondary Evidence*); *Exceptions to Hearsay Rule; Other Enumerations*); Modern Modifications.

—As has been said by Professor Thayer:¹ “Not only has the scope of these old titles been enlarged, but new exceptions have been made; or perhaps they are rather old ones coming to be recognized and formulated. * * * Such things are the natural development of the subject.” Whether the courts shall further relax the rule is a question, as it has been in the past in creating the already existing exceptions, or sound administration having in view during the course of the trial the fundamental rights of the parties and the furtherance of the interests of justice.² It is to these canons of judicial administration that the existence of the present exception is due, it having been regarded that when the conditions of necessity and relevancy were established, the unsworn statement ought to be admitted as secondary evidence of the facts asserted. These principles should control in all cases where extrajudicial declarations are offered in evidence, their admission or exclusion being determined not so much by the purpose for which they are offered as by the questions: Are they relevant for the purpose offered? Do the conditions of necessity and relevancy exist? Do the statements rationally and logically tend to ground the inference of the truth of their assertion in a normal mind? The courts, then, in determining the admissibility of a particular statement should be controlled by these conditions and to the extent that they are so controlled depend further modifications of the hearsay rule.

§ 2769. *Declarations against Interest; Rule stated.*—Among recognized exceptions to the rule excluding hearsay is that which, under the conditions of necessity and relevancy receives the declarations made against interest. Treating the statement as secondary evidence of the facts asserted, the rule is announced that where the primary evidence, the testimony of the declarant, is unavailable owing to the latter's death or other sufficient reason, proof will be received of his extrajudicial statement

It is incumbent upon one who seeks to establish a will in this manner to prove its execution and also to rebut the presumption of cancellation which arises from the fact of its not being found at the testator's

death. *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619 (1863).

§ 2768-1. Thayer's Preliminary Treatise on Evidence, p. 521.

2. § 332.

if against his pecuniary or proprietary interest when made.¹ The

§ 2769-1. *Alabama*.—Hart v. Kendall, 82 Ala. 144, 3 So. 41 (1886).

California.—Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433 (1903).

Georgia.—Chandler v. Mutual Life & Industrial Ass'n of Georgia, 131 Ga. 82, 61 S. E. 1036 (1908); Turner v. Turner, 123 Ga. 5, 50 S. E. 969, 107 Am. St. Rep. 76 (1905).

Idaho.—Work v. Kinney, 8 Ida. 771, 71 Pac. 477 (1902).

Illinois.—McIntosh v. Fisher, 125 Ill. App. 511 (1906); Deuterman v. Ruppel, 103 Ill. App. 106 (1902); Wabash R. Co. v. Farrell, 79 Ill. App. 508 (1898).

Indiana.—Kresling v. Powell, 149 Ind. 372, 49 N. E. 265 (1898); Tyres v. Kennedy, 126 Ind. 523, 26 N. E. 394 (1890).

Kansas.—Mentzer v. Burlingame, 85 Kan. 641, 118 Pac. 698 (1911); Wright v. Stage, 83 Kan. 445, 111 Pac. 467 (1910); Walker v. Brantner, 59 Kan. 117, 52 Pac. 80, 68 Am. St. Rep. 344 (1898).

Maine.—Royal v. Chandler, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305 (1887).

Minnesota.—Paine v. Crane, 112 Minn. 439, 128 N. W. 574 (1910); Dixon v. Union Iron Works, 90 Minn. 492, 97 N. W. 375 (1903).

Mississippi.—Baldridge v. Stribling, 57 So. 658 (1912).

Missouri.—Obuchon v. Boyd, 92 Mo. App. 412 (1902); Wilson v. Albert, 89 Mo. 537, 1 S. W. 209 (1886). See also, Obuchon v. Boyd, 92 Mo. App. 412 (1902).

Nebraska.—Harrison v. Harrison, 80 Neb. 103, 113 N. W. 1042 (1907); Seyfer v. Otoe County Bank, 66 Neb. 566, 92 N. W. 756 (1902); Quimby v. Ayres (1901), 95 N. W. 464 (1901).

New Hampshire.—Perkins v. Towle, 59 N. H. 583 (1880); Hinkley v. Davis, 6 N. H. 210 (1833).

New York.—Wallace v. Wallace, 137 N. Y. Suppl. 43 (1912); Mc-

Carthy v. Stanley, 136 N. Y. Suppl. 386 (1912); Lucia Mining Co. v. Evans, 146 App. Div. 416, 421, 131 N. Y. Suppl. 280 (1911); Kellum v. Mission of Immaculate Virgin, 82 App. Div. 523, 81 N. Y. Suppl. 603 (1903); Card v. Moore, 173 N. Y. 598, 66 N. E. 1105, *affirming* 68 App. Div. 327, 74 N. Y. Suppl. 18 (1902); *In re* Woodward, 69 N. Y. App. Div. 286, 74 N. Y. Suppl. 755 (1902). *Compare*, Putnam v. Lincoln Safe Deposit Co., 39 Misc. 738, 80 N. Y. Suppl. 961, *reversed* in 83 N. Y. Suppl. 1091, 87 App. Div. 13 (1903).

North Carolina.—Smith v. Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684 (1906); Ellis v. Harris, 106 N. C. 395, 11 S. E. 248 (1890); Magee v. Blankenship, 95 N. C. 563 (1886); Melvin v. Bullard, 82 N. C. 33, 37 (1880). See also, Gross v. Smith, 132 N. C. 604, 44 S. E. 111 (1903).

Pennsylvania.—Roberts' Appeal, 126 Pa. St. 102, 17 Atl. 538 (1889).

Rhode Island.—Tiffany v. Morgan, 73 Atl. 465 (1909).

South Carolina.—Wilson v. Gordon, 73 S. C. 155, 53 S. E. 79 (1905); Williams v. Mower, 29 S. C. 332, 7 S. E. 505 (1888)).

Texas.—Schauer v. Von Schauer (Civ. App. 1911), 138 S. W. 145; Smith v. International & G. N. R. Co., 34 Tex. Civ. App. 209, 78 S. W. 556 (1904); Wilson v. Simpson, 80 Tex. 279, 16 S. W. 40 (1891). See also, Smith v. International, etc. R. Co., 34 Tex. Civ. App. 209, 78 S. W. 556 (1904).

Vermont.—Swerdferger v. Hopkins, 67 Vt. 136, 31 Atl. 153 (1894).

Virginia.—First National Bank v. Holland, 99 Va. 495, 39 S. E. 126 (1901); Dooley v. Baynes, 86 Va. 644, 10 S. E. 974 (1890).

Washington.—Corbett v. Weaver, 59 Wash. 248, 109 Pac. 803 (1910).

West Virginia.—Bartlett v. Pat-

extrajudicial statement against interest may be either oral or in writing.²

In a criminal case, the declarations of the owner of the property which is the subject of the proceedings do not affect the prosecution.³

ton, 33 W. Va. 72, 10 S. E. 21, 5 L. R. A. 523 (1889).

England.—Bewley v. Atkinson, 49 L. J. Ch. 153, 13 Ch. D. 283, 41 L. T. 603, 28 W. R. 638 (1879); Parrott v. Watts, 47 L. J. C. P. 79, 37 L. T. 755 (1877); Higham v. Ridgway, 10 East 109, 10 Rev. Rep. 235 (1808); Harper v. Brock, 3 Wooddeson's Lect. 331-333 (1774); Ford v. Hopkins, 1 Salk. 283 (1701).

Canada.—Little v. Hyslop, 7 D. L. R. 478, 4 O. W. N. 285, 23 O. W. R. 247 (1912); Ganton v. Size, 22 U. C. Q. B. 473, 2 Grant Err. & App. (U. C.) 368 (1863).

Circumstances may be controlling upon the question whether or not a declaration is against interest. Humes v. O'Bryan, 74 Ala. 64, 79 (1883); Raines' Adm'r v. Raines' Cred'rs, 30 Ala. 425, 428 (1857).

"The cases where such evidence is admitted, seem to proceed, generally, upon the principle, that, by the decease of the person, better evidence cannot be had." Fitch v. Chapman, 10 Conn. 8, 11 (1833), per Williams, J.

2. Rand v. Dodge, 17 N. H. 343 (1845).

3. Com. v. Sanders, 14 Gray (Mass.) 394, 77 Am. Dec. 335 (1860) (embezzlement).

It has been said by the Supreme Court of Iowa, Mahaska County v. Ingalls, 16 Iowa 81, 95 (1864), per Dillon, J., that "this species of evidence being somewhat anomalous in its character, and standing on the *ultima thule* of competent testimony, is not highly favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, or at least to require the evidence

to be brought clearly within all the conditions requisite for its reception." See, also, Lucia Mining Co. v. Evans, 146 App. Div. 416, 421, 131 N. Y. Suppl. 280 (1911); Sheldon v. Sheldon, 133 N. Y. 1, 30, N. E. 730 (1892).

Declarations of deceased after injury.—In an action brought by a widow against a railway company for negligently causing the death of her husband, his declarations concerning his conduct, and other facts relating to the cause of the injury made after the injury was received, are admissible in evidence against the plaintiff as declarations of a deceased person made against his own interest, and the fact that the person by whom it is sought to prove such declarations is the superintendent of the defendant company, does not render him incompetent as a witness to prove them. Walker v. Brantner, 59 Kan. 117, 52 Pac. 8 (1898).

The declaration must have been against pecuniary or proprietary interests. Life Ins. Co. v. Hauston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 989 (1908). See also, Anderson v. Hanson, 34 Utah 183, 96 Pac. 1087, 18 L. R. A. (N. S.) 520 (1908); Smith v. Hanson, 34 Utah 171, 96 Pac. 1087, 18 L. R. A. (N. S.) 520 (1908).

"It cannot be doubted that the rule is firmly established in England and in this country that, in the absence of a statute, the declaration to be admissible, must be against either a pecuniary or a proprietary interest." Smith v. Hanson, 34 Utah 171, 96 Pac. 1087, 18 L. R. A. (N. S.) 520 (1908), per Straup, J.

Res gestae distinguished.— Whether the term *res gestae* be taken in its restricted or English meaning⁴ or, on the other hand, be accorded its broad American significance,⁵ in neither case is it required that the declaration against interest should be part of it. The extrajudicial statement need not, as a matter of admissibility, accompany or explain the doing of any act which is itself relevant.⁶ Its probative force, however, may gain in a marked degree by such contemporaneous incorporation with a mentally controlling fact as will make the declaration a spontaneous one.

§ 2770. (*Declarations against Interest; Rule Stated*); Distinguished from Admissions.— The declaration against interest, forming the subject of an exception to the rule against hearsay, is broadly distinguished from an *admission*,¹ with which it has at times been confused.² The points of essential difference in main are four: (1) The admission is a creature of procedure; the declaration against interest is entirely a matter of evidence, i. e., of reasoning. (2) Admissions are primary evidence of the facts stated; the declaration against interest is a secondary grade of proof, received only when shown to be necessary to the case of the proponent, the primary evidence being unavailable. (3) The admission is receivable in evidence only when the declarant or some one identified with him in legal interest is a party to the suit and the admission is offered against him; the declaration against interest may be made by anyone, and is receivable in suits between third persons³ and though made in favor of the present proponent⁴ or one in privity with the declarant.⁵ (4) The admission is received although it was not considered by the declarant, at the time it was made, as being opposed to his interest; in the declaration against interest, the declarant must have been distinctly conscious, at the time of making his assertion, that it was directly opposed

4. § 2582.

5. § 2583.

6. *Mentzer v. Burlingame*, 85 Kan. 641, 118 Pac. 698 (1911); *White v. Choteau*, 1 E. D. Smith (N. Y.) 493 (1852); *Ivat v. Finch*, 1 Taunt. 141, 9 Rev. Rep. 716 (1808).

§ 2770-1. § 1233 nn. 1 *et seq.*

2. By way of illustration, however, much light may be thrown upon the exception to the hearsay rule under discussion from an examination of de-

cisions rendered in cases where the declarant or his representative is a party and such rulings have occasionally been cited in this connection.

3. *Rand v. Dodge*, 17 N. H. 343 (1845).

4. *Currier v. Gale*, 14 Gray (Mass.) 504, 77 Am. Dec. 343 (1860).

5. *Rand v. Dodge*, 17 N. H. 343 (1845); *Turner v. Dewan*, 41 U. C. Q. B. 361 (1877).

to his pecuniary or proprietary interest.⁶ The frequent failure to observe the distinction between an admission and a declaration against interest continues to cause confusion.⁷

§ 2771. (*Declarations against Interest*); Administrative Requirements; Necessity.—As in other cases, involving the use of secondary evidence, it is essential to the admission of the hearsay declaration against interest that the existence of a satisfactory necessity for using it be shown to the court.¹ The proponent's right to prove his case² being regarded as paramount, he must do at least two things: (1) He must show that a particular fact is fairly essential to the establishment of his case.³ (2) He must affirmatively prove⁴ that he is practically prevented from produc-

6. § 2772.

Evidence of declarations against the interest of the person making them, is not favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, and the evidence is not admissible, unless the statements were made to the knowledge of the declarant, against his obvious and a real, pecuniary or proprietary interest. *Life Ins. Co. of Virginia v. Hairston*, 108 Va. 832; 62 S. E. 1057, 128 Am. St. Rep. 989 (1908).

7. § 2734a.

§ 2771-1. *Manning v. Lechmere*, 1 Atk. 453, 26 Eng. Reprint 288 (1737). See, also, *Warren v. Greenville*, 2 Str. 1129 (1773). "The general rule of evidence excludes all hearsay. From necessity and from the impracticability in some instances, of other proof, exceptions to this rule have been made." *Westfield v. Warren*, 8 N. J. L. 251 (1826).

2. §§ 334 et seq.

3. It has even been required that no other method of proving the fact should exist. Lord Hardwicke, for example, suggested that the reason of the rule is that "no other [evidence] can be had." *Manning v. Lechmere*, 1 Atk. 453, 26 Eng. Reprint 288 (1737). See, also, *Warren v. Greenville*, 2 Str. 1129 (1740).

4. Alabama.—*Trammell v. Hudson*, 78 Ala. 222 (1884); *Moore v. Andrews*, 5 Port. 107 (1837).

Connecticut.—*Fitch v. Chapman*, 10 Conn. 8 (1833).

Iowa.—*Mahaska Co. v. Ingalls*, 16 Iowa 81 (1864).

Massachusetts.—*Currier v. Gale*, 14 Gray 504, 77 Am. Dec. 343 (1860).

New York.—*Brewster v. Doane*, 2 Hill 537 (1842).

Ohio.—*Webster v. Paul*, 10 Ohio St. 532, 536 (1860).

South Carolina.—*Lowry v. Moss*, 1 Strobb. 63 (1846).

Vermont.—*Davis v. Fuller*, 12 Vt. 178, 189 (1840).

United States.—*Wilson v. Simpson*, 9 How. 109, 13 L. ed. 66 (1850).

England.—*Papendick v. Bridgwater*, 5 E. & B. 166, 178 (1855); *Phillips v. Cole*, 10 A. & E. 106 (1839); *Spargo v. Brown*, 9 B. & C. 935, 936 (1829); *Barough v. White*, 4 B. & C. 325, 328 (1825); *Manby v. Curtis*, 1 Price 225, 229 (1815); *Harri-son v. Blades*, 3 Campb. 457 (1813).

Canada.—*Bertrand v. Heaman*, 11 Man. L. R. 205, 210 (1896).

"Whether a foundation for the admission of such declarations has been shown is a question addressed to the discretion of the trial judge, and his decision thereon will not be reversed if there be any evidence fairly tending to support it." *Paine v. Crane*,

ing the primary evidence of it. In case of hearsay, the extrajudicial statement offered in proof of the facts asserted, this is the testimony of the percipient as a witness. In this connection, as in others, the proponent may show the unavailability of the witness in a very conclusive manner by proving that the declarant is dead.⁵ Should he be able to establish the fact that he has no means of compelling the declarant to testify⁶ and that the latter declines to do so voluntarily, as where the person whose extrajudicial statement is offered is outside the jurisdiction of the court⁷ or has the benefit of a privilege and proposes to avail himself of it, or that by reason of interest he is incompetent,⁸ a sufficient case of forensic

112 Minn. 439, 128 N. W. 574 (1910), per Start, C. J.

5. *Alabama*.—Hart v. Kendall, 82 Ala. 144, 3 So. 41 (1886); Trammell v. Hudmon, 78 Ala. 222 (1884); Humes v. O'Bryan, etc., 74 Ala. 64 (1883).

Arkansas.—Walnut Ridge Mercantile Co. v. Cohn, 79 Ark. 338, 96 S. W. 413 (1906).

Connecticut.—Fitch v. Chapman, 10 Conn. 8 (1833).

Georgia.—Cunningham v. Schley, 41 Ga. 426 (1870).

Indiana.—Doe v. Evans, 8 Blackf. 322 (1846).

Iowa.—Mahaska County v. Ingalls, 16 Iowa 81 (1864).

Massachusetts.—Currier v. Gale, 14 Gray 504, 77 Am. Dec. 343 (1860).

Minnesota.—Paine v. Crane, 112 Minn. 439, 128 N. W. 574 (1910).

Missouri.—Howell v. Howell, 37 Mo. 124 (1865).

New Hampshire.—Rand v. Dodge, 17 N. H. 343 (1845).

New York.—McDonald v. Wesendonck, 30 Misc. 601, 62 N. Y. Suppl. 764 (1900); Swan v. Morgan, 88 Hun 378, 34 N. Y. Suppl. 829, 68 N. Y. St. Rep. 768 (1895); Lyon v. Ricker, 141 N. Y. 225, 36 N. E. 189 (1894).

Ohio.—Bird v. Hueston, 10 Ohio St. 418 (1859).

South Carolina.—Lowry v. Moss, 1 Strobb. 63 (1846).

Utah.—Scott v. Crouch, 24 Utah 377, 67 Pac. 1068 (1902).

Vermont.—Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334 (1840).

West Virginia.—Bartlett v. Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523 (1889).

England.—Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844).

Deceased partner.—Where the member of the firm who alone possessed knowledge on the subject in question is shown to be dead, this should admit the secondary evidence of his extrajudicial statements, in the absence of specific objection. Heidenheimer v. Johnston, 76 Tex. 200, 13 S. W. 46 (1890). See Card v. Moore, 68 N. Y. App. Div. 327, 74 N. Y. Suppl. 18 (1902), *affd.* 173 N. Y. 598, 66 N. E. 1105 (1903).

6. *Harriman v. Brown*, 8 Leigh (Va.) 697 (1837).

7. *Walnut Ridge Mercantile Co. v. Cohn*, 79 Ark. 338, 96 S. W. 413 (1906); *Shearman v. Atkins*, 4 Pick. (Mass.) 283, 293 (1826); *South Omaha v. Wrzensinski*, (Nebr. 1902) 92 N. W. 1045; *Alter v. Berghaus*, 8 Watts (Pa.) 77 (1839). But see, *Mahaska Co. v. Ingalls*, 16 Iowa 81 (1864); *Stephens v. Gwenap*, 1 M. & Rob. 120 (1831).

8. *Pugh v. McRae*, 2 Ala. 393, 394 (1841); *Fitch v. Chapman*, 10 Conn. 8, 11 (1833); *Dwight v. Brown*, 9

necessity is established. Incapacity to testify, due to some physical or mental⁹ infirmity, may constitute a satisfactory necessity to warrant the court in receiving the secondary evidence.

§ 2772. (*Declarations against Interest; Administrative Requirements*); Subjective Relevancy; Adequate Knowledge.—As viewed by judicial administration, not only must the proponent show adequate forensic necessity for receiving the secondary evidence of a declaration against interest, but he must establish the further fact that the extrajudicial statement which he offers is objectively and subjectively *relevant* to the proof of that which it asserts. In respect of objective relevancy, no question, as a rule, arises. In connection with this, as with the other exceptions to the hearsay rule, judicial attention is concentrated upon the subjective relevancy shown by the declarant. Here, as elsewhere, the elements of such subjective relevancy are two, Adequate Knowledge and Absence of Controlling Motive to Misrepresent.

Adequate knowledge may appropriately be defined as knowledge commensurate with the inference or statement which the witness proposes to make, sufficient, in the opinion of the presiding judge, to warrant the jury, as rational men, in acting in accordance with his testimony. Knowledge of this nature and extent on the part of the declarant must be shown in order to warrant the reception of a declaration against interest as secondary evidence of the facts asserted.¹ It is not regarded as sufficient, for example, to show

Conn. 83, 93 (1831). But see, *Burton v. Scott*, 3 Rand. (Va.) 399, 409 (1825).

9. *Mahaska Co. v. Ingalls*, 16 Iowa 81 (1864); *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181 (1825). But see, *Harrison v. Blades*, 3 Campb. 457 (1813). See also, *Jones v. Henry*, 84 N. C. 320, 324 (1881).

§ 2772-1. *Illinois*.—*Friberg v. Donovan*, 23 Ill. App. 58 (1887).

Iowa.—*Mahaska County v. Ingalls*, 16 Iowa 81 (1864).

Minnesota.—*Paine v. Crane*, 112 Minn. 439, 128 N. W. 574 (1910); *Halvorsen v. Moon*, etc. *Lumber Co.*, 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669 (1902).

Missouri.—*Wynn v. Cory*, 48 Mo. 346 (1871).

New York.—*McDonald v. Wesendonck*, 30 Misc. 601, 62 N. Y. Suppl. 764 (1900); *White v. Chouteau*, 1 E. D. Smith 493 (1852).

Ohio.—*Bird v. Hueston*, 10 Ohio St. 418 (1859).

South Carolina.—*Cruger v. Daniel*, *McMull. Eq.* 157 (1840).

Texas.—*Long v. Moore*, 19 Tex. Civ. App. 363, 48 S. W. 43 (1898).

Utah.—*Smith v. Hanson*, 34 Utah 171, 96 Pac. 1087, 18 L. R. A. (N. S.) 520 (1908); *Anderson v. Hanson*, 34 Utah 183, 96 Pac. 1087 (1908).

Virginia.—*Life Ins. Co. v. Han-*

that such an extrajudicial statement was found, after his decease, among the papers of the person purporting to be the declarant.² He must be affirmatively shown to have made the statement and it must also appear that he knew what he was talking about.

§ 2773. (*Declarations against Interest; Administrative Requirements; Subjective Relevancy*); Absence of Controlling Motive to misrepresent.—While the self-serving character of a hearsay declaration is, as a rule, practically fatal to its admissibility, even where it is logically relevant, modern statutory legislation¹ as well as the administrative action of courts² finds a strong element of probative force in the fact that the declaration is against the interest of the declarant. The subjective relevancy of such an extrajudicial statement seems clear, so far as relates to the requirement that an absence of a controlling motive to misrepresent must be affirmatively shown. The very nature of the statement itself excludes, *prima facie* and on the surface, the supposition that it was made with a motive to deceive.³ Men seldom

ston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 989 (1908).

England.—Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844); Marks v. Lahee, 3 Bing. N. C. 408, 420 (1837); Barker v. Ray, 2 Russ. 63, 76 (1826); Goss v. Wathington, 3 B. & B. 132, 7 E. C. L. 645 (1821); Short v. Lee, 2 Jac. & W. 464, 488 (1821).

2. *Devonshire v. Neill*, 2 L. R. Ir. 132 (1877).

§ 2773-1. *Manuel v. Flynn*, 5 Cal. App. 319, 90 Pac. 463 (1907); *Spotswood v. Spotswood*, 4 Cal. App. 711, 89 Pac. 362 (1907); *Shackelford v. Orris*, 135 Ga. 29, 68 S. E. 838 (1910); *Delmoe v. Long*, 35 Mont. 38, 88 Pac. 778 (1907).

2. *Casey v. Casey*, 107 Iowa 192, 70 Am. St. Rep. 190, 77 N. W. 844 (1899).

3. *Alabama.*—*Humes v. O'Bryan*, 74 Ala. 64, 79 (1883).

Georgia.—*Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92 (1892); *Turner v. Tyson*, 49 Ga. 165, 169 (1873).

Indiana.—*Doe v. Evans*, 1 Blackf. 322 (1846).

Iowa.—*Robinson v. Robinson*, 22 Iowa 427, 433 (1867).

Minnesota.—*Halvorsen v. Moon & Kerr Lumber Co.*, 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669 (1902).
New Hampshire.—*Hinkley v. Davis*, 6 N. H. 210 (1833).

New York.—*McDonald v. Wesendonck*, 30 Misc. (N. Y.) 601, 62 N. Y. Suppl. 764 (1900).

South Carolina.—*Gilchrist v. Martin*, Bailey Eq. 492 (1831).

England.—*Smith v. Blakey*, L. R. 2 Q. B. 326 (1867); *R. v. Birmingham*, 1 B. & S. 763 (1861); *Doe v. Langfield*, 16 M. & W. 497, 513 (1847); *Baron de Bode's Case*, 8 Q. B. 208, 243 (1845); *Peaceable v. Watson*, 4 Taunt. 16 (1811); *Doe v. Rickarby*, 5 Esp. 4 (1803).

Canada.—*Powell v. Wathen*, 5 All. N. Br. 258 (1862). But see, *County of Mahaska v. Ingalls*, 16 Iowa 81 (1864); *Gilchrist v. Martin*, 1 Bailey's Eq. 503 (1831); *Marks v.*

affirm the existence of facts which are in derogation of their pecuniary or proprietary interests. When they do, it is usually because they believe in the truth of that which they state.⁴ Un-

Lahee, 3 Bing. N. C. 40 (1837); *Gleadow v. Atkins*, 3 Tyrw. 289, 301 (1833).

"The admissibility of the evidence rests upon the improbability that one will admit that which it is for his pecuniary interest to deny." *Mentzer v. Burlingame*, 85 Kan. 641, 118 Pac. 698 (1911), per Benson, J.

"Experience has taught us that when one makes a declaration in disparagement of his own rights or interests it is generally true, and because it is so the law has deemed it safe to admit evidence of such declarations against him and those claiming through or under him." *Mercer's Adm'r v. Mackin*, 14 Bush (Ky.) 434, 441 (1879), per Cofer, J.

"The rule as thus established is said to be founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against himself, and the law, in this instance, substitutes for the sanction of a judicial oath the more powerful one arising out of the sacrifice of a man's own interests. This natural disposition to speak in favor of, rather than against interest, is so strong that when one has declared anything to his own prejudice, his statement is so stamped with the image and superscription of truth that it is accepted by the law as proof of the correctness and accuracy of what was said, and the fact that it was against interest is taken as a full guaranty of its truthfulness in place, not only of an oath, but of cross-examination as well, they being the usual tests of credibility." *Smith v. Moore*, 142 N. C. 277, 287, 55 S. E. 275, 7 L. R. A. (N. S.) 684 (1906), per Walker, J.

"The rule * * * is no more than an extension of the principle which allows entries or memorandums, which were prejudicial to the interest of the writer where his testimony can not be had, to be evidence of a fact in a controversy between strangers; thus substituting for the sanction of a judicial oath, the more powerful sanction of a sacrifice of self-interest." *Addams v. Seitzinger*, 1 Watts & S. (Pa.) 243, 244 (1841), per Gibson, C. J.

"The principle is founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against his own interest." *Gibblehouse v. Strong*, 3 Rawle (Pa.) 437, 438 (1832), per Rogers, J.

"The interest against which the statement appears to be made must, in order to supply that sanction which, after the death of the party, is accepted as a substitute for an oath be an interest existing at the time of making the statement." *Lalor v. Lalor*, 4 L. R. Ire. 678, 681 (1879), per Fitzgibbon, C. J.

"When entries are against the pecuniary interest of the person making them, and never could be made available for the person himself, there is such a probability of their truth that such statements have been admitted after the death of the person making them." *Smith v. Blakey*, L. R. 2 Q. B. 326, 331 (1867), per Blackburn, J.

4. *Humes v. O'Bryan, etc.*, 74 Ala. 64 (1883); *Swan v. Morgan*, 88 Hun (N. Y.) 378, 34 N. Y. Suppl. 829, 68 N. Y. St. Rep. 768 (1895); *Peace v. Jenkins*, 32 N. C. 355 (1849).

doubtedly, it is this characteristic feature of this species of evidence which constitutes the reason for having selected it as an exception to the hearsay rule, presenting, as it does, few of the administrative dangers to which self-serving hearsay naturally gives rise. The statement in question may be admissible upon quite other grounds. For example, it may be the admission of a party to the record⁵ or of some one who sustains a relation of privity to such a party.⁶ Even under such circumstances, the fact that the utterance is against the interest of the declarant is made

5. *Hunter v. Porter*, 133 Iowa 391, 109 N. W. 283 (1906).

6. *Alabama*.—*Knight v. Hunter*, 155 Ala. 238, 46 So. 235 (1908).

Colorado.—*Allen v. Shires*, 47 Colo. 433, 439, 107 Pac. 1070, 1072 (1910).

Nebraska.—*Harrison v. Harrison*, 80 Neb. 103, 113 N. W. 1042 (1907).

Rhode Island.—*Tiffany v. Morgan*, 73 Atl. 465 (1909).

Texas.—*Chew v. Jackson*, 45 Tex. Civ. App. 656, 102 S. W. 427 (1907).

Vermont.—*Mower v. McCarthy*, 79 Vt. 142, 64 Atl. 578, 7 L. R. A. 418 (N. S.) 118 Am. St. Rep. 942 (1906).

Life insurance.—Where plaintiff and defendant claimed the proceeds of a beneficiary certificate adversely, declarations made by insured to defendant were inadmissible against plaintiff. *Grand Lodge Colored Knights of Pythias v. Mackey*, (Tex. Civ. App. 1907) 104 S. W. 907.

The interest of one whose life has been insured in the proceeds of the policy is so remote and contingent as scarcely to amount to a pecuniary interest. His declarations after the issuing of the policy and its going into effect are not so far against his pecuniary interest as to be admissible after his decease as those of a decedent. *Life Ins. Co. of Virginia v. Hairston*, 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 989 (1908).

That such a statement of a deceased person against interest should be received it may even be required

that a relation of privity be established. Thus the statement of the insured under a beneficiary certificate tending to show the falseness of certain representations in his application will not be received to impair the vested right of the beneficiary under the certificate. *Rawson v. Milwaukee Mut. Life Ins. Co.*, 115 Wis. 641, 92 N. W. 378 (1902).

Statutory damages for killing.—Where a suit is brought by a widow to recover damages for the death of her husband, under a certain statute, declarations of decedent as to his physical condition on the morning of the day when he was killed, and not a part of the *res gestae*, are inadmissible against the objection of the widow. *Jacksonville Electric Co. v. Sloan*, 52 Fla. 257, 42 So. 516 (1906).

Statements against interest are presumptively true. *Chambers v. Chambers*, 227 Mo. 262, 127 S. W. 86, 137 Am. St. Rep. 567 (1910). In other words, the circumstance does not constitute conclusive evidence on the subject. *Linderman v. Carmin*, 142 Mo. App. 519, 127 S. W. 124 (1910).

On the contrary, it has been held that the admissions of a decedent, although receivable, constitute, when standing alone, evidence of an unsatisfactory nature. *Collins v. Harrell*, 219 Mo. 279, 118 S. W. 432 (1908) (specific performance of contract to convey land).

to furnish the ground for admissibility,⁷ although admissibility, as distinguished from weight, rests, in case of an admission, upon a procedural rather than upon a rational basis.⁸ Nevertheless, the statement is most often spoken of as a "declaration against interest," though the distinction between an admission and a declaration against interest⁹ is apparently difficult to observe. Naturally, if declarations even of this highly probative nature, were made many years before evidence of them was submitted to the tribunal, they will be received by the court with careful scrutiny.¹⁰

Need not be made ante litem motam. A still stronger guaranty to trustworthiness is furnished where the extrajudicial declaration is not only shown to have been made in opposition to the known financial or proprietary interest of the declarant, but made at a time when these inhibiting considerations were strengthened and reinforced by a spirit of partisanship and controversy attending the presence of a *lis mota*. Naturally, it is not required that the declaration of this nature and quality should have been made *ante litem motam*.¹¹

Spontaneity not required.—No administrative necessity has

7. *Alabama.*—Burton v. Phillips, 161 Ala. 664, 49 So. 848 (1909) (joint debtor).

Iowa.—Hunter v. Porter, 133 Iowa 391, 109 N. W. 283 (1906).

Montana.—Delmoe v. Long, 35 Mont. 38, 88 Pac. 778 (1907).

Ohio.—Hicks v. Hicks, 29 Ohio Cir. Ct. R. 628 (1906), judgment affirmed 76 Ohio St. 575, 81 N. E. 1187 (1907).

Pennsylvania.—Laughlin v. Laughlin, 219 Pa. 629, 69 Atl. 288 (1908).

Texas.—Chew v. Jackson, 45 Tex. Civ. App. 656, 102 S. W. 427 (1907).

Vermont.—Mower v. McCarthy, 79 Vt. 142, 64 Atl. 578, 7 L. R. A. (N. S.) 418, 118 Am. St. Rep. 942 (1906).

That a declaration is against the pecuniary or proprietary interest of the decedent must appear clearly and unmistakably if, in the absence of a statute, the declaration of a decedent is to be received in evidence. Smith v. Hanson, 34 Utah 171, 96 Pac. 1087, 18 L. R. A. (N. S.) 520 (1908);

Anderson v. Hanson, 34 Utah 183, 96 Pac. 1092 (1908).

8. § 1233.

Action in suppressing deposition made effective.—Alleged admissions to the opposite party of the same facts testified to by a witness whose deposition has been suppressed cannot be shown on cross-examination of such opposite party to supply the loss of the deposition suppressed. Sayre v. Woodyard, 66 W. Va. 288, 66 S. E. 320, 28 L. R. A. (N. S.) 388 (1909).

9. § 2770.

10. Rinkel v. Lubke, (Mo. 1912) 152 S. W. 81; Cobb v. Macfarland, 87 Neb. 408, 127 N. W. 377 (1910).

11. Chandler v. Mutual L. I. Assn., 131 Ga. 82, 61 S. E. 1036 (1908); Halvorsen v. Moon, etc., Lumber Co., 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669 (1902); Compare Mahaska Co. v. Ingalls Ex'r, 16 Iowa 81 (1864).

been perceived for requiring that another general safeguard against mistake in or manufacture of evidence, *guaranty of spontaneity* should also be present, if a statement against interest is to be received.¹²

The burden of proving that the declaration was against the interest of the deceased declarant lies upon the proponent of the evidence.¹³ For greater caution, also, it is not objectionable that affirmative proof be made that there was, in point of fact, no controlling motive on the part of the declarant to misrepresent the truth.¹⁴

Whether a sufficient foundation has been shown for admission in evidence of declarations by a person since deceased against declarant's pecuniary interests is a question within the administrative function of the trial judge.¹⁵

§ 2774. (*Declarations against Interest*); Nature of Interest; Pecuniary.—As embodied in the statement of the rule¹ the interest in derogation of which the declarant speaks may be either pecuniary or proprietary. In other words, the statement must have antagonized the direct material interest of the speaker as owner of money or other property.²

Pecuniary interest.—Considering these forms of interest in the order stated, the declaration against interest is seen to be admissible when the nature of that interest is pecuniary.³ This decla-

12. *Doe v. Turford*, 3 B. & Ad. 890, 1 L. J. K. B. 262, 23 E. C. L. 388 (1832).

13. *Sanguinetti v. Rossen*, 12 Cal. App. 623, 107 Pac. 560 (1906).

14. *Paine v. Crane*, 112 Minn. 439, 128 N. W. 574 (1910).

15. *Paine v. Crane*, 112 Minn. 439, 128 N. W. 574 (1910).

§ 2774-1. § 2769.

2. These forms of material interest possess the administrative advantage that, being subject to direct perception, their existence may be readily proved. On principle, however, interest in any form, though mental or moral, which may reasonably be assumed to influence the action of the declarant toward truth telling should be within the rule.

3. *Alabama*.—*Bondurant v. State Bank*, 7 Ala. 830 (1845).

Arkansas.—*Walnut Ridge Mercantile Co. v. Cohn*, 79 Ark. 338, 96 S. W. 413 (1906).

Illinois.—*German Ins. Co. v. Bartlett*, 188 Ill. 165, 58 N. E. 1075, 80 Am. St. Rep. 172 (1900).

Indiana.—*Keesling v. Powell*, 149 Ind. 372, 49 N. E. 265 (1898).

Louisiana.—*Malchaux v. Lefebvre*, 4 Mart. (N. S.) 489 (1826).

Minnesota.—*Paine v. Crane*, 112 Minn. 439, 128 N. W. 574 (1910); *Halvorsen v. Moon, etc., Lumber Co.*, 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669 (1902); *Vogely v. Bloom*, 43 Minn. 163, 45 N. W. 10 (1890).

Nebraska.—*Quinby v. Ayres*, 1

ration may, with equal admissibility, be made in one of several different forms. The declarant, for example, may acknowledge himself legally indebted to some other person.⁴ On the other hand, he may state that nothing or something less than the *prima facie* sum is due to himself from a third person on a particular account.⁵ He may concede that he has received money⁶ or other thing of

Neb. (Unof.) 70, 95 N. W. 464 (1901).

New York.—McCarthy v. Stanley, 151 App. Div. 358, 136 N. Y. Suppl. 386 (1912); Livingston v. Armoux, 56 N. Y. 507, 519 (1874).

Ohio.—Hicks v. Hicks, 29 Ohio Cir. Ct. R. 628 (1906), *affirmed* 76 Ohio St. 575, 81 N. E. 1187 (1907); Bird v. Hueston, 10 Ohio St. 418 (1859).

Pennsylvania.—Kridner v. Hartzell, 40 Pa. Super. Ct. 186 (1909).

Vermont.—Chase v. Smith, 5 Vt. 556 (1833).

Virginia.—Burton v. Scott, 3 Rand, 399 (1825).

England.—Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844); Goss v. Watlington, 3 B. & B. 132, 7 E. C. L. 645 (1821); Roe v. Raulings, 7 East, 279 (1806).

Consideration.—A declaration that no consideration was given for a mortgage is admissible. Sparling v. Wells, 24 App. Div. (N. Y.) 584, 49 N. Y. Suppl. 321 (1898).

4. *Alabama*.—Burton v. Phillips, 161 Ala. 664, 49 So. 848 (1909).

Illinois.—Deuterman v. Ruppel, 103 Ill. App. 106 (1902).

Indiana.—Parker v. State, 8 Blackf. 292 (1846).

Kentucky.—Story v. Story, 61 S. W. 279, 22 Ky. L. Rep. 1731 (1901).

Louisiana.—Succession of Trouilly, 52 La. Ann. 276, 26 So. 851 (1899).

New York.—Swan v. Morgan, 88 Hun 378, 34 N. Y. Suppl. 829, 68 N. Y. St. Rep. 768 (1895).

North Carolina.—Peace v. Jenkins, 32 N. C. 355 (1849).

West Virginia.—Bartlett v. Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523 (1889).

Declarations by one of the makers of a note tending to show that the entire debt has not been paid have been admitted as declarations against interest. Burton v. Phillips, 161 Ala. 664, 49 So. 848 (1909).

Services.—In an action against executors for services rendered to the testator declarations by the latter in respect thereto should be received in behalf of the plaintiff. Wright v. Stage, 83 Kan. 445, 111 Pac. 467 (1910); Tiffany v. Morgan, (R. I. 1909) 73 Atl. 465.

5. *Scammon v. Scammon*, 33 N. H. 52 (1856); Sparling v. Wells, 24 N. Y. App. Div. 584, 49 N. Y. Suppl. 321 (1898); Scott v. Crouch, 24 Utah 377, 67 Pac. 1068 (1902).

6. *Alabama*.—Hart v. Kendall, 82 Ala. 144, 3 So. 41 (1886).

Georgia.—Field v. Boynton, 33 Ga. 239 (1862).

Illinois.—Deuterman v. Ruppel, 103 Ill. App. 106 (1902).

Indiana.—Keesling v. Powell, 149 Ind. 372, 49 N. E. 265 (1898).

Maine.—Libbey v. Brown, 78 Me. 492, 7 Atl. 114 (1886).

Massachusetts.—Cunningham v. Davis, 175 Mass. 213, 56 N. E. 2 (1900); Jones v. Howard, 3 Allen. 223 (1861); Hancock v. Cook, 18 Pick. 30, 32 (1836); Shearman v. Akins, 4 Pick. 283 (1826).

New Hampshire.—Rand v. Dodge, 17 N. H. 343 (1845).

New York.—Livingston v. Arnoux, 56 N. Y. 507 (1874); Sherman v. Crosby, 11 Johns 70 (1814).

Pennsylvania.—Taylor v. Gould,

value⁷ on a given day. In the same way, the declarant may assert under this exception to the hearsay rule, not only that he has received the money in question but also that he has misappropriated it.⁸ Similarly he may admit that he owes more than his apparent share of an obligation, which he owes in common with others⁹ or even that he is sole debtor under an instrument which ostensibly binds others as well as himself.¹⁰ In short, any statement to the effect that his financial position is worse than it would *prima facie* appear to be will be received, under proper conditions, as a declaration against interest.

§ 2775. (*Declarations against Interest; Nature of Interest*); Proprietary.—An equal guarantee of trustworthiness is furnished where the extrajudicial statement is opposed to the *proprietary* interest of the declarant.¹

58 Pa. St. 152 (1868); Addams v. Seitzinger, 1 W. & S. 243, 244 (1841), per Gibson, C. J.

South Carolina.—Lowry v. Moss, 1 Strobb. 63 (1846).

Tennessee.—Nichol v. Ridley, 5 Yerg. 63, 26 Am. Dec. 254 (1833).

Texas.—Heidenheimer v. Johnston, 76 Tex. 200, 13 S. W. 46 (1890).

Virginia.—Holladay v. Littlepage, 2 Munf. 316 (1811).

England.—Taylor v. Witham, 3 Ch. D. 605, 45 L. J. Ch. 798, 24 Wkly. Rep. 877 (1876); Giffard v. Williams, L. R. 8 Eq. 494, 38 L. J. Ch. 597, 21 L. T. Rep. (N. S.) 575, 17 Wkly. Rep. 56 (1868); Bright v. Legerton, 6 Jur. (N. S.) 1179, 29 L. J. Ch. 852, 8 Wkly. Rep. 678 (1860); Davies v. Humphreys, 6 M. & W. 153 (1840); Middleton v. Melton, 10 B. & C. 317, 21 E. C. L. 139 (1829); Higham v. Ridgeway, 10 East 109, 10 Rev. Rep. 235 (1808); Fawkner v. Watts, 1 Atk. 406, 26 Eng. Reprint 257 (1739); Ford v. Hopkins, 1 Salk. 283 (1701).

Canada.—Turner v. Dewan, 41 U. C. Q. B. 361 (1877); The St. John Mechanics' Whale Fishing Co. v. Kirby, 2 Kerr (4 N. Br.) 647 (1845).

7. Wardhope v. Canadian Pac. R. Co., 7 Ont. 321, 329 (1884).

8. Scott County v. Fluke, 34 Iowa 317 (1872); Mahaska County v. Ingalls, 16 Iowa 81 (1864).

9. Humes v. O'Bryan, etc., 74 Ala. 64 (1883); Card v. Moore, 68 N. Y. App. Div. 327, 74 N. Y. Suppl. 18 affirmed 173 N. Y. 598, 66 N. E. 1105 (1902); Duncan v. Seaborn, Rice (S. C.) 27 (1838); Overton v. Hardin, 6 Coldw. (Tenn.) 375 (1869).

Continuance of common obligation.—In like manner, he may state that he is still liable on a common obligation, the continuance of which seems doubtful. Hunter v. Porter, 133 Iowa 391, 109 N. W. 283 (1906). The fact that such a statement would not bind his co-debtors does not prevent its use in this connection. Hunter v. Porter, 133 Iowa 391, 109 N. W. 283 (1906).

10. Humes v. O'Bryan, etc., 74 Ala. 64 (1883); Raines v. Raines, 30 Ala. 425 (1857).

§ 2775-1. Helm v. State, 67 Miss. 562, 7 So. 487 (1890); Powers v. Silsby, 41 Vt. 288 (1868); Bowen v. Chase, 98 U. S. 254, 25 L. ed. 47

§ 2776. (*Declarations against Interest; Nature of Interest; Proprietary*); Personal Property.—The declaration against proprietary interest may relate to the ownership of *personal* property, as where one in the apparently absolute possession of a chattel concedes that he is not the owner of it¹ for the reason, as he alleges, that he has already given it away² or made a transfer of it³ or of some interest in it. In the same way, a declaration that the speaker, though holding possession, is not doing so as owner, but in some fiduciary capacity, as that of trustee,⁴ will properly be regarded as having been made against proprietary interest.⁵ Should an alleged donee of personal property be in possession of the same his extrajudicial statement that no gift has been made to him would, under proper conditions, be admissible under the present rule.

§ 2777. (*Declarations against Interest; Nature of Interest; Proprietary*); Real Estate.—Declarations against proprietary interest in real estate stand in the same position.¹ Should an heir-at-law assert the existence of a will under which his estate in land

(1878); Carr v. Mostyn, 5 Exch. 69, 19 L. J. Exch. 249 (1850); DeWhelpdale v. Milburn, 5 Price 485 (1818).

§ 2776-1. Riggs v. Powell, 142 Ill. 453, 32 N. E. 482 (1892); Friberg v. Donovan, 23 Ill. App. 58 (1886); Dean v. Wilkerson, 126 Ind. 338, 26 N. E. 55 (1890); Hall v. Insurance Co., 3 Phila. (Pa.) 331 (1859); Goodson v. Johnson, 35 Tex. 622 (1871). See also, Gross v. Smith, 132 N. C. 604, 44 S. E. 111 (1903).

Bank deposits.—Declarations by a wife will be received to the effect that bank deposits belonged to the husband. Moore v. Fingar, 138 App. Div. 929, 122 N. Y. Suppl. 851 (1910).

2. Illinois.—McIntosh v. Fisher, 125 Ill. App. 511 (1906); Riggs v. Powell, 142 Ill. 453, 32 N. E. 482 (1892).

Indiana.—Dean v. Wilkerson, 126 Ind. 338, 26 N. E. 55 (1890).

North Carolina.—Gross v. Smith, 132 N. C. 604, 44 S. E. 111 (1903).

Texas.—Schauer v. Von Schauer (Civ. App. 1911), 138 S. W. 145;

Lord v. New York L. Ins. Co., 27 Tex. Civ. App. 139, 65 S. W. 699 (1901).

England.—Smith v. Smith, 3 Bing. N. Cas. 29, 2 Hodges 130, 5 L. J. C. P. 305, 3 Scott, 352, 32 E. C. L. 24 (1836).

Life insurance policy.—Declaration admissible to show gift of. Lord v. New York L. I. Co., 95 Tex. 216, 66 S. W. 290, 56 L. R. A. 596, 93 Am. St. Rep. 827 (1902).

3. Iyat v. Finch, 1 Taunt. 141, 9 Rev. Rep. 716 (1808). See also, Wonsetler v. Wonsetler, 23 Pa. Super. Ct. 321 (1903).

4. Swan v. Morgan, 88 Hun (N. Y.) 378, 34 N. Y. Suppl. 829, 68 N. Y. St. Rep. 768 (1895); Laughlin v. Laughlin, 219 Pa. St. 629, 69 Atl. 288 (1908); Stair v. York Nat. Bank, 55 Pa. St. 364, 93 Am. Dec. 759 (1867); Harrisburg Bank v. Tyler, 3 Watts & S. (Pa.) 373 (1842); Goodson v. Johnson, 35 Tex. 622 (1872).

5. Abend v. Mueller, 11 Ill. App. 257 (1882).

§ 2777-1. Alabama.—Knight v.

would be less than he would have by inheritance,² or should one in the actual possession of land having *prima facie* the position of an owner³ reduce his apparent proprietary interest by announcing that he is holding the lands simply as a trustee,⁴ tenant,⁵ or under some one else,⁶ instances of extrajudicial statements in dero-

Hunter, 155 Ala. 238, 46 So. 235 (1908).

California.—Tench v. McMeekan (App. 1911), 118 Pac. 476; Oliver v. Warren, 16 Cal. App. 164, 116 Pac. 312 (1911).

Illinois.—Kirby v. Kirby, 236 Ill. 255, 86 N. E. 259 (1908).

Iowa.—Moehn v. Moehn, 105 Iowa, 710, 75 N. W. 710 (1898).

Massachusetts.—Currier v. Gale, 14 Gray (Mass.), 504 (1860).

New Hampshire.—Perkins v. Towle, 59 N. H. 583, 584 (1880).

North Carolina.—Smith v. Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684 (1906).

Texas.—Ruedas v. O'Shea (Civ. App. 1910), 127 S. W. 891.

England.—Fawke v. Miles, 27 L. T. R. 202 (1911).

Canada.—Lloyd v. Adams, 37 N. B. R. 590 (1906).

That the entire declaration should be against the proprietary interest of the declarant is not required. Smith v. Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684 (1906).

"It is true that these cases sustain the principle that the declarations of a deceased occupant of land made while occupying, in the course of his occupation, as to the character of his occupation, and against his own pecuniary interest are admissible evidence." Walsh v. Wheelwright, 96 Me. 174, 188, 52 Atl. 649 (1902), per Emery, J.

"Then is such a statement admissible to the same extent and for the same purposes as where the effect of the statement is to charge the person with the receipt of money? I neither find any such distinction taken between them in any of the cases, nor

can I, in principle, see any. The probability that a man would speak truth (which is the reason assigned for admitting the evidence) is equally great whether the tendency of the declaration is to establish liability for money or to deprive a man of real estate." R. v. Birmingham, 1 B. & S. 763 (1861), per Blackburn, J.

2. Fetherly v. Waggoner, 11 Wend. (N. Y.) 599 (1834); Flood v. Russell, 29 L. R. Ir. 91 (1891).

3. Doe v. Langfield, 16 M. & W. 497 (1847); Doe v. Arkwright, 5 C. & P. 575, 24 E. C. L. 715 (1833); La Touche v. Hutton, Ir. R. 9 Eq. 166 (1875).

4. *California*.—Tench v. McMeekan (App. 1911), 118 Pac. 476.

Georgia.—Lamar v. Pearre, 90 Ga. 277, 17 S. E. 92 (1892).

Illinois.—German Ins. Co. v. Bartlett, 188 Ill. 165, 58 N. E. 1075, 80 Am. St. Rep. 172, *affg.* 89 Ill. App. 469 (1900).

New York.—Leary v. Corvin, 63 App. Div. 151, 71 N. Y. Suppl. 335 (1901).

Pennsylvania.—Houser v. Lamont, 55 Pa. St. 311, 93 Am. Dec. 755 (1867); Sergeant v. Ingersoll, 15 Pa. St. 343 (1850).

5. Lamar v. Pearre, 90 Ga. 377, 17 S. E. 92 (1892); Doe v. Langfield, 16 M. & W. 497 (1847).

6. *Illinois*.—Crain v. Wright, 46 Ill. 107 (1867).

Indiana.—Chandler v. Evans, 8 Blackf. 322 (1846).

Massachusetts.—Currier v. Gale, 14 Gray, 504, 77 Am. Dec. 343 (1860).

New Hampshire.—Rand v. Dodge, 17 N. H. 343 (1845).

New York.—Jackson v. Murray,

gation of proprietary interest are furnished.⁷ Admissibility is conceded, under this exception to the hearsay rule, where one in apparent ownership and possession of land nevertheless declares that he is not sole owner⁸ but is co-tenant with another person.⁹ Still more clearly is the evidence receivable should the declarations be to the effect that the possessor has no title whatever to the property in question,¹⁰ never having received a deed of it¹¹ but that someone else is owner of the land¹² either because the speaker

Anth. N. P. 105 (2d ed. 143) *reversed*
7 Johnson, 5 (1809).

England.—Reg. v. Exeter, L. R. 4 Q. B. 341, 10 B. & S. 433, 38 L. J. M. C. 126, 20 L. T. Rep. (N. S.) 693, 17 Wkly. Rep. 850 (1869); Reg. v. Birmingham Parish, 1 B. & S. 763, 8 Jur. (N. S.) 37, 31 L. J. M. C. 63, 5 L. T. Rep. (N. S.) 309, 10 Wkly. Rep. 41, 101 E. C. L. 763 (1861); Crane v. Nicoll, 1 Bing. N. Cas. 430, 4 L. J. C. P. 89, 1 Scott 466, 27 E. C. L. 707 (1835); Doe v. Arkwright, 5 C. & P. 575, 24 E. C. L. 715 (1833); Doe v. Austin, 9 Bing. 41, 1 L. J. C. P. 152, 2 M. & S. 107, 23 E. C. L. 477 (1832); Doe v. Jones, 1 Campb. 367 (1808).

7. Such a declaration is none the less admissible because a portion of it may not have been against the interest of the declarant. Smith v. Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684 (1906).

8. *Alabama*.—Steed v. Knowles, 97 Ala. 573, 12 So. 75 (1893).

Georgia.—McLeod v. Swain, 87 Ga. 156, 13 S. E. 315, 27 Am. St. Rep. 229 (1891).

Louisiana.—Guidry v. Davis, 6 La. Ann. 90 (1851).

Montana.—Delmoe v. Long, 35 Mont. 38, 88 Pac. 778 (1907).

England.—Doe d. Welsh v. Langfield, 16 M. & W. 497 (1847); Doe v. Coulthred, 7 A. & E. 235, 7 L. J. Q. B. 52, 2 N. & P. 165, W. W. & D. 477, 34 E. C. L. 140 (1837).

A distinction has been made between statements that a third party

was interested in or the owner of property standing in the name of the party making the admission and those that a third person's money paid for the property, it being said that declarations of the latter class are entitled to more weight than those of the former, especially when they are corroborated by the circumstances and attended by proof of some previous arrangement under which the money was advanced. Wells v. Messenger, 249 Ill. 501, 94 N. E. 942 (1911); Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383 (1893).

9. Delmoe v. Long, 35 Mont. 139, 88 Pac. 778 (1907) (mining claim).

10. Spotswood v. Spotswood, 4 Cal. App. 711, 89 Pac. 362 (1907).

11. West Cambridge v. Lexington, 2 Pick. (Mass.) 536 (1824); Saffold v. Horne, 72 Miss. 470, 18 So. 433 (1894).

12. *Massachusetts*.—Bosworth v. Sturtevant, 2 Cush. 392 (1848).

Mississippi.—Walker v. Marseilles, 70 Miss. 283, 12 So. 211 (1892).

Missouri.—Wynn v. Cory, 48 Mo. 346 (1871).

New York.—Lyon v. Ricker, 141 N. Y. 225, 36 N. E. 189 (1894).

Utah.—Scott v. Crouch, 24 Utah, 377, 67 Pac. 1068 (1902).

United States.—Bowen v. Chase, 98 U. S. 254, 25 L. ed. 47 (1878).

England.—Doe v. Arkwright, 5 C. & P. 575, 24 E. C. L. 715 (1833).

Canada.—Powell v. Wathen, 10 N. Brunsw. 258 (1862).

has given it to him,¹³ made him a conveyance of it¹⁴ or for some other reason. The same result follows where the apparent owner of real property asserts that while he at one time received a conveyance conferring on him additional rights, in the land, he has since cancelled the deed by which this was done.¹⁵ Again a declaration by an owner of land that he is under a binding agreement to dispose of it by a will, in favor of a given individual has been regarded as being admissible as a declaration against interest.¹⁶ On the contrary, a denial of an agreement to make a will is regarded as being in favor of the declarant's interest and is accordingly rejected as hearsay.¹⁷

§ 2778. (*Declarations against Interest; Nature of Interest; Proprietary; Real Estate*); Boundaries.—A declaration against interest may relate to the position of a *boundary*. Thus, in an action to quiet title to a strip of land concerning which the boundary was in dispute, a witness was permitted to state that during a conversation with the defendant at the time when the fence built by the plaintiff as marking the boundary was still intact, the former said that he had all the land that belonged to him, such statement being regarded admissible as a declaration against interest.¹

§ 2779. (*Declarations against Interest; Nature of Interest*); Interest other than Pecuniary or Proprietary.—In the nature of things, there are many kinds of interest which a sane declarant may well regard as of equal or even greater importance to him than his money or tangible possessions. So far as actually influencing his statements is concerned, the operation of such an interest may be equally potent with those of a pecuniary or proprietary nature. On principle, therefore, the assertion of a declarant antagonistic to such an interest ought properly, in the event of his death or equivalent unavailability to a proponent, be usable by the latter

13. *Allen v. Shires*, 47 Colo. 433, 107 Pac. 1070 (1910); *Shackleford v. Orris*, 135 Ga. 29, 68 S. E. 838 (1910); *Caldwell v. Caldwell*, 24 Pa. Super. Ct. 230 (1904); *Chew v. Jackson*, 45 Tex. 656, 102 S. W. 427 (1907).

14. *Napier v. Elliott* (Ala. 1912), 58 So. 435.

15. *Hosford v. Rowe*, 41 Minn. 245, 42 N. W. 1018 (1889).

16. *Wilson v. Gordon*, 73 S. C. 155, 53 S. E. 79 (1905).

17. *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. 35, 98 Am. St. Rep. 63 (1903).

§ 2778-1. *Manuel v. Flynn*, 5 Cal. App. 319, 90 Pac. 463 (1907).

as secondary evidence of the facts asserted. Such, however, is not the present state of the law. The interest affected by the extrajudicial declaration must be materialistic, pecuniary or proprietary.¹ Even the value which a declarant may place upon his reputation or his interest in escaping the disgrace or unpleasant

§ 2779-1. *Alabama*.—*Welsh v. State*, 96 Ala. 92, 11 So. 450 (1892); *West v. State*, 76 Ala. 98, 99 (1884); *Snow v. State*, 58 Ala. 372, 375 (1887); *Smith v. State*, 9 Ala. 990, 995 (1846).

California.—*People v. Hall*, 94 Cal. 595, 30 Pac. 7 (1892).

Connecticut.—*Benton v. Starr*, 58 Conn. 285, 20 Atl. 450 (1890).

Georgia.—*Robison v. State*, 114 Ga. 445, 40 S. E. 253 (1901); *Lowry v. State*, 100 Ga. 574, 28 S. E. 419 (1897); *Kelly v. State*, 82 Ga. 441, 9 S. E. 171 (1889); *Lyon v. State*, 22 Ga. 399 (1857).

Indiana.—*Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465 (1897); *Jones v. State*, 64 Ind. 473, 484 (1878).

Iowa.—*State v. Sale*, 119 Iowa 1, 92 N. W. 680, 95 N. W. 193 (1902).

Kentucky.—*Davis v. Com.*, 95 Ky. 19, 23 S. W. 585 (1893).

Louisiana.—*State v. Young*, 107 La. 618, 31 So. 993 (1901); *State v. West*, 45 La. Ann. 928, 929, 13 So. 173 (1893).

Maine.—*Pike v. Crehore*, 40 Me. 503, 511 (1855).

Maryland.—*Munshower v. State*, 55 Md. 11, 18 (1880).

Michigan.—*People v. Stevens*, 47 Mich. 411, 11 N. W. 220 (1882).

Mississippi.—*Heim v. State*, 67 Miss. 562, 572, 7 So. 487 (1890).

Missouri.—*State v. Hack*, 118 Mo. 92, 98, 23 S. W. 1089 (1893); *State v. Duncan*, 116 Mo. 288, 311, 22 S. W. 699 (1893); *State v. Evans*, 55 Mo. 460 (1874).

New York.—*Greenfield v. State*, 85 N. Y. 75, 86, 88 (1881).

North Carolina.—*State v. Bishop*, 73 N. C. 44 (1875); *State v. Haynes*,

71 N. C. 79, 84 (1874); *State v. White*, 68 N. C. 158 (1873); *State v. Duncan*, 6 Ired. 236, 239 (1846); *State v. May*, 4 Dev. 328, 332 (1833).

Oregon.—*State v. Fletcher*, 24 Or. 295, 300, 33 Pac. 575 (1893).

Tennessee.—*Peck v. State*, 86 Tenn. 259, 6 S. W. 389 (1887); *Sible v. State*, 3 Heisk. 137 (1870); *Rhea v. State*, 10 Yerg. 258, 260 (1837); *Wright v. State*, 9 Yerg. 342, 344 (1836).

Vermont.—*State v. Totten*, 72 Vt. 73, 47 Atl. 105 (1899).

Wyoming.—*Reavis v. State*, 6 Wyo. 240, 44 Pac. 62 (1895).

England.—*Papendick v. Bridgwater*, 5 E. & B. 166, 180 (1855); *Davis v. Lloyd*, 1 C. & K. 275, 276 (1844); *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Jur. 793 (1844).

Canada.—*Blair v. Hopkins*, 1 Kerr (N. Br.) 540 (1842).

"We are not aware that the exception has ever been extended further, so as to render competent declarations which are not otherwise against the interest of the party who made them, except that they tend to show on himself some degree of blame or criminality in relation to a particular transaction, and to exonerate others therefrom." *Com. v. Densmore*, 12 Allen (Mass.) 535, 537 (1866), per Bigelow, C. J. See also, *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. 783 (1894); *Com. v. Chance*, 174 Mass. 245, 54 N. E. 551 (1899).

Social misconduct.—For example, that a man should acknowledge that he was wrong in his conduct in a social meeting on a certain occasion is inadmissible as a declaration against interest. *Cole v. State*, 125 Ga. 276, 53 S. E. 958 (1906).

physical consequences of being known to have committed a criminal offense is not regarded as such that a declaration in derogation of it constitutes trustworthy evidence under the present rule.

§ 2780. (*Declarations against Interest; Nature of Interest; Interest other than Pecuniary or Proprietary*); Legal Liability.—Judicial administration does not regard the extrajudicial statement of a third person as having been made against his interest merely because it tends to expose the declarant to being made an unsuccessful litigant in a civil action¹ or may render him subject to criminal punishment.² On the civil side, acknowledgment of the existence of a binding contractual relation would not be deemed a declaration against interest,³ however readily receivable against a party as being his admission. On the criminal side it results that the confession of a third person that he committed the crime for which a particular individual is on trial is not receivable in the latter proceeding, either as a relevant fact in itself⁴ or as a declaration against interest under the present exception to the hearsay rule.

§ 2781. (*Declarations against Interest; Nature of Interest*); General Requirements.—Judicial administration and, later on, procedure, has imposed certain general requirements as to the nature of the interest which the proponent must show, regardless of whether the statement be opposed to the pecuniary interest of the declarant or taken to be in derogation of his estate in chattels or land. To establish the degree of relevancy or probative force upon which this exception of the hearsay rule rests, it is essential

§ 2780-1. *Ayer v. Colgrove*, 81 Hun (N. Y.) 322, 30 N. Y. Suppl. 788 (1894); *Penner v. Cooper*, 4 Munf. (Va.) 458 (1815) (trespass); *Smith v. Blakey*, L. R. 2 Q. B. 326, 8 B. & S. 157, 36 L. J. Q. B. 156, 15 Wkly. Rep. 492 (1867).

2. *Alabama*.—*West v. State*, 76 Ala. 98 (1884).

Iowa.—*Ibbitson v. Brown*, 5 Iowa 532 (1857).

Kentucky.—*Davis v. Com.*, 95 Ky. 19, 23 S. W. 585, 15 Ky. L. Rep. 396, 44 Am. St. Rep. 201 (1893).

Louisiana.—*State v. West*, 45 La. Ann. 14, 12 So. 7 (1893).

Massachusetts.—*Com. v. Chabcock*, 1 Mass. 144 (1804).

Mississippi.—*Helm v. State*, 67 Miss. 562, 7 So. 487 (1890).

United States.—*U. S. v. Mulholland*, 50 Fed. 413 (1892).

England.—*Davis v. Lloyd*, 1 C. & K. 275, 47 E. C. L. 275 (1844); *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844).

3. *Perchard v. Benyon*, 1 Cox Ch. 214, 29 Eng. Reprint 1134 (1736).

4. § 2703.

that the speaker should possess a present, rather than be expecting to acquire a future interest. He must not only possess this interest in point of fact but be aware that he does so. The willingness of the declarant to minimize his apparent interest must not spring from a desire that a still greater gain will result by his making an apparently trifling sacrifice, so that he may be really the victim of a controlling motive to misrepresent while seemingly forced to speak the truth though highly injurious to himself. In other words, it is required that the interest in derogation of which the declarant speaks should be shown by the proponent to be (1) actual, (2) known to the declarant, (3) the substantial interest involved in the matter.

§ 2782. (*Declarations against Interest; Nature of Interest; General Requirements*); Interest must be Actual.—The interest of the declarant under this exception to the rule against hearsay must be *actual*, rather than prospective or contingent. Only present interest compels that degree of subjective relevancy which is contemplated by the exception. Such an actual interest the declarant must have possessed at the time when his statement was made.¹ To put the matter a little differently, should the interest of the declarant be erroneously supposed by him to be served by the statement which he is making, the latter is devoid of probative force,² although as the situation actually exists it is very much against his pecuniary or proprietary interest. In much the same way, where the declarant has no interest at the time of his state-

§ 2782-1. California.—*Thaxter v. Inglis*, 121 Cal. 593, 54 Pac. 86 (1898).

New York.—*Clason v. Baldwin*, 56 Hun 326, 9 N. Y. Suppl. 609, 31 N. Y. St. Rep. 350 (1890).

Texas.—*Wilson v. Simpson*, 68 Tex. 306, 4 S. W. 839 (1887).

England.—*Outram v. Morewood*, 5 T. R. 121, 12 Rev. Rep. 542 (1793).

Canada.—*Yuill v. White*, 5 N. W. Terr. 275, 291 (1902).

The admission "amounts no more than an admission that he has the care of the three chests which have arrived at the office, and the possibility that this statement might make

him liable in case of their being lost is an interest of too remote a nature to make the statement admissible in evidence." *Smith v. Blakey*, L. R. 2 Q. B. 326, 332 (1867), per Blackburn, J.

"The book here does not show any entry operating against the interest of the party. The memorandum could only fix upon him a liability on proof that the services referred to had been performed." *R. v. Worth*, 4 Q. B. 132, 137 (1843), per Denman, C. J.

2. *Taylor v. Witham*, 3 Ch. D. 605, 45 L. J. Ch. 798, 24 Wkly. Rep. 877 (1876).

ment, it is not material that he had one in the past but has parted with it. It is obviously as impossible for one who was formerly a partner in a business³ or a former owner of property⁴ to make a valid declaration after parting with his interest, as it would be for a prospective heir to affect the quality of his future estate.⁵

§ 2783. (*Declarations against Interest; Nature of Interest; General Requirements*); Interest must be known to Declarant.

— Not only must the declarant possess an actual and present interest, he must be aware that he possesses it. Only one conscious of his rights can properly be said to waive them. The probative force created by speaking in derogation of one's rights cannot arise in the case of a declarant who is ignorant as to what they are. A speaker, as has just been said, who asserts what he believes to be his interest¹ or makes a statement which he does not know to be against it hardly presents the guaranty of truth exhibited by one who is seen to be telling the truth regardless of the consequences to himself. The important fact is not what the situation actually is, but as to what the declarant supposes it to be. Knowledge by the declarant as to his interest must be shown by the proponent of the extrajudicial statement, unless, indeed, the circumstances of the case warrant the presiding judge,— as a matter of administration, in assuming that the speaker must have known of his rights.² A declaration which its maker knows will impair his interest only in case a remotely contingent event occurs³ is not admissible under the present exception to the hearsay rule.

§ 2784. (*Declarations against Interest; Nature of Interest; General Requirements*); Interest must be the substantial one.

— Not only must the declarant know his rights and that his decla-

3. *Jeffries v. Castleman*, 75 Ala. 262 (1883).

4. *Moehn v. Moehn*, 105 Iowa 710, 75 N. W. 521 (1898); *Johnson v. Cole*, 76 App. Div. 606, 78 N. Y. Suppl. 489, *reversed* 178 N. Y. 364, 70 N. E. 873 (1902); *Hutchins v. Hutchins*, 98 N. Y. 56 (1885); *Bullock v. Smith*, 72 Tex. 545, 10 S. W. 687 (1889); *Wilson v. Simpson*, 68 Tex. 306, 4 S. W. 839 (1887). See also, *Ellis v. Newell*, 120 Iowa 71, 94 N. W. 463 (1903).

5. *Morton v. Massie*, 3 Mo. 482 (1834).

§ 2783-1. *Taylor v. Witham*, 3 Ch. D. 605, 45 L. G. Ch. 798, 24 Wkly. Rep. 877 (1876).

2. *White v. Chouteau*, 1 E. D. Smith (N. Y.) 493 (1852); *Brain v. Preece*, 11 M. & W. 773 (1843).

3. *Tate v. Tate's Ex'r*, 75 Va. 522 (1881); *Smith v. Blakey*, L. R. 2 Q. B. 326, 8 B. & S. 157, 36 L. J. Q. B. 156, 15 Wkly. Rep. 492 (1867).

ration is in derogation of them; he must also be aware that his statement loses for him more than it gains. He must speak against his real, substantial, paramount interest if his statement is to have the probative force upon which the present exception to the hearsay rule is predicated.¹ In other words, judicial administration rationally requires that it should be made to appear by the proponent that the declarant is not, as it were, making a jettison, throwing over a small portion of his cargo for the sake of saving the rest. Should the court come to entertain a suspicion that it is dealing with an attempt to prejudice a small interest for the purpose or with the result of saving a larger one,—the evidence will be rejected. Thus, a husband, in danger of having his property taken by his creditors in payment of his debts, is not really declaring against his substantial material interest in saying that this property is not his own, but belongs to his wife,² however prejudicial to his apparent proprietary interest such a statement might be. In such cases, the declaration will not be regarded as having been made against interest. So, again, while an extrajudicial statement acknowledging the receipt of money is, *prima facie*, a declaration against interest,³ its actual character in this respect would be materially affected if not entirely changed were it to be made to appear that this acknowledgment made it possible for the declarant to claim a much larger sum,⁴ either directly or indirectly by way of removing the bar of the statute of limitations or preventing its running⁵ by showing a part payment at a particular time or in some other way. In case an endorsement of the payment of interest or principal is made upon a bond, promissory note or other chose in action with the effect of removing the bar of the statute of limitations it has been very reasonably required that the endorsement should be affirmatively shown by satisfactory evidence *de hors* the document to have been actually made at a time when making it was in dero-

§ 2784-1. That the entire declaration should be against the pecuniary or proprietary interest of the declarant is not required. *Smith v. Moore*, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684 (1906).

2. *Dimitry v. Pollock*, 12 La. 296 (1838).

3. § 2774.

4. *Haines v. Christie*, 28 Colo. 502, 66 Pac. 883 (1901); *Confederation L. Assoc. v. O'Donnell*, 13 Can. Supreme Ct. 218 (1886); *Ganton v. Size*, 22 U. C. Q. B. 473, 2 Grant Err. & App. (U. C.) 368 (1863).

5. *Glynn v. Bank of England*, 2 Ves. 38, 28 Eng. reprint 26 (1750), (bond).

gation of the real interest of the declarant.⁶ The same requirement has been made by statute. Such, as a matter of legal necessity, is the result in all cases where the declaration though ostensibly against the interest of the declarant is, in reality, on the broader view, in his favor.⁷ On the other hand, a declaration *prima facie impugning*, when made, the substantial interest of the declarant is not rendered incompetent by the fact that it subsequently turns out to be beneficial to him.⁸ Should it appear that only a portion of a given declaration against interest is tainted with the self-interest for gain and that it is separable from all the remainder the latter may be received in evidence under the present exception.⁹ Where such a separation cannot be effected, judicial administration is forced to reject the entire statement,¹⁰ if, taken as a whole, the declaration is in favor of the person who made it,¹¹ though there is authority for the admission of the entire statement

6. *Louisiana*.—Beatty v. Clement, 12 La. Ann. 82 (1857).

Maine.—Small v. Rose, 97 Me. 285, 286, 54 Atl. 726 (1903); Coffin v. Bucknam, 12 Me. 471 (1835).

New York.—Roseboom v. Billington, 17 Johns. 182 (1819).

North Carolina.—Gupton v. Hawkins, 126 N. C. 81, 35 S. E. 229 (1900) (bond); Bland v. Warren, 65 N. C. 372, 373 (1871).

Pennsylvania.—Addams v. Seitzinger, 1 Watts & S. 243 (1841); Allegheny v. Nelson, 25 Pa. 332, 334 (1855).

South Carolina.—Gibson v. Peebles, 2 McCord (S. C.) 418, 419 (1823).

England.—Gleadow v. Atkin, 3 Tyrwh. 289, 301 (1833); Short v. Lee, 2 Jac. & W. 464, 488 (1821); Glynn v. Bank of England, 2 Ves. 38, 43 (1750).

See also, Libby v. Brown, 78 Me. 492, 7 Atl. 114 (1886); Hancock v. Cook, 18 Pick. (Mass.) 30 (1836); Searle v. Barrington, 2 Str. 826 (1729).

"I think you must prove that these indorsements were on the bond at, or recently after, the times when they bear date, before you are en-

titled to read them. Although it may seem at first sight against the interest of the obligee to admit part payment, he may thereby in many cases set up the bond for the residue of the sum secured. * * * I am of opinion they cannot be properly admitted unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest." Rose v. Bryant, 2 Camp. 321, 322 (1809), per Ellenborough, L. C. J.

7. *Massee-Felton Lumber Co. v. Sirmans*, 122 Ga. 297, 50 S. E. 92 (1905).

8. *Taylor v. Witham*, 3 Ch. D. 605, 45 L. J. Ch. 798, 24 Wkly. Rep. 877 (1876); *Reg. v. Inhab. Lower Heyford*, 2 Sm. L. C. (7th ed.) p. 333 (1840); *Turner v. Crisp*, 2 Strange's Rep. 827 (1728).

9. *Chamberlain v. Chamberlain*, 116 Ill. 480, 6 N. E. 444 (1886).

10. *Beatty v. Clement*, 12 La. Ann. 82 (1857); *Coffin v. Bucknam*, 12 Me. 471 (1835); *Addams v. Seitsinger*, 1 Watts & S. (Pa.) 243 (1841).

11. *Ganton v. Size*, 22 U. C. Q. B. 473, 2 Grant Err. & App. (U. S.) 368 (1863).

where the declaration against interest is not counterbalanced by the self-serving part.¹²

§ 2785. (*Declarations against Interest*); Form of Statement; Oral.—The extrajudicial declaration against interest may, as regards form, be either oral¹ or in writing.²

§ 2786. (*Declarations against Interest*; Form of Statement; Oral); Effect of Substantive Law.—No general distinction as to inadmissibility can be drawn between oral and written declarations against interest.¹ Where, however, the substantive law requires the exhibition of a written instrument for attaining a given result, oral declarations tending to establish it will not be received. It is commonly said, even by careful administrators that the oral declaration is not admissible to show the fact in question. The real administrative reason seems to be that the objective to which the

12. *Massee-Felton Lumber Co. v. Sirmans*, 122 Ga. 297, 50 S. E. 92 (1905).

§ 2785-1. *Alabama*.—*Humes v. D'Bryan*, etc., 74 Ala. 64 (1883).

Georgia.—*Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92 (1892).

Iowa.—*Mahaska County v. Ingalls*, 16 Iowa 81 (1864).

Maryland.—*Prather v. Johnson*, 3 Harr. & J. 487 (1814).

Minnesota.—*Hosford v. Rowe*, 41 Minn. 245, 42 N. W. 1018 (1889).

New Hampshire.—*Rand v. Dodge*, 17 N. H. 343 (1845); *Hinkley v. Davis*, 6 N. H. 210, 25 Am. Dec. 457 (1833).

New York.—*People v. Blakeley*, 4 Park. Cr. 176 (1859); *White v. ChoctEAU*, 1 E. D. Smith 493 (1852).

Pennsylvania.—*Huzzard v. Trego*, 35 Pa. St. 9 (1859); *Trego v. Huzzard*, 19 Pa. St. 441 (1852).

South Carolina.—*Coleman v. Frazier*, 4 Rich. L. 146, 53 Am. Dec. 727 (1850); *Gilechrist v. Martin*, Bailey Eq. 492 (1831).

Virginia.—*Holladay v. Littlepage*, 2 Munf. 316 (1811).

United States.—*Bowen v. Chase*, 98 U. S. 254, 25 L. ed. 47 (1878).

England.—*Flood v. Russell*, 29 Ir. L. R. Pr. 91 (1891); *Reg. v. Birmingham Parish*, 1 B. & S. 763, 8 Jur. (N. S.) 37, 31 L. J. M. C. 63, 5 L. T. Rep. N. S. 309, 10 Wkly. Rep. 41, 101 E. C. L. 763 (1861); *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844); *Barker v. Ray*, 2 Russ. 63, 3 Eng. Ch. 63, 38 Eng. Reprint 259 (1826), per Lord Eldon; *Doe v. Pettet*, 5 B. & Ald. 223, 7 E. C. L. 129 (1821), per Lord Eldon; *Ivat v. Finch*, 1 Taunt. 141, 9 Rev. Rep. 716 (1808), per Mansfield, C. J.; *Doe v. Jones*, 1 Campb. 367 (1808); *Davies v. Pierce*, 2 T. R. 53, 1 Rev. Rep. 419 (1787); *Fawkner v. Watts*, 1 Atk. 406, 26 Eng. Reprint 257 (1739).

2. § 2787.

§ 2786-1. *Bewley v. Atkinson*, 13 Ch. D. 283, 49 L. J. Ch. 153, 41 L. T. Rep. (N. S.) 603, 28 Wkly. Rep. 638 (1880); *Reg. v. Birmingham Parish*, 1 B. & S. 763, 8 Jur. (N. S.) 37, 31 L. J. M. C. 63, 5 L. T. Rep. (N. S.) 309, 10 Wkly. Rep. 41, 101 E. C. L. 763 (1861); *Ganton v. Size*, 22 U. C. Q. B. 473, 2 Grant Err. & App. (U. C.) 368 (1863).

evidence is directed cannot itself be shown² and that, therefore, the evidence, though entirely receivable were the objective itself competent, is nevertheless rejected and an example as to the manner in which the so-called parol evidence rule³ is practically administered by the courts is furnished. Not the adjective law of evidence is at work but the substantive law. The *factum probans*, the statement against interest, is fully competent to prove the *factum probandum*, were the latter itself a probative or *res gestae* fact. Thus, declarations by a decedent that he sold certain lands, no deed being produced or accounted for, are insufficient to prove a conveyance by him of such lands.⁴

§ 2787. (*Declarations against Interest; Form of Statement*); Written.—Written declarations against interest may be in any form capable of conveying thought.¹ They may consist of solemn

2. § 1718i.

3. Best on Ev., (Chamberlayne's 3d Amer. ed.) p. 220.

4. Marsh v. Ne-ha-sa-ne Park Assoc., 18 Misc. (N. Y.) 314, 42 N. Y. Suppl. 996, reversed 25 App. Div. 34, 49 N. Y. Suppl. 384 (1896).

§ 2787-1. *Alabama*.—Hart v. Kendall, 82 Ala. 144, 3 So. 41 (1886) (entry).

California.—Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433 (1903).

Georgia.—Field v. Boynton, 33 Ga. 239 (1862).

Massachusetts.—Jones v. Howard, 3 Allen 223 (1861) (entry); Shearman v. Akins, 4 Pick. 283, 293 (1826).

New Hampshire.—Rand v. Dodge, 17 N. H. 343 (1845).

New York.—Livingston v. Arnoux, 56 N. Y. 507, 519 (1874); Sherman v. Crosby, 11 Johns. 70 (1814).

Pennsylvania.—Hall v. Insurance Co., 3 Phila. 331 (1859) (enrolment of vessel).

South Carolina.—Cruger v. Daniel, McMull. Eq. 157 (1840).

Texas.—Heidenheimer v. Johnson, 76 Tex. 200, 13 S. W. 46 (1890) (entry).

England.—Sly v. Sly, 2 P. D. 91, 46 L. J. P. & Adm. 63, 25 Wkly. Rep.

463 (1877); Reg. v. Birmingham Parish, 1 B. & S. 763, 31 L. J. M. C. 63, 8 Jur. (N. S.) 37, 5 L. T. Rep. (N. S.) 309, 10 Wkly. Rep. 41, 101 E. C. L. 763 (1861); Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844); Doe v. Coulthred, 7 A. & E. 235, 7 L. J. Q. B. 52, 2 N. & P. 165, W. W. & D. 477, 34 E. C. L. 140 (1837); Goss v. Watlington, 3 B. & B. 132, 7 E. C. L. 645 (1821); Higham v. Ridgway, 10 East 109, 10 Rev. Rep. 235 (1808).

Canada.—Resther v. Matte, Que. L. R. 13 K. B. 198 (1903); Wardrope v. Canadian Pac. R. Co., 7 Ont. 321, 329 (1884); Turner v. Dewan, 41 U. C. Q. B. 361 (1877) (entry).

Massachusetts rule.—Under a rule in Massachusetts declarations against pecuniary interest must be in writing. Jones v. Howard, 3 Allen (Mass.) 223 (1861); Lawrence v. Kimball, 1 Metc. (Mass.) 524 (1840); Framingham Mfg. Co. v. Barnard, 2 Pick. (Mass.) 532 (1824).

Oral declarations against *proprietary* interest may, however, be received. Currier v. Gale, 14 Gray (Mass.) 504 (1860); Stearns v. Hendersass, 9 Cush. (Mass.) 497, 502 (1852); Marcy v. Stone, 8 Cush. (Mass.) 4, 54 Am. Dec. 736 (1851).

and formal documents such as deeds.² Mercantile papers, e. g., accounts³ or receipts⁴ may also be a vehicle conveying a declaration against interest. The writings may even consist of casual papers, such as loose memoranda.⁵

Private marks.— That the memorandum containing the declaration against interest is made by private marks the significance of which is known to the writer alone does not render it inadmissible.⁶

§ 2788. (*Declarations against Interest*); Scope of Declaration.— The rule admitting the declarations against the interest of

2. *Sly v. Sly*, 2 P. D. 91, 46 L. J. P. & Adm. 63, 25 Wkly. Rep. 463 (1877); *Doe v. Coulthred*, 7 A. & E. 235, 7 L. J. Q. B. 52, 2 N. & P. 165, W. W. & D. 477, 34 E. C. L. 140 (1837).

3. *Hart v. Kendall*, 82 Ala. 144, 3 So. 41 (1886); *Cunningham v. Schley*, 41 Ga. 426 (1870); *Bright v. Legerton*, 6 Jur. (N. S.) 1179, 29 L. J. Ch. 852, 8 Wkly. Rep. 678 (1860).

4. *Arkansas*.— *Walnut Ridge Mercantile Co. v. Cohn*, 79 Ark. 338, 96 S. W. 413 (1906).

Georgia.— *Field v. Boynton*, 33 Ga. 239 (1862).

Massachusetts. — *Shearman v. Akins*, 4 Pick. 282 (1826).

New Hampshire.— *Rand v. Dodge*, 17 N. H. 343 (1845).

New York.— *Livingston v. Arnoux*, 56 N. Y. 507 (1874); *Sherman v. Crosby*, 11 Johns. 70 (1814).

England.— *Giffard v. Williams*, L. R. 8 Eq. 494, 38 L. J. Ch. 597, 21 L. T. Rep. (N. S.) 575, 17 Wkly. Rep. 56 (1870).

Unless the person giving the receipt is dead or beyond the jurisdiction of the court or for some other reason is unavailable as a witness receipts are not admissible.

Connecticut.— *Newell v. Roberts*, 13 Conn. 63, 72 (1839).

Massachusetts. — *Silverstein v. O'Brien*, 165 Mass. 512, 43 N. E. 496 (1896); *Shearman v. Akins*, 4 Pick. 283, 293 (1826).

Minnesota.— *Ferris v. Boxell*, 34 Minn. 262, 25 N. W. 592 (1885).

Pennsylvania.— *Morton v. McGlaughlin*, 13 S. & R. 107 (1825); *Cutbush v. Gilbert*, 4 S. & R. 551, 555 (1818).

Canada.— *Joplin v. Johnston*, 2 Kerr (N. Br.) 541 (1844).

In an action between a depositor and a third person, the depositor's passbook is not competent to show a deposit at a certain time. *Austrian v. Laubheim*, 78 N. J. L. 178, 73 Atl. 226 (1909), *affirmed* (Err. & App. 1910), 78 Atl. 1134.

Third persons.— Where the testimony of an original declarant may be procured, a receipt is mere hearsay as against strangers thereto, and would, if received as evidence of the facts asserted, afford opportunity for fabrication and be objectionable as tending to mislead the jury. *Doherty v. Doherty*, 155 Mo. App. 481, 134 S. W. 1112 (1911).

Such a use would "operate the substitution of such *ex parte* statements made by the person executing the receipts, for the testimony under the sanction of an oath and all of the advantages of cross-examination of the parties executing the receipts." *Doherty v. Doherty*, 155 Mo. App. 481, 134 S. W. 1112 (1911).

5. *Middleton v. Walton*, 10 B. & C. 317, 21 E. C. L. 139 (1829).

6. *Middleton v. Walton*, 10 B. & C. 317, 21 E. C. L. 139 (1829).

the declarant extends in its scope not only so far as to receive them in proof of the facts directly asserted, but also of such incidentally stated facts¹ as judicial administration may regard as fairly constituting part of the statement itself. Thus, a written receipt for money proves not only the fact that the money was received, but also the *date* at which it was done,² the *person* from whom the money came³ or regarding the nature of the claim upon which payment was made.⁴ Any special circumstances regarding the transaction,⁵ e. g., the amount of rent which a tenant is under

§ 2788-1. *Alabama*.—Hart v. Kendall, 82 Ala. 144, 3 So. 41 (1886).

Missouri.—See Obuchon v. Boyd, 92 Mo. App. 412 (1902).

New York.—McDonald v. Wesendonck, 30 Misc. 601, 62 N. Y. Suppl. 764 (1900).

Pennsylvania.—Taylor v. Gould, 57 Pa. St. 152 (1868).

South Carolina.—Lowry v. Moss, 1 Strobb. 63 (1846).

England.—Smith v. Blakey, L. R. 2 Q. B. 326 (1867); R. v. Birmingham, 1 B. & S. 763 (1861); Davies v. Humphreys, 6 M. & W. 153 (1840); Doe v. Cartwright, Ry. & M. 62 (1824); Stead v. Heaton, 4 T. R. 669, 670 (1792).

"The declaration is admissible as an entirety, including statements therein which were not in themselves against interest, but which are integral or substantial parts of the declaration, the reason why this is so being that the portion which is trustworthy, because against interest, imports credit to the whole declaration." Smith v. Moore, 142 N. C. 277, 286, 55 S. E. 275, 7 L. R. A. (N. S.) 684 (1906), per Walker, J.

"The principle, that a declaration against interest was evidence as to all that formed an essential part of it, was long since settled." R. v. Exeter, L. R. 4 Q. B. 341, 345 (1869), per Hayes, J.

"If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement." Percival v. Nanson, 7 Exch. 1, 3 (1851), per Pollock, C. B.

"It is idle to say that the word *paid* only shall be admitted in evidence without the context, which explains to what it refers; we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged. By the reference to the ledger, the entry there was virtually incorporated with and made a part of the other entry, of which it is explanatory." Higham v. Ridgway, 10 East 109, 117 (1808), per Ellenborough, L. C. J.

Records incorporated in a statement may be a part thereof and the whole statement admissible. "It was a short mode of re-entering it, exactly the same as if it had all been written over again." Doe v. Wittcomb, 15 Jur. 778 (1851), per Coleridge, J.

2. Taylor v. Gould, 57 Pa. St. 152 (1868); Lowry v. Moss, 1 Strobb. (S. C.) 63 (1846).

3. Thompson v. Stevens, 2 Nott & M. (S. C.) 493 (1820). See also, Furdson v. Clogg, 10 M. & W. 572 (1842).

4. Taylor v. Witham, 3 Ch. D. 605, 45 L. J. Ch. 798, 24 Wkly. Rep. 877 (1876); Davies v. Humphreys, 6 M. & W. 153 (1840); Higham v. Ridgway, 10 East 109, 10 Rev. Rep. 235 (1808); Harper v. Brock, 3 Wooddeson's Lect. 331-333 (1774).

5. Higham v. Ridgway, 10 East 109, 10 Rev. Rep. 235 (1808); Fawkner v. Watts, 1 Atk. 406, 26 Eng. Reprint 257 (1739).

obligation to pay⁶ or the source of a title⁷ may be shown in the same way.

Ancient facts.—The administrative justification of applying such declarations to proof of ancient facts is clear.⁸ It has even been suggested that the application of the rule should properly be limited to proof of such facts.⁹

§ 2789. (*Declarations against Interest*); Probative Force.—

Some question has been made as to the general probative value of such statements.¹ The probative force of the inference of the existence of the facts asserted which arises from a declaration against interest is indeterminate, not readily estimated. Such a declaration is by no means conclusively binding upon the declarant. He may explain² or modify it, but is not permitted to rebut it by evidence of other declarations.³ In pursuance of the same line of thought, the declaration against interest has been spoken of as having but slight evidentiary weight as against documentary evidence.⁴

6. *Reg. v. Exeter*, L. R. 4 Q. B. 341, 10 B. & S. 433, 38 L. J. M. C. 126, 20 L. T. Rep. (N. S.) 693, 17 Wkly. Rep. 850 (1869); *Reg. v. Birmingham Parish*, 1 B. & S. 763, 8 Jur. (N. S.) 37, 31 L. J. M. C. 63, 5 L. T. Rep. (N. S.) 309, 10 Wkly. Rep. 41, 101 E. C. L. 763 (1861).

7. *Sly v. Dredge*, 2 P. D. 91, 46 L. J. P. & Adm. 63, 25 Wkly. Rep. 463 (1877).

8. § 2741a.

9. *Gilchrist v. Martin*, Bailey Eq. (S. C.) 492 (1831); *Reg. v. Birmingham Parish*, 1 B. & S. 763, 8 Jur. (N. S.) 37, L. J. M. C. 63, 5 L. T. Rep. (N. S.) 309, 10 Wkly. Rep. 41, 101 E. C. L. 763 (1861).

§ 2789-1. *Idaho*.—*Kent v. Richardson*, 8 Ida. 750, 71 Pac. 117 (1902).

Iowa.—*Mahaska County v. Ingalls*, 16 Iowa 81, 95 (1864).

Minnesota.—*Zimmerman v. Bloom*, 43 Minn. 163, 45 N. W. 10 (1890).

New Hampshire.—*Austin v. Thomson*, 45 N. H. 113 (1863).

Texas.—*Heidenheimer v. Johnston*, 76 Tex. 200, 13 S. W. 46 (1890).

Vermont.—*Chase v. Smith*, 5 Vt. 556 (1833).

England.—*Higham v. Ridgway*, 10 East 109, 10 Rev. Rep. 235 (1808).

2. *Phipps v. Martin*, 33 Ark. 207 (1878); *Raymond v. Cummings*, 17 N. Brunsw. 544 (1877).

3. *Harrison v. Harrison*, 80 Neb. 103, 113 N. W. 1042 (1907).

4. *Pargoud v. Amberson*, 10 La. 352 (1830).

CHAPTER XL.

HEARSAY AS SECONDARY EVIDENCE; DECLARATIONS AS TO MATTERS OF PUBLIC AND GENERAL INTEREST.

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§ 2790. **Declarations as to Matters of Public and General Interest.**—Matters of public and general interest, those of such relation to the general life of the community or of the public at large as to lead to a rational assumption that they have been widely and understandingly discussed, are the subject of another “ex-

ception" to the rule excluding hearsay.¹ In other words, the proponent being unable to produce, in the exercise of his paramount right to prove his case,² the primary evidence of these important facts is permitted, under fixed conditions, to introduce extrajudicial statements as a secondary grade of proof. So far as hearsay declarations upon these topics are presented to the court in the composite form of reputation, the action of judicial administration with regard to them is elsewhere considered.³ It remains to examine the circumstances under which the statements of identified persons as to such matters of public and general interest will be admitted after their decease as proof of the facts which they assert. That under the established administrative conditions of necessity⁴ and relevancy⁵ extrajudicial statements of deceased persons regarding such matters will be received as secondary evidence of the facts asserted is well settled.⁶

Probative force.—In the opinion of early judicial administration, hardening later into a rule of procedure, declarations as to matters of public and general interest were relevant in proof of the facts asserted and consequently admissible when no other satisfactory evidence could be produced, because the constant discussion on all sides which such a public matter naturally invites⁷ may rationally be assumed to result in a statement of the truth. Such

§ 2790-1. *Inhabitants of Enfield v. Woods*, (Mass. 1912) 99 N. E. 331.

Hearsay declarations, to be admissible concerning matters of general or public interest, must refer to a public or general right and not to a particular exercise of it. *Inhabitants of Enfield v. Woods*, (Mass. 1912) 99 N. E. 331.

2. §§ 334 *et seq.*

3. §§ 2741 *et seq.*

4. § 2791.

5. §§ 2792 *et seq.*

6. *California*.—*Monterey v. Jacks*, 139 Cal. 542, 73 Pac. 436, *affirmed* 203 U. S. 360, 27 Sup. Ct. 67, 51 L. ed. 220 (1903); *People v. Velarde*, 59 Cal. 457 (1881).

Connecticut.—*Bolton Southwest School Dist. v. Williams*, 48 Conn. 504 (1881).

Dakota.—*McCall v. U. S.*, 1 Dak. 320, 46 N. W. 608 (1876).

New Hampshire.—*Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. 543 (1888).

North Carolina.—*Bethea v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240 (1886).

Texas.—*Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671 (1887); *Cox v. State*, 41 Tex. 1 (1874).

7. "The matters are presumably the subject of frequent discussion and criticism, which accomplishes in a manner the purpose of a cross-examination, while the persons whose declarations are offered in evidence must have been in a situation to know the truth. After passing such an ordeal it is reasonably safe to accept the result as established fact." *Southwest School Dist. of Bolton v. Williams*, 48 Conn. 504, 507 (1881), per Loomis, J.

an interchange of views tends naturally to the elimination of error. For the complete working of the process, however, it is essential that there be a conflict or antagonism of interest. Should it occur, as not infrequently happens, that discussion is confined to those whose interest is the same, as where the question is as to the existence of a right which the great bulk of the community are desirous of establishing, the value of the resulting assertions in the discovery of truth would seem much impaired. This circumstance may assist to account for the fact that the further extension of the application of this exception is not favored by the courts.⁸ As against documentary evidence, declarations of deceased persons as to matters of public and general interest cannot be accorded much probative force.⁹

§ 2791. Administrative Requirements; Necessity.—Before secondary evidence of unsworn statements can be received, as proof of the facts asserted, it is essential, here, as in other instances of the use of secondary evidence, that the primary proof of the oral testimony of the declarant¹ should be shown to be unavailable, and that, in consequence, a sufficient administrative necessity to procure secondary evidence has been placed on the proponent.² A declaration of this nature is said to be admissible “where no better evidence can be had.”³ In general, administration requires that the declarant should be shown to be dead,⁴ although other facts

8. This exception is not to be favored or extended. *Hartford v. Maslen*, 76 Conn. 599, 57 Atl. 740 (1904).

9. *Dawson v. Town of Orange*, 78 Conn. 96, 61 Atl. 101 (1905) (town common).

§ 2791-1. That another declarant on the point can be procured as a witness is not a necessary ground for excluding the hearsay statement of the unavailable person. *Beard v. Talbot*, 2 Fed. Cas. No. 1,182; *Brunn*. Col. Cas. 201, *Cooke* (Tenn.) 142 (1812). Even that a surveyor testifies to the same effect does not exclude the evidence. *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782 (1904).

2. *Scroggins v. Dalrymple*, 52 N. C. 46 (1859); *Birmingham v. Anderson*,

40 Pa. St. 506 (1861); *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354, 45 Atl. 896 (1899); *Woods v. Willard*, 37 Vt. 377, 86 Am. Dec. 716 (1864).

3. *King v. Watkins*, 98 Fed. 913 (1899).

4. *California*.—*Lay v. Neville*, 25 Cal. 545 (1864).

Connecticut.—*Wooster v. Butler*, 13 Conn. 309 (1839).

Maine.—*Chapman v. Twitchell*, 37 Me. 59, 58 Am. Dec. 773 (1853).

New Hampshire.—*Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. 543 (1888); *Bow v. Allentown*, 34 N. H. 351, 69 Am. Dec. 489 (1857).

Pennsylvania.—*In re Old Eagle School Property*, 36 Wkly. Notes Cas. 348 (1895).

West Virginia.—*High v. Pancake*,

showing unavailability have occasionally been deemed to establish a necessity warranting the reception of the evidence.⁵ It can scarcely be said, however, that this very rational indulgence is in accordance with the general rule, under which absence from the jurisdiction⁶ is not treated as a sufficient ground for failing to produce the declarant as a witness.

Boundaries.—In case of private *boundaries*, as generally, the necessity for introducing secondary evidence of statements regarding matters of public and general interest is shown only where the declarant is proved to be dead.⁷ Upon the so-called principle

42 W. Va. 602, 26 S. E. 536 (1896).

Removal of Incompetency.—Should the declarant, as, for instance, a slave, have been incompetent to testify at the time of making his declaration, his statement will be received after his decease if at that time he would have been competent to testify. *Whitehurst v. Pettipher*, 87 N. C. 179, 42 Am. Rep. 520 (1882).

5. "The exception to the general rule excluding hearsay evidence, which permits in certain cases the reception of what is called traditional evidence concerning facts of public or general interest affecting public or private rights, is limited to proof of declarations of deceased persons, or persons supposed to be dead or who are not available as witnesses, as to ancient rights of which they are presumed or are shown to have had competent knowledge, and which rights are incapable of proof in the ordinary way by living witnesses." *Hartford v. Maslen*, 76 Conn. 599, 615, 57 Atl. 740 (1904), per Hall, J., (strip of land claimed as part of public parks).

6. *North Carolina.*—*Bethea v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240 (1884); *Gervin v. Meredith*, 4 N. C. 439, 2 Car. Law Repos. 635 (1815).

Pennsylvania.—*Birmingham v. Anderson*, 40 Pa. St. 506 (1861); *Buchanan v. Moore*, 10 Serg. & R. 275 (1823).

Texas.—*Beal v. Asberry*, 20 S. W.

115 (1892); *Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671 (1887); *Evans v. Hurt*, 34 Tex. 111 (1871).

Vermont.—*Miller v. Wood*, 44 Vt. 378 (1872).

United States.—*Tracy v. Eggleston*, 108 Fed. 324, 47 C. C. A. 357 writ of certiorari *denied* 183 U. S. 699, 22 S. Ct. 935, 46 L. ed. 396 (1901); *Scaife v. Western North Carolina Land Co.*, 90 Fed. 238, 33 C. C. A. 47 (1898); *Robinson v. Dewhurst*, 68 Fed. 336, 15 C. C. A. 466 (1895); *Clement v. Packer*, 125 U. S. 309, 8 S. Ct. 907, 31 L. ed. 721 (1888).

7. *Alabama.*—*Barrett v. Kelly*, 131 Ala. 378, 30 So. 824 (1901); *Payne v. Crawford*, 102 Ala. 387, 14 So. 854 (1893); *Lamar v. Minter*, 13 Ala. 31 (1848).

Connecticut.—*Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884 (1902); *Hingley v. Bidwell*, 9 Conn. 447 (1833); *Porter v. Warner*, 2 Root 22 (1793).

Illinois.—*Reh fuss v. Hill*, 243 Ill. 140, 90 N. E. 187 (1909); *Noble v. Chrisman*, 88 Ill. 186 (1878).

Kentucky.—*Whalen v. Nisbet*, 95 Ky. 464, 26 S. W. 188, 16 Ky. L. Rep. 52 (1894).

Maine.—*Royal v. Chandler*, 83 Me. 150, 21 Atl. 842 (1891).

Massachusetts.—*Amee v. Boston & A. R. Co.*, 99 N. E. 168 (1904).

New Hampshire.—*Morss v. Emery*, 49 N. H. 239 note (1870); *Adams v.*

of the *res gestae*, to which attention is elsewhere directed,⁸ the extrajudicial statement of a former owner is admissible although he is alive.⁹

§ 2792. (Administrative Requirements); Subjective Relevancy: Adequate Knowledge.—Administration requires not only that the opponent of secondary evidence should be protected in his right to insist on the primary¹ until the proponent exhibits to the court a satisfactory forensic necessity for receiving the inferior grade, but also that the latter, when offered, should be found to be relevant, both objectively and subjectively. In connection with the present exception to the hearsay rule the existence of objective relevancy is a question presenting but little difficulty. It is a necessary prerequisite of all evidence. The crucial test of admissibility is the existence of subjective relevancy. Did the declarant possess at the time of making his statement Adequate Knowledge on the subject? Was he then under the influence of a Controlling Motive to Misrepresent?

Adequate Knowledge.—Unless the situation presented to a presiding judge is such that knowledge on the part of a given declarant as to the existence of a fact of public and general interest may rationally be assumed, affirmative proof to the satisfaction of the court must be offered on the subject.² As a rule, any intelligent member of the public of adult years may, as a matter of administration, be reasonably assumed to possess a satisfactory degree of knowledge in regard to a matter which concerns the public as a whole. In the same way, should interest in a certain subject be general through a given community, it may be considered a proper exercise of the administrative function of the court to dispense

Blodgett, 47 N. H. 219, 90 Am. Dec. 569 (1866); *Great Falls Co. v. Worcester*, 15 N. H. 412 (1844).

New York.—*Partridge v. Russell*, 2 N. Y. Suppl. 529 (1888).

North Carolina.—*Caldwell Land & L. Co. v. Triplett*, 151 N. C. 409, 66 S. E. 343 (1909); *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782 (1904); *Bethea v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240 (1886); *Smith v. Headrick*, 93 N. C. 210 (1885).

Ohio.—*Detwiler v. Toledo*, 13 Ohio

Cir. Ct. R. 572, 6 Ohio Cir. Dec. 297 affirmed 56 Ohio St. 772, 49 N. E. 1109 (1896).

8. § 2808.

9. *Davis v. Jones*, 3 Head (Tenn.) 603, 606 (1859).

§ 2792-1. § 464.

2. *Lay v. Neville*, 25 Cal. 545 (1864); *Cornwall v. Culver*, 16 Cal. 423 (1860); *Adams v. Stanyan*, 24 N. H. 405 (1852); *Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App. 1906), 96 S. W. 64.

with affirmative proof of the knowledge of a particular declarant in that community regarding it,³ at least in the first instance.

§ 2793. (*Administrative Requirements; Subjective Relevancy; Adequate Knowledge*); Boundaries.—An extrajudicial statement relating to the position of a public boundary, being on a matter of public and general interest, may fairly be assumed to have been made by one possessed of adequate knowledge on the subject. Such an assumption may be made in favor of any member of the public or of one resident in the community affected by the position of a public boundary.¹ Proof of actual knowledge may at any time be demanded by the presiding judge. Should the proponent fail to comply with such requirement the evidence may be rejected if calculated to mislead the jury or be so devoid of probative force that affirmative action could not rationally be taken in accordance with it.

§ 2794. (*Administrative Requirements; Subjective Relevancy; Adequate Knowledge; Boundaries*); Actual Knowledge required.—Where, however, the extrajudicial declaration relates to the location or landmarks of a *private* boundary which can at most be but a matter of quasi-public concern, judicial administration no longer feels justified in making the same assumption in all cases. Some satisfactory proof of actual knowledge will usually be required¹ as to the position of a private boundary,² of its land-

3. *Dunraven v. Llewellen*, 15 Q. B. 791, 14 Jur. 1089, 19 L. J. Q. B. 388, 69 E. C. L. 791 (1850).

"In subjects interesting to a comparatively small portion of the community, as a city or a parish, a foundation for admitting evidence of reputation, or the declarations of ancient and deceased persons, must first be laid by showing that from their situation they probably were conversant with the matter of which they were speaking." *Bow v. Allenstown*, 34 N. H. 351, 366, 69 Am. Dec. 489 (1857), per Bell, J.

§ 2793-1. § 2792.

§ 2794-1. *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489 (1857); *Draper v. Stanley*, 1 Heisk. (Tenn.) 432

(1870); *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354, 45 Atl. 896 (1899); *Hadley v. Howe*, 46 Vt. 142 (1873); *Miller v. Wood*, 44 Vt. 378 (1872); *Wood v. Willard*, 37 Vt. 377, 86 Am. Dec. 716 (1864).

2. *Alabama*.—*Barrett v. Kelley*, 131 Ala. 378, 30 So. 824 (1901).

California.—*Cornwall v. Culver*, 16 Cal. 423 (1860); *Morton v. Folger*, 15 Cal. 275 (1860).

Missouri.—*Lammon v. Hartsook*, 80 Mo. 13 (1883).

New Hampshire.—*Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. 543 (1888); *Morse v. Emery*, 49 N. H. 239 note (1870); *Smith v. Forrest*, 49 N. H. 230 (1870); *Adams v. Stanley*, 24 N. H. 405 (1852); *Melvin v.*

marks³ or of facts of incidental importance.⁴ Evidence resting upon such knowledge is deemed preferable to that based upon speculation, however persuasive the latter may be.⁵ Direct evidence of knowledge is not required, circumstantial proof being sufficient.⁶ Knowledge, however, must be shown to be commensurate with the fact which the witness proposes to state. This may be found, at times, in the statement itself. As the Supreme Court of North Carolina say:⁷ "The objection that it must affirmatively appear before such declarations are received, that the person making them had such knowledge or opportunities of obtaining information of the location and boundaries of the land as would enable him to speak of them as facts, finds no warrant in the adjudications. The declaration itself presupposes such knowledge or information, for how could he say where a boundary was,

Marshall, 22 N. H. 379 (1851);
Smith v. Powers, 15 N. H. 546
(1844).

Pennsylvania.—Moul v. Hartman,
104 Pa. St. 43 (1883); Bender v.
Pitzer, 27 Pa. St. 333 (1856); Kauf-
man v. Cedar Springs Presb. Cong.,
6 Binn. 59 (1813).

Texas.—Tucker v. Smith, 68 Tex.
473, 3 S. W. 671 (1887); Smith v.
Russell, 37 Tex. 247 (1872); Stroud
v. Springfield, 28 Tex. 649 (1866).

Vermont.—Martyn v. Curtis, 68
Vt. 397, 35 Atl. 333 (1896).

Virginia.—Fry v. Stowers, 92 Va.
13, 22 S. E. 500 (1895); Clements
v. Kyles, 13 Gratt. 468 (1856).

West Virginia.—Hill v. Proctor,
10 W. Va. 59 (1877).

3. *New Hampshire*.—Morse v.
Emery, 49 N. H. 239 note (1870)
(corner).

Pennsylvania.—Caufman v. Cedar
Springs Presb. Cong., 6 Binn. 59
(1813).

Tennessee.—Montgomery v. Lips-
comb, 105 Tenn. 144, 58 S. W. 306
(1900) (corner).

Texas.—Smith v. Russell, 37 Tex.
247 (1872).

Virginia.—Fry v. Stowers, 92 Va.
13, 22 S. E. 500 (1895) (corner);

Clements v. Kyles, 13 Gratt. 468, 477
(1856).

4. Lemmon v. Hartsook, 80 Mo. 13
(1883).

5. The declaration of a vendor as
to the boundary of his land along a
river, made when the marsh or mead-
ow lands and the actual high-water
mark of the river were well-known
landmarks, is of more weight than
the speculations concerning the ac-
tual location of the high-water mark,
evolved more than a century later
from the general references in the an-
cient charter to marshes, meadows,
and pastures along such river. Bren-
stein v. North American Realty Co.,
119 N. Y. Suppl. 1 (1909).

6. Broadwell v. Morgan, 142 N. C.
475, 55 S. E. 340 (1906) (long resi-
dence in the neighborhood); McDon-
ald v. McCaskill, 53 N. C. 158
(1860); Coate v. Speer, 3 McCord
(S. C.) 227, 15 Am. Dec. 627 (1825);
Turner Falls Lumber Co. v. Burns,
71 Vt. 354, 45 Atl. 896 (1899); Mil-
ler v. Wood, 44 Vt. 378 (1872);
Wood v. Willard, 37 Vt. 377, 86 Am.
Dec. 716 (1864).

7. Smith v. Headrick, 93 N. C. 210,
212 (1885), per Smith, C. J.

unless he did have personal knowledge or the means of arriving at the fact declared?"

Ancient Boundaries.—Should the boundary be an ancient one, it may be sound administration to confine the persons deemed eligible to testify to those who were of an advanced age at the time of making their statements.⁸

Lack of actual knowledge, as well as its possession, may be shown circumstantially.⁹ The court may infer from the circumstances under which the extrajudicial statement was made, especially including the declarant's opportunities for acquiring knowledge, that he could have known nothing about the subject upon which the jury could rationally act.¹⁰

§ 2795. (Administrative Requirements; Subjective Relevance; Adequate Knowledge; Boundaries); Judicial Assumptions as to Knowledge of Owners.—Direct proof of actual knowledge is not essential. The court may well be justified, as a matter of administration, in assuming knowledge in certain cases, although this perhaps may be nothing more than estimating the probative value of certain facts which circumstantially tend to establish the existence of knowledge. Adequate knowledge of boundaries may properly be taken for granted in case of certain persons whose relations to the property are such as to make it probable that they had suitable opportunities for observation and so great an interest to utilize them as to create a belief that they have sufficient knowledge on the subject. Among persons of this class are neighbors. A person residing within a short distance¹ of the property may be regarded as a suitable witness with respect to its boundaries or their landmarks.² Should no motive for careful search and accurate memory as to boundaries be shown, merely living on the land will not be deemed to supply the qualification of actual knowledge. "Duty or interest to make diligent

8. *Royal v. Chandler*, 83 Me. 150, 21 Atl. 842 (1892); *Daggett v. Shaw*, 5 Metc. (Mass.) 223 (1842); *Smith v. Headrick*, 93 N. C. 210 (1885); *Williams v. Kivett*, 82 N. C. 110 (1880).

9. *Cable v. Jackson*, 16 Tex. Civ. App. 579, 42 S. W. 136 (1897).

10. *Cable v. Jackson*, 16 Tex. Civ. App. 579, 42 S. W. 136 (1897).

§ 2795-1. *Broadwell v. Morgan*, 142 N. C. 475, 55 S. E. 340 (1906) (half a mile).

2. *Broadwell v. Morgan*, 142 N. C. 475, 55 S. E. 340 (1906) (pine tree as starting corner).

inquiry and obtain accurate information as to the facts " must be affirmatively shown.³

Railroad location.—The foreman in charge of the track and fences of a railroad company may be assumed to have such knowledge of the boundaries of the railroad location as to make his declarations on the subject, made while he is on the premises, evidence after his decease.⁴

§ 2796. (Administrative Requirements; Subjective Relevancy; Adequate Knowledge; Boundaries); Judicial Assumptions as to Knowledge of adjoining Owners.—Judicial administration is amply justified in assuming that an owner of land¹ who is in possession of it has adequate knowledge as to its boundaries, including the position of their marks. It is essential to the probative value of the evidence that these owners should be identified,² and the statement is most readily admitted where

3. *Clements v. Kyles*, 13 Gratt. (Va.) 468, 478 (1856).

4. *Keefe v. Sullivan County R. R.*, 75 N. H. 116, 71 Atl. 379 (1908).

§ 2796-1. *Alabama.*—*Payne v. Crawford*, 102 Ala. 387, 14 So. 854 (1893).

Connecticut.—*Higley v. Bidwell*, 9 Conn. 447 (1833); *Porter v. Warner*, 2 Root 22 (1793).

Illinois.—*Noble v. Chrisman*, 88 Ill. 186 (1878).

Indiana.—*Burr v. Smith*, 152 Ind. 469, 53 N. E. 469 (1899).

Maine.—*Royal v. Chandler*, 83 Me. 150, 21 Atl. 842 (1891).

New Hampshire.—*Keefe v. Sullivan County R. R.*, 75 N. H. 116, 71 Atl. 379 (1908); *Nutter v. Tucker*, 67 N. H. 185, 30 Atl. 352, 68 Am. St. Rep. 647 (1892).

North Carolina.—*Halstead v. Mullen*, 93 N. C. 252 (1885); *Mason v. McCormick*, 85 N. C. 226 (1881); *Harris v. Powell's Heirs*, 3 N. C. 349 (1805).

Tennessee.—*Montgomery v. Lipscomb*, 105 Tenn. 144, 58 S. W. 306 (1900); *Davis v. Jones*, 3 Head 603 (1859).

Texas.—*Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61

(1903); *Beal v. Asberry* (Sup. 1892), 20 S. W. 115; *Whitman v. Haywood*, 77 Tex. 557, 14 S. W. 166 (1890); *Hurt v. Evans*, 49 Tex. 311 (1878); *Evans v. Hurt*, 34 Tex. 111 (1871).

Vermont.—*Hathaway v. Goslant*, 77 Vt. 199, 59 Atl. 835 (1905); *Child v. Kingsbury*, 46 Vt. 47 (1873); *Powers v. Silsby*, 41 Vt. 288 (1868).

Virginia.—*Clements v. Kyles*, 13 Gratt. 468, 479 (1856); *Harriman v. Brown*, 8 Leigh 697 (1837).

West Virginia.—*High's Heirs v. Pancake*, 42 W. Va. 602, 26 S. E. 536 (1896).

United States.—*Robinson v. Dewhurst*, 68 Fed. 336, 15 C. C. A. 466 (1895); *Beard v. Talbot*, 2 Fed. Cas. No. 1,182, Brunn. Col. Cas. 201, Cooke (Tenn.) 142 (1812).

See also, *Marion County Lumber Co. v. Tilghman Lumber Co.*, 79 S. C. 54, 60 S. E. 33 (1908).

2. In trial of a case involving location of a boundary between landowners, evidence of a witness examined by interrogatories that a given corner was recognized by all the adjoining landowners as the true corner was properly excluded, where it did not appear from the answer who were the landowners referred to. or whether

the declarant has deceased³ and had no apparent motive to misrepresent.⁴ That a person now deceased had sufficient knowledge to make his declarations regarding the position of a private boundary or landmark competent, may be shown by other facts than that of his ownership of the land affected at the time his declarations were made.⁵

Adjoining owners.—With somewhat less reason, a presiding judge may be warranted in assuming that an owner of land whose premises adjoin those in dispute is possessed of adequate knowledge⁶ as to the position of the boundary line between his land and the premises in question and as to the location and character of their landmarks. Mere possession, however, of adjoining premises does not warrant the administrative assumption of knowledge.⁷ The declaration of a deceased adjoining owner of land as to the location of a corner or line, to be admissible, must relate to a line or corner of his own land, in the ascertainment of which he has an interest.⁸ The existence of such an interest affects the weight rather than the admissibility of the declarations made by him as to the boundary in question.⁹

§ 2797. (Administrative Requirements; Subjective Relevancy; Adequate Knowledge; Boundaries); Judicial Assumptions as to Knowledge of Surveyors, Chain Bearers.—Adequate knowledge may well be assumed by judicial administration in favor of deceased surveyors, should there be no direct proof on the subject.¹ Professional probity and scientific knowledge are united in these most valuable guides in dealing with questions of

they were owners at the time they recognized the true corner, or at what time the recognition was made. *Hix v. Gulley*, 124 Ga. 547, 52 S. E. 890 (1905).

3. *Simpson v. De Ramirez*, 50 Tex. Civ. App. 25, 110 S. W. 149 (1908).

4. *Simpson v. De Ramirez*, 50 Tex. Civ. App. 25, 110 S. W. 149 (1908). See also, § 2798.

5. *Keefe v. Sullivan County R. R.*, 75 N. H. 116, 71 Atl. 379 (1908).

6. *Lewis v. John L. Roper Lumber Co.*, 113 N. C. 55, 18 S. E. 52 (1893); *Bethea v. Byrd*, 95 N. C. 309, 59 Am.

Rep. 240 (1886); *Bender v. Pitzer*, 27 Pa. St. 333 (1856); *Harriman v. Brown*, 8 Leigh (Va.) 697 (1837); *King v. Watkins*, 98 Fed. 913 (1899).

7. *King v. Watkins*, 98 Fed. 913 (1899).

8. *State v. King*, 64 W. Va. 546, 63 S. E. 468, 495 (1908).

9. *Keefe v. Sullivan County R. R.*, 75 N. H. 116, 71 Atl. 379 (1908).

§ 2797-1. *Simpson v. De Ramirez*, 50 Tex. Civ. App. 25, 110 S. W. 149 (1908).

The surveyor's knowledge of the names and relations of landmarks

boundary. Where such a person has made a survey of the land in dispute and has since deceased, his verbal statements and the representations made by his plans, maps, drawings and the like² will be received in proof of the facts which they assert.³ It has been required that the declarations of the surveyor should have been made while he is upon the land in question.⁴ This seems, while justifiable as a matter of precaution, scarcely in accordance with considerations upon which the rule rests. It is essential, however, that the surveyor's knowledge should relate to the land in question. Having made a survey of *adjoining* land cannot be judicially assumed to confer the required knowledge.⁵ The statement of a surveyor must be one of fact. His inference, conclusion or judgment as to the effect of what he has observed is not regarded as receivable.⁶ The statement must also be *certain*.

may be shown by the survey itself. *Smith v. Headrick*, 93 N. C. 210 (1885).

Where it appears that the surveyor has long since died, the survey made by him may be given in evidence to prove the names borne by streams and other natural objects, called for in the surveys and situate in the vicinity thereof, at the dates of the surveys, and the surveyor's knowledge of these facts, if such names and knowledge thereof become material; they being mere subsidiary issues, bearing indirectly and resultantly upon the main issues in the case. *State v. King*, 64 W. Va. 546, 549, 63 S. E. 468, 495 (1908).

2. *Keystone Mills Co. v. Peach River Lumber Co.*, (Tex. Civ. App. 1906) 96 S. W. 64 (field notes).

3. *Tennessee*.—*Montgomery v. Lipscomb*, 105 Tenn. 144, 58 S. W. 306 (1900); *Moore v. Davis*, 4 Heisk. 540 (1871); *Lannum v. Brooks' Lessee*, 4 Hayw. 121, 122 (1817).

Texas.—*Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App. 1906) 96 S. W. 64 (field notes); *Beal v. Asberry* (Sup. 1892), 20 S. W. 115 (1892); *George v. Thomas*, 16 Tex. 74, 67 Am. Dec. 612 (1856).

Vermont.—*Powers v. Silsby*, 41 Vt. 288 (1868).

Virginia.—*Clements v. Kyles*, 13 Gratt. 468 (1856); *Harriman v. Brown*, 8 Leigh (Va.) 697 (1837).

United States.—*Tracy v. Eggleston*, 108 Fed. 324, 47 C. C. A. 357 writ of certiorari *denied* 183 U. S. 699, 22 S. Ct. 935, 46 L. ed. 396 (1901); *Martin v. Hughes*, 90 Fed. 632, 33 C. C. A. 198 (1898).

4. *Kramer v. Goodlander*, 98 Pa. St. 366 (1881); *Clay County Land, etc. Co. v. Montague County*, 8 Tex. Civ. App. 575, 28 S. W. 704 (1894); *Welder v. Hunt*, 34 Tex. 44 (1870); *Martin v. Hughes*, 90 Fed. 632, 33 C. C. A. 198 (1898); *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. ed. 113 (1880).

5. *Cable v. Jackson*, 16 Tex. Civ. App. 579, 42 S. W. 136 (1897). See also, *Angle v. Young* (Tex. Civ. App. 1894), 25 S. W. 798.

6. *Evans v. Greene*, 21 Mo. 170 (1855); *Wallace v. Goodall*, 18 N. H. 439 (1846); *Thacker v. Wilson* (Tex. Civ. App. 1909), 122 S. W. 938; *Russell v. Hunnicutt*, 70 Tex. 657, 8 S. W. 500 (1888).

Evidence of declarations of a surveyor since deceased, made when he

Where, therefore, he has located a certain corner at two different places his assertion as to its location is deprived of all evidentiary value.⁷

Chain bearers.—Frequently classed in judicial administration with surveyors as being persons who may be assumed to possess adequate knowledge as to facts concerning private boundaries are chain bearers. These persons intelligently⁸ co-operate with the surveyor in making his survey and may rationally be taken to have possessed adequate knowledge as to the salient facts which it represents. After the decease of such persons, their extrajudicial statements will be received as evidence of the facts asserted.⁹

§ 2798. (Administrative Requirements; Subjective Relevancy); Absence of Controlling Motive to misrepresent.—Essential to the subjective relevancy of an extrajudicial statement relating to a matter of public and general interest as secondary evidence of the facts asserted, is not only the requirement that the declarant was possessed of adequate knowledge but also that the latter was not, at the time of making his statement, under a controlling motive to misrepresent. The declarant must be disinterested.¹ Should an interest in the speaker to misrepresent be ex-

was attempting to plot out a tract of land not originally surveyed by him, and of which he had no previous knowledge, as to his opinion of the identification of corners and lines of the survey, is inadmissible. *Thacker v. Wilson* (Tex. Civ. App. 1909), 122 S. W. 938.

7. *Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App. 1906), 96 S. W. 64.

8. *Overton v. Davisson*, 1 Gratt. (Va.) 216, 42 Am. Dec. 544 (1844); *Hill v. Proctor*, 10 W. Va. 59 (1877).

Technical training is therefore essential. The mere mechanical act of carrying the chain is not sufficient to justify the assumption of adequate knowledge. The circumstances must be such, in the absence of direct evidence on the point, that the judge might reasonably assume that the chain-carrier understood the professional aspect and effect of his acts

while making the survey. *Fry v. Stowers*, 92 Va. 13, 22 S. E. 500 (1895).

9. *Coate v. Speer*, 3 McCord (S. C.) 227 (1825); *Clements v. Kyles*, 13 Gratt. (Va.) 468 (1856); *Smith v. Chapman*, 10 Gratt. (Va.) 445 (1853) *Overton v. Davisson*, 1 Gratt. (Va.) 211, 42 Am. Dec. 544 (1844); *Harriman v. Brown*, 8 Leigh (Va.) 697 (1837).

§ 2798-1. California.—*Cornwall v. Culver*, 16 Cal. 423 (1860); *Morton v. Folger*, 15 Cal. 275 (1860).

Connecticut.—*Porter v. Warner*, 2 Root 22 (1793).

Illinois.—*Noble v. Chrisman*, 88 Ill. 186 (1878).

Maine.—*Wilson v. Rowe*, 93 Me. 205, 44 Atl. 615 (1899).

Maryland.—*Medley v. Williams*, 7 Gill & J. 61 (1835); *Jarrett's Lessee v. West*, 1 Harr. & J. 501 (1804).

New Hampshire.—*Adams v. Stan-*

hibited to the court his declaration may properly be rejected.² The influence of bias³ or of the partisan warmth of feeling developed by the arising of a controversy⁴ have been deemed to render the statement untrustworthy.⁵ It has, therefore, been required that the declaration should have been made *ante litem motam*.⁶ Statements made *post litem motam* may, however, be used in corroboration of those made before any controversy on the subject arose.⁷

yan, 24 N. H. 405 (1852); *Melvin v. Marshall*, 22 N. H. 379 (1851); *Great Falls Co. v. Worster*, 15 N. H. 412 (1844).

North Carolina.—*Caldwell Land & Lumber Co. v. Triplett*, 151 N. C. 409, 66 S. E. 343 (1909); *Bullard v. Hollingsworth*, 140 N. C. 634, 53 S. E. 441 (1906); *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782 (1904); *Bethea v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240 (1886); *Whitehurst v. Pettipher*, 87 N. C. 179, 42 Am. Rep. 520 (1882); *Caldwell v. Neely*, 81 N. C. 114 (1879).

South Carolina.—*Coate v. Speer*, 3 McCord 227, 15 Am. Dec. 627 (1825).

Texas.—*Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671 (1887); *Evans v. Hurt*, 34 Tex. 111 (1871); *Stroud v. Springfield*, 28 Tex. 649 (1866).

Vermont.—*Hathaway v. Goslant*, 77 Vt. 199, 59 Atl. 835 (1905); *Evarts v. Young*, 52 Vt. 329 (1880).

Virginia.—*Harriman v. Brown*, 8 Leigh 697 (1837).

United States.—*Scaife v. Western North Carolina Land Co.*, 90 Fed. 238, 33 C. C. A. 47 (1898).

2. *Corbleys v. Ripley*, 22 W. Va. 154, 46 Am. Rep. 502 (1883).

3. *Bethea v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240 (1886).

"Those declarations which are liable to the suspicion of bias from interest" are always to be excluded. *Harriman v. Brown*, 8 Leigh (Va.) 697, 713 (1837), per Tucker, P.

4. *Dancy v. Sugg*, 19 N. C. 515 (1837).

5. *Royal v. Chandler*, 83 Me. 150, 21 Atl. 842 (1891); *Lawrence v. Ten-*

ant, 64 N. H. 532, 15 Atl. 543 (1888); *Adams v. Blodgett*, 47 N. H. 219, 90 Am. Dec. 569 (1866); *Mason v. McCormick*, 85 N. C. 226 (1881); *Child v. Kingsbury*, 46 Vt. 47 (1873).

6. *Arkansas*.—*De Loney v. State*, 88 Ark. 311, 115 S. W. 138 (1908).

Connecticut.—*Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884 (1902).

Dakota.—*McCall v. U. S.*, 1 Dak. 320, 46 N. W. 608 (1876).

Michigan.—*Stockton v. Williams*, Walk. Ch. 120 (1843).

New Hampshire.—*Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. 543 (1888).

New York.—*Partridge v. Russell*, 50 Hun 601, 2 N. Y. Suppl. 529, 18 N. Y. St. Rep. 685 (1888).

North Carolina.—*Table Rock Lumber Co. v. Branch*, 150 N. C. 240, 63 S. E. 948 (1909) (boundary); *Bullard v. Hollingsworth*, 140 N. C. 634, 53 S. E. 441 (1906); *Hill v. Dalton*, 140 N. C. 9, 52 S. E. 273 (1905); *Lewis v. John L. Roper Lumber Co.*, 113 N. C. 55, 18 S. E. 52 (1893); *Bethea v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240 (1886); *Whitehurst v. Pettipher*, 87 N. C. 179, 42 Am. Rep. 520 (1882).

Pennsylvania.—*In re Old Eagle School Property*, 36 Wkly. Notes Cas. 348 (1895).

Tennessee.—*McCloud v. Mynott*, 2 Coldw. 163 (1865).

Texas.—*Stroud v. Springfield*, 28 Tex. 649, 670 (1866).

United States.—*Robinson v. Dewhurst*, 68 Fed. 336, 15 C. C. A. 466 (1895).

7. *Coate v. Speer*, 3 McCord (S. C.)

Private Boundaries.—A deceased declarant as to private boundaries should be shown to have been without motive to misrepresent.⁸ Under the present requirement, an adjoining owner is not necessarily an interested person.⁹

§ 2799. (Administrative Requirements; Subjective Relevancy; Absence of Controlling Motive to misrepresent); Self-serving Statements.—An extrajudicial declaration regarding a matter of public and general interest is not necessarily excluded because self-serving.¹ As has been suggested,² the interest of a member of the public to gain a personal advantage under the guise of defending or establishing a public right may well be regarded as an infirmative consideration in determining the probative force of this species of evidence. Naturally the evidentiary effect of a statement is much increased when it is made against the declarant's known interest.³

§ 2800. Form of Declaration.—Hearsay declarations regarding matters of public and general interest may be composite or individual. Composite hearsay on the subject as embodied in reputation is elsewhere considered.¹ Individual, identified hearsay receivable under the present exception may properly be in any form, oral or written,² by which thought may be conveyed.

227, 15 Am. Dec. 627 (1825); *Whitman v. Haywood*, 77 Tex. 557, 14 S. W. 166 (1890); *Martyn v. Curtis*, 68 Vt. 397, 35 Atl. 333 (1896).

8. *Turgeon v. Woodward*, 83 Conn. 537, 78 Atl. 577 (1910); *Broadwell v. Morgan*, 142 N. C. 475, 55 S. E. 340 (1906).

The term "no interest to misrepresent" as used with reference to conditions requisite to the admission of declarations of a deceased person respecting a boundary, means freedom from selfish motive or self-interest or personal advantage; disinterested, not merely in the sense of having no pecuniary interest, but in the broader sense of being absolutely impartial and indifferent to the controversy on trial. *Turgeon v. Woodward*, 83 Conn. 537, 78 Atl. 577 (1910).

A guardian is an interested person

in relation to the boundaries of land owned by his ward. *Peters v. Tilghman & Purnell*, 111 Md. 227, 73 Atl. 726 (1909). His declarations upon the subject are, therefore, not receivable.

9. *Turgeon v. Woodward*, 83 Conn. 537, 78 Atl. 577 (1910); *Bethea v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240 (1886); *Turners Falls Lumber Co. v. Burns*, 71 Vt. 354, 45 Atl. 896 (1899); *Martyn v. Curtis*, 68 Vt. 397, 35 Atl. 333 (1896); *Wood v. Willard*, 37 Vt. 377, 86 Am. Dec. 716 (1864).

§ 2799-1. *Child v. Kingsbury*, 46 Vt. 47 (1873); *Tracy v. Eggleston*, 108 Fed. 324, 47 C. C. A. 357 (1901).

2. § 2790.

3. *Powers v. Silsby*, 41 Vt. 288 (1868).

§ 2800-1. §§ 2741 *et seq.*

2. *Bow v. Allentown*, 34 N. H. 351,

Circumstantial evidence may, of course, be used in proof of matters of public or general interest. Thus, the incorporation of a town may be shown, in part, by the issuance to it of a venire for jurors.³

Private Boundaries.— Extrajudicial declarations relating to private boundaries may be in a variety of written forms.⁴ Prominent among these are deeds, depositions of surveyors,⁵ their field notes,⁶ plans,⁷ and the like.

Proof of reputation.— The existence of a reputation regarding a matter of public and general interest, which is itself considered at another place,⁸ may be shown by the unsworn statements of deceased persons under the present exception. Thus, certain delineations upon a plan may have a tendency to establish the existence of a reputation with regard to a matter of public and general interest, e. g., the location of a public highway.⁹

§ 2801. Scope of Rule.— The admissibility of the extrajudicial

69 Am. Dec. 489 (1857); *New Boston v. Dunbarton*, 15 N. H. 201 (1844) (deed); *Plaxton v. Dare*, 10 B. & C. 17, 8 L. J. K. B. (O. S.) 98, 5 M. & R. 1, 21 E. C. L. 17 (1829); *Brett v. Beals*, M. & M. 416, 22 E. C. L. 553 (1829) (deed).

3. *Bow v. Allentown*, 34 N. H. 351, 69 Am. Dec. 489 (1857).

4. *Weld v. Brooks*, 152 Mass. 297, 25 N. E. 719 (1890); *Bow v. Allentown*, 34 N. H. 351, 69 Am. Dec. 489 (1857); *Daniels v. Fitzhugh*, 13 Tex. Civ. App. 300, 35 S. W. 38 (1896).

5. *Morton v. Folger*, 15 Cal. 275 (1860).

Withholding deposition.— A party into whose possession the deposition of the surveyor who made the survey has come will not be allowed to suppress it and substitute therefor the unsworn statements of the surveyor himself. The presiding judge is justified in rejecting the substitutionary evidence. *McNeil v. Dixon*, 1 A. K. Marsh. (Ky.) 365, 10 Am. Dec. 740 (1818).

6. *Detwiler v. Toledo*, 13 Ohio Civ. Ct. R. 572, 6 Ohio Civ. Dec. 297,

affirmed 56 Ohio St. 772, 49 N. E. 1109 (1896).

7. *Birmingham v. Anderson*, 40 Pa. St. 506 (1861); *Cottingham v. Seward*, (Tex. Civ. App. 1894) 25 S. W. 797. See, also, *Mineral R. & M. Co. v. Auten*, 188 Pa. St. 568, 41 Atl. 327 (1898) (draft of a survey over a hundred years old held admissible).

8. §§ 2741 *et seq.*

9. *Attorney General v. Antrobus*, 74 Law J. Ch. 599, 2 Ch. 188, 92 Law T. 790, 3 Local Gov. R. 1071, 21 Times Law R. 471 (1905).

In England, ancient documents such as surveys, estimates and petitions of a private character, produced from the record office, which do not affect the king's property or revenues, are not public documents which are admissible as such according to the ruling of Lord Blackburn in *Sturla v. Freccia*, 50 Law J. Ch. 86, 96, 5 App. Cas. 623, 643, or as evidence of reputation. *Mercer v. Denne*, (Eng. 1905) 74 Law J. Ch. 723 (1905) 2 Ch. 538, 93 Law T. 412, 3 Local Gov. R. 1293, 21 Times Law R. 760.

statement extends to facts directly¹ but not to those incidentally² asserted. Facts of the latter nature, such as dates,³ and the like, are not apt to be the subjects of extended discussion and mutual correction⁴ upon which the relevancy of this species of evidence rests. Where, however, the extrajudicial declaration undertakes to locate the position of a matter of public and general interest by reference to the location of something else not itself possessing public interest, e. g., a house,⁵ the extrajudicial statement may properly cover the position of that to which reference is made.

“Interest.”—The interest spoken of in the rule is that of ownership or some lesser property right in the chattels, land or franchises to which an individual may properly lay claim by virtue of being a member of the public, more or less extended. That a subject possesses *historical* interest apart from ownership is no ground for admitting, under the present rule, extrajudicial assertions regarding it.⁶

§ 2802. (*Scope of Rule*); Topics Excluded.—Though a topic may possess a quasi public interest, it may still be essentially of a private nature. For the purposes of the present rule, the test of what is public is as to whether the subject in question is calculated to excite such a general, sustained, and, as it were, spirited discussion as will be apt to result in the establishment of a correct opinion. Where this characteristic quality is absent, the declaration is to be rejected,¹ although, in a certain sense, the topic is a

§ 2801-1. § 2790.

2. *Smith v. Cornett*, 38 S. W. 639, 18 Ky. L. Rep. 818 (1897) (date); *Peck v. Clark*, 142 Mass. 436, 8 N. E. 335 (1886); *Van Deusen v. Turner*, 12 Pick. (Mass.) 532 (1832).

3. *Bolton Southwest School Dist. v. Williams*, 48 Conn. 504 (1881).

4. “If the fact to be proved is a particular date, though connected incidentally with a public matter, it is easy to see that it could not stand out as a salient fact for contemporaneous criticism and discussion so as to furnish any guaranty for its correctness; so that the general rule excluding hearsay evidence applies in full force. The human memory is proverbially treacherous even in re-

gard to very recent dates, and little reliance can be placed on the sworn testimony of living witnesses in such matters, unless they are able to associate the date given with some more striking fact.” *Southwest School Dist. of Bolton v. Williams*, 48 Conn. 504, 507 (1881), per Loomis, J.

5. *Abington v. North Bridgewater*, 23 Pick. (Mass.) 170 (1839). See, however, *Reg. v. Bliss*, 7 A. & E. 550, 7 L. J. Q. B. 4, 2 N. & P. 464, W. & D. 624, 34 E. C. L. 294 (1837).

6. *Swinerton v. Columbian Ins. Co.*, 9 Bosw. (N. Y.) 361 (1881).

§ 2802-1. *Wells v. Jesus College*, 7 C. & P. 284, 32 E. C. L. 615 (1836) (farm); *Lonsdale v. Heaton, Younge* 58 (1830) (farm).

public one. Such a situation is presented where the unsworn statement is made concerning the existence of a *modus* or commutation for tithes² or the issue relates to the private nature of a given way.³ Even more clearly justified is the ruling that matters distinctly of private concern are not suitable topics for the unsworn statements of deceased witnesses as secondary evidence of the facts asserted.⁴ In matters so largely involving questions of degree, it is not unnatural that much variety of judicial opinion should have been expressed, and that the task of seeking to reconcile the authorities is a difficult if not impossible one. The Supreme Court of Appeals of West Virginia truly say:⁵ "Upon the admissibility of declarations of deceased persons as evidence in land controversies, there is a large volume of law, and it is somewhat confused; and unless we examine it with an eye open to the purpose for which it is designed, we shall misunderstand and misapply it."

§ 2803. (*Scope of Rule*); Topics Included.—Among topics deemed by administration of sufficient public and general interest to warrant the assumption that they will be widely discussed and truly settled and that, therefore, an extrajudicial declaration which states the prevailing opinion will be helpful secondary evidence of the facts asserted is that of the position of municipal boundaries.¹ These boundaries may be those of large political divisions, such as territories² or states³ or those of smaller or more local governmental divisions such as counties⁴ towns⁵ and similar

2. *Wells v. Jesus College*, 7 C. & P. 284, 32 E. C. L. 615 (1836).

3. *Reg. v. Bliss*, 7 A. & E. 550, 7 L. J. Q. B. 4, 2 N. & P. 464, W. W. & D. 624, 34 E. C. L. 294 (1837).

4. *Blackett v. Lowes*, 2 M. & S. 494, 15 Rev. Rep. 324 (1814).

5. *High's Heirs v. Pancake*, 42 W. Va. 602, 606, 26 S. E. 536 (1896), per Brannon, J.

§ 2803-1. *California*.—*Cornwall v. Culver*, 16 Cal. 423 (1860); *Morton v. Folger*, 15 Cal. 275 (1860).

Maine.—*Chapman v. Twitchell*, 37 Me. 59, 58 Am. Dec. 773 (1853).

New Hampshire.—*Adams v. Stannan*, 24 N. H. 405 (1852).

Texas.—*Stroud v. Springfield*, 28 Tex. 649 (1866).

Washington.—*Inmon v. Pearson*, 47 Wash. 402, 92 Pac. 279 (1907).

Ancient boundaries.—Where the boundary is an ancient one an additional administrative reason for admitting hearsay statements with regard to it is furnished. *De Loney v. State*, 88 Ark. 311, 115 S. W. 138 (1908).

2. *McCall v. U. S.*, 1 Dak. 320, 46 N. W. 608 (1876).

3. *De Loney v. State*, 88 Ark. 311, 115 S. W. 138, 142 (1908).

4. *People v. Velarde*, 59 Cal. 457 (1881); *Lay v. Neville*, 25 Cal. 545

public corporations. Other matters of municipal concern, as the incorporation of a town,⁶ the layout and location⁷ of its highways⁸ and streets⁹ may be proved in the same way. Certain topics, though more local in their nature, may yet excite general interest throughout the community and be provocative of such a discussion as administration deems a satisfactory formative force in the creation of a correct final opinion on the subject. In England, for example, to the tenants of a manor their common rights, e. g., those of pasture,¹⁰ are matters of general interest. In the same way, to the residents of a given community various questions generally affecting them all, as the location of a large navigable stream¹¹ may be deemed of public or general interest within the rule.

*Whether certain lands are public or owned by private individuals may properly be a subject of general concern to the members of a community.*¹² If, however, the declarations of deceased persons on the subject be in conflict with a complete paper title established by the public records they cannot be deemed to possess much probative force.¹³

§ 2804. (Scope of Rule); Private Boundaries.—The subject of private boundaries is one very largely of personal concern. With certain exceptions shortly to be noted, as where the boundary is an ancient one¹ or coincides with or is in some other way distinctly related to the location of a public boundary,² it can scarcely be rationally assumed that the position of the lines of individual ownership or of their marks or monuments will give rise to a general discussion productive of truth. Partly by reason of the condi-

(1864); *Drury v. Midland R. Co.*, 127 Mass. 571 (1879).

5. *Abington v. North Bridgewater*, 23 Pick. (Mass.) 170 (1839).

6. *Bow v. Allentown*, 34 N. H. 351, 69 Am. Dec. 489 (1857).

7. *Wooster v. Butler*, 13 Conn. 309 (1839).

8. *Weld v. Brooks*, 152 Mass. 297, 25 N. E. 719 (1890); *Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. 543 (1888).

9. *Birmingham v. Anderson*, 40 Pa. St. 506 (1861).

10. *Weeks v. Sparke*, 1 M. & S. 679, 14 Rev. Rep. 546 (1813).

11. *Drury v. Midland R. Co.*, 127 Mass. 571 (1879); *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584 (1886).

12. *Dawson v. Town of Orange*, 78 Conn. 96, 61 Atl. 101 (1905) (town common).

13. *Dawson v. Town of Orange*, 78 Conn. 96, 61 Atl. 101 (1905).

§ 2804-1. § 2804a.

2. § 2805.

tions of the early settlement of colonial lands and the issues of patents to the public domain of the United States, both of which, for slightly different reasons, tended to establish a marked coincidence between public and private boundaries,³ but still more largely by reason of the necessity of the case elsewhere more fully stated⁴ it became necessary for judicial administration in America to receive the extrajudicial statements of deceased witnesses as to the position of private boundaries.⁵ These social and economic conditions have not arisen in England, and a different rule, excluding such statements as to private boundaries in proof of the facts asserted, prevails in that country.⁶ Canadian practice⁷ is in accord with the English.

§ 2804a. (*Scope of Rule; Private Boundaries*); Ancient Boundaries.—In no connection, perhaps, is the forensic necessity of the proponent for the admission of such evidence so great as where the boundary or landmark is an ancient one.¹ It may be

3. § 2805.

4. §§ 2805, 2806.

5. "In many of the States, and especially in this State, the territory within their limits was first divided into townships, and these were soon after subdivided into small lots, and distributed between the several proprietors. Almost the only evidence left upon the land, to indicate the location of the lines either of the townships or of the division between the proprietors, was marks upon the trees standing thereon, and these evidences, from lapse of time, accidental causes, and the cutting off the timber, are almost entirely obliterated. . . . If it be said that ('dividing lines between lands must be shown') by the testimony of witnesses who have personal knowledge of their original location, they cannot be proved at all, as in the great majority of cases, all such persons are now dead." Wood v. Willard, 37 Vt. 377, 387 (1864), per Pierpont, J.

6. Thomas v. Jenkins, 6 A. & E. 525, 1 Jur. 261, 6 L. J. K. B. 163, 1 N. & P. 587, 33 E. C. L. 285 (1837).

7. Manary v. Dash, 23 U. C. Q. B. 580 (1864).

"From my experience I know of nothing better calculated to sway the judgment of jurymen than the declarations of deceased persons in relation to their boundaries. It is therefore most necessary to exclude from their consideration statements of that kind, or any statements which the witness may be repeating which amount to mere hearsay. It is not necessary to comment on the danger and injustice which would result in trying boundary lines by reputation in the neighborhood. The wisdom of the law has always restricted such evidence to boundaries in which the whole community are interested, such as township or county lines." Bartlett v. Nova Scotia Steel Co., Ltd., 37 Nova Scotia R. 259, 265 (1905), per Townsend, J.

§ 2804a-1. *Alabama*.—Barrett v. Kelly, 131 Ala. 378, 30 So. 824 (1901); Taylor v. Fomby, 116 Ala. 621, 22 So. 910, 67 Am. St. Rep. 149 (1897).

California.—Lay v. Neville, 25 Cal.

and often is difficult to obtain relevant evidence as to the location of private boundaries other than the unsworn statements of deceased persons familiar with the facts. Should the line be an ancient one, i. e., established for over thirty years, administration may well be justified in the absence of evidence to the contrary, in assuming that securing other evidence on the point is beyond the power of the proponent. Such is the rule of practice or procedure relating to other ancient facts.²

Probative force.—The very nature of this kind of evidence invites the suggestion that it should be received with caution.³

§ 2805. (Scope of Rule; Private Boundaries); Coincidence or relation to Public Boundaries.—The same preponderance of authority which prevails in the United States in favor of receiving the extrajudicial statements of deceased persons with regard to ancient boundaries obtains also in favor of receiving such evidence where the line of private boundary coincides to a greater or less extent with that of public boundary¹ or is in some definite

545 (1864); *Morton v. Folger*, 15 Cal. 275 (1860).

Connecticut.—*Porter v. Warner*, 2 Root. 22 (1793).

New Hampshire.—*Adams v. Blodgett*, 47 N. H. 219, 90 Am. Dec. 569 (1866).

New York.—*McKineron v. Bliss*, 31 Barb. 180 affirmed 21 N. Y. 206 (1860).

North Carolina.—*Smith v. Headrick*, 93 N. C. 210 (1885).

Pennsylvania.—*In re Old Eagle School Property*, 36 Wkly. Notes Cas. 348 (1895); *Kramer v. Goodlander*, 98 Pa. St. 366 (1881); *Kennedy v. Lubold*, 88 Pa. St. 246 (1878).

Texas.—*Whitman v. Haywood*, 77 Tex. 557, 14 S. W. 166 (1890); *Linney v. Wood*, 66 Tex. 22, 17 S. W. 244 (1886).

Vermont.—*Martyn v. Curtis*, 68 Vt. 397, 35 Atl. 333 (1896); *Powers v. Silsby*, 41 Vt. 288 (1868); *Wood v. Willard*, 37 Vt. 377, 86 Am. Dec. 716 (1864).

United States.—*Boardman v. Ried*, 6 Pet. 328, 8 L. ed. 415 (1832);

Conn. v. Penn, 6 Fed. Cas. No. 3,104, 1 Pet. C. C. 496 (1818).

2. Ancient Records.—*McKinnon v. Bliss*, 21 N. Y. 206 (1860).

“In matters of general public interest, as to which there is no inducement to collusion for a particular end, the declarations of deceased witnesses made before the controversy arose as to reputation in ancient things and ancient documentary evidence may be received.” *In re Old Eagle School Property*, 36 Wkly. Notes Cas. (Pa.) 348 (1895).

3. Welder v. Carroll, 29 Tex. 317 (1867). “While, as has been heretofore held by this court, hearsay evidence to establish ancient boundaries is, under proper circumstances, admissible, (*Stroud v. Springfield*, 28 Tex. 649) it should be closely scrutinized, and received with proper caution.” *Welder v. Carroll*, 29 Tex. 317, 335 (1867), per Moore, C. J.

§ 2805-1. *Thomas v. Jenkins*, 6 A. & E. 525, 1 Jur. 261, 6 L. J. K. B. 163, 1 N. & P. 587, 33 E. C. L. 285 (1837).

way related to it. Such a forensic situation is most frequently presented, perhaps, in those sections of the United States which have formed part of the public domain and which have been laid out on meridian, range and section lines. Here it frequently happens, as less often in the older parts of the country,² that a single line may form a common boundary for a number of individual estates. In this way, even where it does not coincide, as it well may, with a public boundary, the position of common line can scarcely fail to constitute a matter of quasi-public interest.³

§ 2806. (*Scope of Rule; Private Boundaries*); A Distinct Step Forward.—A distinct step forward has, moreover, been taken in many jurisdictions of the United States. The peculiar circumstances attending the settlement of a new country¹ have

2. Early land settlement.—Bearing in mind this aspect of the rule, it may be said that, as compared to England, the changed social conditions of early life in America under which the rule relating to private boundaries arose, not only materially affected the nature and scope of what might reasonably be thought to be matters of public and general interest, but also presented a practically new set of administrative conditions under which the rule relating to extrajudicial statements regarding such matters was to be applied. Hence, almost necessarily, arose not so much a change in the rule as an extended application of it. Large grants of land made by the Crown to individuals or associations were common features in the settlement of America. The boundaries of such grants were frequently given in most general terms, and were often established by the use of extremely perishable landmarks. As the granted territory was made the subject of smaller proprietary holdings, it naturally occurred that the boundaries of the original patent or grant were in the highest degree matters of public and general interest. *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. 886,

60 Am. Rep. 584 (1886); *McKinnon v. Bliss*, 21 N. Y. 206 (1860). The marked trees, stakes and stones and other perishable landmarks of the early deeds soon disappeared or were easily changed. *Scoggin v. Dalrymple*, 52 N. C. 46 (1859); *Kennedy v. Lubold*, 88 Pa. St. 246 (1878). In many causes, upon the destruction of the latter by fire, decay, or other natural cause, the true position of the line could only rest in memory and, as time progressed, it became necessary to trace a continuous tradition among ancient persons having adequate knowledge on the subject.

3. *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584 (1886); *McKinnon v. Bliss*, 21 N. Y. 206 (1860).

§ 2806-1. The common mistakes of early surveyors.—(*Conn. v. Penn*, 6 Fed. Cas. No. 3,104, Pet. C. C. 496 (1818)). The obliteration of transient or easily perishable monuments hastily erected (*Scoggin v. Dalrymple*, 52 N. C. 46 (1859)); (*Kennedy v. Lubold*, 88 Pa. St. 246 (1878) (evidence deemed "strong")), and similar infirmative considerations have not failed to receive attention.

A Topic of Public Interest.—There were causes in the early days of land

made it natural if not inevitable for judicial administration in these jurisdictions not only to lay stress upon the quasi-public character of certain lines of individual ownership, e. g., those which correspond or stand in some fixed relation to public boundaries,² but also to receive, by reason of the necessity of the case, the proponent being unable to produce other evidence in support of his contention, unsworn statements as to the position of private boundaries in general,³ their corners⁴ or their landmarks if made

settlement in America and by no means insignificant ones, tending to make the marks and lines of all private boundaries a matter of public and general interest and discussion. In practically every community that the true marks and boundaries of private estates should be known and recognized by all persons was justly deemed a matter of public concern. Such knowledge and recognition was, in effect, no inconsiderable element in the certainty and security of all land titles. Among scattered settlements where a large proportion of the general wealth was in the ownership of land, few topics could well be of greater or more legitimate public interest.

2. § 2805.

3. *Arkansas*.—Butler v. Hines, 142 S. W. 509 (1912).

California.—Cornwall v. Culver, 16 Cal. 423 (1860); Morton v. Folger, 15 Cal. 275 (1860).

Illinois.—Noble v. Chrisman, 88 Ill. 186 (1878).

Maine.—Emmett v. Perry, 100 Me. 139, 60 Atl. 872 (1905).

Maryland.—Cadwalader v. Price, 111 Md. 310, 73 Atl. 273, 134 Am. St. Rep. 603-n (1909); Weem's Lessee v. Disney, 4 Harr. & McH. 156 (1798); Howell's Lessee v. Tilden, 1 Harr. & McH. 84 (1735).

New Hampshire.—Keefe v. Sullivan County Railroad, 75 N. H. 116, 71 Atl. 379 (1908); Adams v. Stannan, 24 N. H. 405 (1852); Melvin v. Marshall, 22 N. H. 379 (1851); Great Falls Co. v. Worster, 15 N. H. 412 (1844).

North Carolina.—Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782 (1904); Westfeldt v. Adams, 131 N. C. 379, 42 S. E. 823 (1902); Bethea v. Byrd, 95 N. C. 309, 59 Am. Rep. 240 (1886); Hartzog v. Hubbard, 19 N. C. 241 (1837); Sasser v. Herring, 14 N. C. 340, 342 (1832).

Pennsylvania.—Moul v. Hartman, 104 Pa. St. 43 (1883); Kramer v. Goodlander, 98 Pa. St. 366 (1881); Bender v. Pitzer, 27 Pa. St. 333 (1856); Buchanan v. Moore, 10 Serg. & R. 275 (Pa.) (1823); Hamilton v. Menor, 2 Serg. & R. (Pa.) 70 (1815).

South Carolina.—Sexton v. Hollis, 26 S. C. 231, 1 S. E. 893 (1886); Lynn v. Thompson, 17 S. C. 129 (1881); Coate v. Speer, 3 McCord 227 (S. C.), 15 Am. Dec. 627 (1825).

Tennessee.—McCloud v. Mynatt, 2 Coldw. 163 (1865).

Texas.—Tucker v. Smith, 68 Tex. 473, 3 S. W. 671 (1887); Evans v. Hurt, 34 Tex. 111 (1870); Stroud v. Springfield, 28 Tex. 649 (1866).

Vermont.—Hathaway v. Goslant, 77 Vt. 199, 59 Atl. 835 (1905); Martin v. Curtis, 68 Vt. 397, 35 Atl. 333 (1896) (to be admissible must be brought within the rules laid down).

Virginia.—Douglas Land Co. v. T. W. Thayer Co., 107 Va. 292, 58 S. E. 1101 (1907).

Washington.—Inmon v. Pearson, 47 Wash. 402, 92 Pac. 279 (1907).

West Virginia.—Hill v. Proctor, 10 W. Va. 59 (1877).

4. Lamb v. Copeland, 158 N. C. 136, 73 S. E. 797 (1912); Inmon v. Pearson, 47 Wash. 402, 92 Pac. 279 (1907).

by deceased persons⁵ possessed of adequate knowledge⁶ or by a vendor at the time of the conveyance of the land in question.⁷

The contrary view, that judicial administration is not justified in treating the statements of deceased persons regarding private boundaries as admissible under the present exception of the hearsay rule as secondary evidence of the facts asserted, is briefly considered elsewhere.⁸

5. *Connecticut*.—Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884 (1902).

Indiana.—Burr v. Smith, 152 Ind. 469, 53 N. E. 469 (1899).

Kentucky.—Whalen v. Nisbet, 95 Ky. 464, 26 S. W. 188, 16 Ky. L. Rep. 52 (1894) (trees).

New Hampshire.—Wendell v. Abbott, 45 N. H. 349 (1864) (corner).

North Carolina.—Caldwell Land & Lumber Co. v. Triplett, 151 N. C. 409, 66 S. E. 343 (1909) (tree); Bullard v. Hollingsworth, 140 N. C. 634, 53 S. E. 441 (1906) (tree); Westfelt v. Adams, 131 N. C. 379, 42 S. E. 823 (1902) (tree); McDonald v. McCaskill, 53 N. C. 158 (1860) (tree); Scoggin v. Dalrymple, 52 N. C. 46 (1859) (corner tree).

Pennsylvania.—Collins v. Clough, 222 Pa. St. 472, 71 Atl. 1077 (1909); Kennedy v. Lubold, 88 Pa. St. 246 (1878) (trees).

Tennessee.—McCloud v. Mynatt, 2 Coldw. 163 (1865).

Texas.—Beal v. Asberry (Sup. 1892), 20 S. W. 115 (corner); Tucker v. Smith, 68 Tex. 473, 3 S. W. 671 (1887) (posts); Linney v. Wood, 66 Tex. 22, 17 S. W. 244 (1886).

Vermont.—Hadley v. Howe, 46 Vt. 142 (1873) (monuments).

Virginia.—Smith v. Chapman, 10 Gratt. 445 (1853); Harriman v. Brown, 8 Leigh 697 (1837).

Washington.—Inmon v. Pearson, 47 Wash. 402, 92 Pac. 279 (1907).

West Virginia.—High's Heirs v. Pancake, 42 W. Va. 602, 26 S. E. 536 (1896) (tree); Corbleys v. Ripley, 22

W. Va. 154, 46 Am. Rep. 502 (1883) (corner).

This requirement has not been at all times insisted on by judicial administration. Inmon v. Pearson, 47 Wash. 402, 92 Pac. 279 (1907).

6. Fincannon v. Sudderth, 144 N. C. 587, 57 S. E. 337 (1907); Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340 (1906).

7. Bollinger v. McMinn, 47 Tex. Civ. App. 89, 104 S. W. 1079 (1907).

8. § 2804.

Federal courts follow the practice prevailing in the jurisdiction within or for which they are sitting so far as relates to the reception of extrajudicial statements by deceased persons as to the lines or landmarks of private boundaries. Martin v. Hughes, 90 Fed. 632, 33 C. C. A. 198 (1898) (following Pennsylvania rule); Ayers v. Watson, 137 U. S. 594, 5 S. Ct. 641, 28 L. ed. 1093 (1890) (admitting declarations under the Texas rule); Clement v. Packer, 125 U. S. 309, 8 S. Ct. 907, 31 L. ed. 721 (1888) (admitting declarations, pursuant to the Pennsylvania rule); Hunnicut v. Peyton, 102 U. S. 333, 26 L. ed. 113 (1880) (following Texas rule); Ellicott v. Pearl, 10 Pet. (U. S.) 412, 9 L. ed. 475 (1836) (rejecting declarations, in accordance with the Kentucky rule). Should a case occur where the federal court would be at liberty to exercise its independent judgment on this subject, it seems probable that the court would prefer the rule admitting extrajudicial declarations to prove the

Connecticut rule.—A rule of qualification in case of witnesses to the location of private boundaries, well calculated to secure satisfactory results, has been adopted in Connecticut. In order that declarations of another with reference to the boundaries of land may be admissible, it must be first proven that the declarant is dead; that he would have been qualified to testify if present; that he had peculiar means of knowing the boundary; that the declaration was made before controversy; and that the declarant had no interest to misrepresent the facts.⁹

Maryland rule.—Declarations of a deceased person having peculiar means of information and no interest in the matter, and made *ante litem motam*, are admissible to prove private boundaries.¹⁰

New Hampshire rule.—“The declarations of deceased persons who were so situated as to have the means of knowledge, and had no interest to misrepresent, are competent evidence upon a question of boundary, whether the same pertains to public tracts or private rights.”¹¹

North Carolina rule.—North Carolina admits, on a question of boundary, the declarations made by a disinterested deceased person before any controversy has arisen if they are definite and refer to some monument or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location.¹²

boundaries of private persons. See *Ayres v. Watson*, 137 U. S. 594, 5 S. Ct. 641, 28 L. ed. 1093 (1890); *Clement v. Packer*, 125 U. S. 309, 8 S. Ct. 907, 31 L. ed. 721 (1887). Compare the *res gestae* qualification stated in *Hunnicut v. Peyton*, 102 U. S. 333, 336, 26 L. ed. 113 (1880).

9. *Turgeon v. Woodward*, 83 Conn. 537, 78 Atl. 577 (1910).

10. *Cadwalader v. Price*, 111 Md. 310, 73 Atl. 273, 134 Am. St. Rep. 603 n. (1909).

11. *Adams v. Stanyan*, 24 N. H. 405, 417 (1852), per Eastman, J. quoted in *Keefe v. Sullivan County R. R.*, 75 N. H. 116, 71 Atl. 379 (1908).

12. *Caldwell Land & Lumber Co. v. Triplett*, 151 N. C. 409, 66 S. E. 343 (1909); *Table Rock Lumber Co. v. Branch*, 150 N. C. 240, 63 S. E.

948 (1909).

“Traditional evidence has long been received by the courts of North Carolina in questions of private boundaries as well as public. . . . The necessity for such a departure from the common law principle grew out of the inartificial manner in which the lands of the State were originally surveyed and marked, making it necessary, in order to fix the position of the respective parcels, to resort more frequently to tradition, and to give this kind of evidence greater efficiency by enlarging its limits.” *Scoggin v. Dalrymple*, 7 Jones L. (N. C.) 46 (1859), per Manly, J.

Completeness.—Where, on an issue as to the location of a boundary corner, plaintiff asked a witness if B., since deceased, under whom plain-

*Part of the res gestae.*¹³—The local rule is established in several jurisdictions that declarations of an owner of land as to his boundaries made while on the land and in the act of pointing them out are evidence, after his decease, as to the location of such boundaries.¹⁴ Such a declaration may be self-serving.¹⁵

§ 2807. (*Scope of Rule; Private Boundaries*); Facts Incidentally stated.—The practice previously referred to¹ of not accepting extrajudicial statements regarding matters of public and general interest in proof of facts therein incidentally stated, is not invariably applied to statements regarding *private boundaries*. The unsworn declarations regarding such private boundaries are accepted not only as probative of the location and landmarks of the boundary itself, but also as establishing facts of minor and more individual importance incidentally mentioned. In this way, it may be shown that there has been a survey of the premises² and that it was made at a particular date.³ This practice, however, has not been universally approved. Proponents have not been allowed in all cases to prove by means of an unsworn declaration relating to a private boundary facts of strictly individual interest. It cannot, for example, be shown in this way what streams a given boundary line would cross,⁴ or as to the location of a stream claimed to be a boundary.⁵ Similarly, such a declaration cannot be used to prove that there is no discrepancy between two surveys of a given tract.⁶

tiff's title was derived, was not present when a survey was made from the corner claimed by defendant, to obtain the benefit of a quasi admission against B's interest, but the witness testified that while B. was present he objected to the survey and said it was run from the wrong point, plaintiff was not thereby entitled to prove declarations of B. in his own interest as to where the corner really was as showing the entire conversation. *Brooks v. Shook*, 147 N. C. 630, 61 S. E. 601 (1908).

13. Viewing the declaration not so much as determining the extent and nature of the claim with regard to the position of boundaries, but as tending to prove the fact asserted in the statement to be true, an additional element of relevancy is required. This is frequently felt to be

found in the fact that the declaration is part of the *res gestae*.

See, also, § 2606.

14. *Williamson v. Gooch*, 103 Me. 402, 69 Atl. 691 (1908); *Abbott v. Walker*, 204 Mass. 71, 90 N. E. 405, 26 L. R. A. (N. S.) 814 n. (1910).

15. *Williamson v. Gooch*, 103 Me. 402, 69 Atl. 691 (1908).

§ 2807-1. § 2801.

2. *Hamilton v. Menor*, 2 Serg. & R. (Pa.) 70 (1815).

3. *Murray v. Spencer*, 88 N. C. 357 (1883).

4. *Smith v. Chapman*, 10 Gratt. (Va.) 445 (1853).

5. *Taylor v. Glenn*, 29 S. C. 292, 7 S. E. 483, 12 Am. St. Rep. 724 (1888).

6. *Moore v. Davis*, 4 Heisk. (Tenn.) 540 (1871).

§ 2808. (*Scope of Rule; Private Boundaries*); Principle of the *res gestae*.—The circumstance that a declaration regarding private boundaries was a *spontaneous* one rather than made as the result of reflection, would undoubtedly add in many instances to its probative force.¹ For the admissibility of a relevant extrajudicial statement by a deceased person regarding facts of private boundary it is not essential that spontaneity should be shown. Consequently, no need exists that the assertions regarding boundaries should be proved to have been made while the owner as declarant was upon the land in question or engaged in pointing out the boundaries of his estate.² In certain jurisdictions, as Pennsylvania³ and Texas,⁴ the so-called “principle of the *res gestae*” has been thought to warrant the court in requiring that a surveyor’s assertions with regard to private boundaries must be shown to have been made while he is actually on the land in dispute.

§ 2809. (*Scope of Rule; Private Boundaries*); Statements of Claim distinguished.—The introduction of the topic of private boundaries into the scope of the hearsay exception relating to matters of public and general interest has tended to create a confusion between the statements properly receivable under the present exception to the hearsay rule as proof of the facts asserted and those which are independently or circumstantially relevant as serving to indicate the nature of the *claim* relating to boundaries or landmarks.¹ Yet there are marked essential differences. Declarations of the latter class may, for example, be self-serving without apparent diminution of probative force. Under the present exception to the hearsay rule which treats as secondary evidence of the facts asserted the declarations of deceased persons with regard to matters of public and general interest the declarant as to private

§ 2808-1. §§ 2982 et seq.

2. *Emmet v. Perry*, 100 Me. 139, 60 Atl. 872 (1905) (settled law); *Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. 543 (1888); *Morse v. Emery*, 49 N. H. 239 note (1870); *Smith v. Forrest*, 49 N. H. 230 (1870).

See, however, *Southern Iron Works v. Georgia Cent. R. Co.*, 131 Ala. 649, 31 So. 723 (1901); *Willison v. Ringwood*, (Alaska 1911) 190 Fed. 549, 111 C. C. A. 401.

3. *Kramer v. Goodlander*, 98 Pa. St.

366 (1881). See, also, *Martin v. Hughes*, 90 Fed. 632, 33 C. C. A. 198 (1898) (decided in accordance with Pennsylvania rule).

4. *Clay County Land, etc., Co. v. Montague County*, 8 Tex. Civ. App. 575, 28 S. W. 704 (1894); *Welder v. Hunt*, 34 Tex. 44 (1870).

See, also, *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. ed. 113 (1880) (decided in accordance with Texas rule).

§ 2809-1. § 2603.

boundaries must have been disinterested at the time of making his assertion.² It is further to be observed that declarations as to *claim* have no connection with the hearsay rule.³ They characterize and define the possession which is being maintained by the declarant. It follows that possession by the speaker or some one on his behalf must be affirmatively shown in this connection.⁴ The declarant, under the present exception to the hearsay rule, need not be proved to have been in possession of the disputed premises at the time of making his statement. Possession need not be shown in case of the declaration of deceased persons with regard to the facts of private boundary. The extrajudicial declaration alleging the existence of a claim to certain boundaries is, moreover, primary evidence, there being no superior grade of proof for establishing the fact. On the other hand, the unsworn statement relating to the position or landmarks of private boundaries as matters of quasi-public and general interest is obviously a secondary grade of proof, the primary being the judicial testimony of the declarant as a percipient witness.

§ 2810. (*Scope of Rule; Private Boundaries*); Declarations rejected.—The propriety of the rulings given elsewhere¹ to the effect that the extrajudicial statements of deceased persons with regard to the position and marks of private boundaries may be received under the present exception to the hearsay rule as secondary evidence of the facts asserted has by no means been acknowledged in all jurisdictions of the United States. In several highly respected courts proof of this nature has been rejected.²

2. §§ 2798, 2799.

3. Statements of this nature are not offered as evidence that the claim is a *true* one, but simply establish the fact that it was made and its nature and extent.

4. § 2606.

§ 2810-1. § 2806.

2. *Alabama*.—Southern Iron Works v. Georgia Cent. R. Co., 131 Ala. 649, 31 So. 723 (1901); Barrett v. Kelly, 131 Ala. 378, 30 So. 824 (1901).

Kentucky.—Cherry v. Boyd, Litt. Sel. Cas. 7 (1800). See also, Clement v. Packer, 125 U. S. 326, 8 S. Ct. 907, 13 L. ed. 721 (1887), was held to be governed by the Kentucky rule.

Maine.—Sullivan Granite Co. v. Gordon, 57 Me. 520 (1869); Chapman x. Twitchell, 37 Me. 59, 58 Am. Dec. 773 (1853).

Massachusetts.—Hall v. Mayo, 97 Mass. 416 (1867).

New Jersey.—Curtis v. Aaronson, 49 N. J. L. 68, 7 Atl. 886, 60 Am. Rep. 584 (1886); Runk v. Ten Eyck, 24 N. J. L. 756 (1853).

North Carolina.—Perkins v. Brinkley, 133 N. C. 348, 45 S. E. 652 (1903).

Texas.—Matthews v. Thatcher, 33 Tex. Civ. App. 133, 76 S. W. 61 (1903).

CHAPTER XLI.

HEARSAY AS SECONDARY EVIDENCE; DYING DECLARATIONS.

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§ 2811. Hearsay as secondary Evidence; Dying Declarations.

— A unique form of extrajudicial statement, often full of dramatic interest, employed by judicial administration as secondary proof of the facts asserted, is the dying declaration. On an indictment for the homicide of the declarant¹ his statement covering the details of the fatal encounter² is admissible, *provided* that it be shown, to the satisfaction of the presiding judge,³ to have been made under a conscious sense of impending death.⁴ The

§ 2811-1. § 2825.

2. § 2849.

3. § 2832.

4. *Alabama*.—Pate v. State, 150

relevancy upon which its admissibility was originally predicated and since maintained, although with apparently decreasing confidence, is the solemnity of the occasion on which the statement is made. Its probative force is closely related to that created by the presence of an oath. At the time when the present exception took its rise immediate consequences were thought to attend perjury in undergoing the oath ordeal. In a later age, the false taking of an oath was thought to be punished by an offended God after the death of the offender. Under this conception, it was not surprising that the immediate prospect of impending death should be thought to impose upon the mind of a declarant a feeling of the presence of the Divine Being which would clear it of all motive to misrepresent the truth, and, being practically equivalent to the sanction of an oath, might fairly be regarded as a

Ala. 10, 43 So. 343 (1907); *Logan v. State*, 149 *Ala.* 11, 43 So. 10 (1907); *Gregory v. State*, 148 *Ala.* 566, 42 So. 829 (1906); *Dubose v. State*, 120 *Ala.* 300, 25 So. 185 (1899); *Blackburn v. State*, 98 *Ala.* 63, 13 So. 274 (1892).

Arkansas.—*Crowley v. State*, 147 *S. W.* 47 (1912); *Fogg v. State*, 81 *Ark.* 417, 99 *S. W.* 537 (1907).

California.—*People v. Hawes*, 98 *Cal.* 648, 33 *Pac.* 791 (1893).

Colorado.—*Weaver v. People*, 47 *Colo.* 617, 108 *Pac.* 331 (1910).

Florida.—*Newton v. State*, 51 *Fla.* 82, 41 So. 19 (1906).

Georgia.—*Johnson v. State*, 136 *Ga.* 804, 72 *S. E.* 233 (1911); *Smith v. State*, 8 *Ga. App.* 680, 70 *S. E.* 42 (1911); *Pyle v. State*, 4 *Ga. App.* 811, 62 *S. E.* 540 (1908); *Oliver v. State*, 129 *Ga.* 777, 59 *S. E.* 900 (1907).

Iowa.—*State v. Fielding*, 135 *Iowa* 255, 112 *N. W.* 539 (1907).

Kentucky.—*Tibbs v. Com.*, 138 *Ky.* 558, 128 *S. W.* 871, 28 *L. R. A.* (N. S.) 665 n. (1910) *Crump v. Com.*, 20 *S. W.* 390, 14 *Ky. Law Rep.* 450 (1892).

Louisiana.—*State v. Brady*, 124 *La.* 951, 50 So. 806 (1909).

Maryland.—*Hawkins v. State*, 98

Md. 355, 57 *Atl.* 27 (1904).

Mississippi.—*House v. State*, 94 *Miss.* 107, 48 So. 3, 21 *L. R. A.* (N. S.) 840 n. (1909); *Jackson v. State*, 94 *Miss.* 83, 47 So. 502 (1908).

Missouri.—*State v. Umble*, 115 *Mo.* 452, 22 *S. W.* 378 (1893).

New Jersey.—*State v. Barnes*, 45 *N. J. L.* 426, 68 *Atl.* 145 (1907).

New York.—*People v. Madas*, 201 *N. Y.* 349, 94 *N. E.* 857 (1911).

North Carolina.—*State v. Tate*, 76 *S. E.* 713 (1912); *State v. Laughter*, 159 *N. C.* 488, 74 *S. E.* 913 (1912).

Oklahoma.—*Hawkins v. United States*, 3 *Okla. Cr.* 651, 108 *Pac.* 561 (1910); *Nelson v. State*, 3 *Okla. Cr. App.* 468, 106 *Pac.* 647 (1910).

Oregon.—*State v. Fuller*, 52 *Or.* 42, 96 *Pac.* 456 (1908); *State v. Pool*, 20 *Oreg.* 150, 25 *Pac.* 375 (1890).

South Carolina.—*State v. Franklin*, 80 *S. C.* 332, 60 *S. E.* 953 (1908); *State v. McCommer*, 79 *S. C.* 63, 79 *S. E.* 237 (1908).

Texas.—*Johnson v. State* (*Cr. App.* 1912), 149 *S. W.* 165; *Hunter v. State*, 59 *Tex. Cr. App.* 439, 129 *S. W.* 125 (1910); *Douglas v. State*, 58 *Tex. Cr. App.* 122, 124 *S. W.* 933 (1910).

See also § 2831.

"Dying declarations are such as are

satisfactory substitute for it.⁵ Relevancy being thus established, extrajudicial statements by the victim of a homicide giving the circumstances attending the occurrence will be received in evidence as secondary proof of the facts asserted if made in the fixed belief of immediately impending death.⁶ Such statements may be

made, relating to the facts of an injury of which the party afterwards dies, under the fixed belief and moral conviction that immediate death is inevitable, without opportunity for repentance, and without hope of escaping the impending danger." *Simons v. People*, 150 Ill. 66, 73, 36 N. E. 1019 (1894), per Mr. Justice Craig.

The declarations of decedent, voluntarily made while sane, when in *articulo mortis* and under the solemn conviction of approaching dissolution, concerning the circumstances constituting the *res gestae*, are admissible in evidence, provided decedent would be a competent witness if living. *Tibbs v. Com.*, 138 Ky. 558, 128 S. W. 871, 28 L. R. A. (N. S.) 665 n. (1910).

"To render these declarations admissible, it was only necessary that the trial judge should be satisfied, 1st. That the death of deceased was imminent at the time the declarations were made. 2nd. That the deceased was so fully aware of this as to be without hope of recovery. 3rd. That the subject of the charge was the death of the declarant and the circumstance of the death was the subject of the declarations." *State v. Banister*, 35 S. C. 290, 295, 14 S. E. 678 (1891) per McIver, C. J.

"Dying declarations are made in *extremis*, when the party is at the point of death, when every hope of this world is gone, when every incentive to falsehood is silenced, and the mind is induced by the most powerful considerations, to speak the truth; and is considered, in law, as creating an obligation as great as that created by an oath; and in prosecutions for

murder, it is the common practice to admit as evidence, the dying declaration of the person, with whose murder the prisoner stands charged." *Hudson v. State*, 3 Cold. (Tenn.) 355, 358 (1866), per Schackelford, J.

5. See § 2815.

6. *Alabama*.—*Sanders v. State*, 2 Ala. App. 13, 56 So. 69 (1911); *Patterson v. State*, 171 Ala. 2, 54 So. 696 (1911); *Johnson v. State*, 169 Ala. 10, 53 So. 769 (1910); *Parker v. State*, 165 Ala. 1, 51 So. 260 (1909); *Henningburg v. State*, 153 Ala. 13, 45 So. 246 (1907); *Rose v. State*, 144 Ala. 114, 42 So. 21 (1905); *Hammil v. State*, 90 Ala. 577, 8 So. 380 (1890); *Johnson v. State*, 17 Ala. 618 (1850).

Arizona.—*Wagoner v. Territory*, 5 Ariz. 175, 51 Pac. 145 (1897).

Arkansas.—*Crowley v. State*, 147 S. W. 47 (1912); *Jackson v. State*, 145 S. W. 559 (1912); *Robinson v. State*, 99 Ark. 208, 137 S. W. 831 (1911); *Evans v. State*, 58 Ark. 47, 22 S. W. 1026 (1893).

California.—*People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829 (1911); *People v. Cipolla*, 155 Cal. 224, 100 Pac. 252 (1909); *People v. Glover*, 141 Cal. 233, 74 Pac. 745 (1903); *People v. Glenn*, 10 Cal. 32 (1858).

Colorado.—*Jamison v. People*, 119 Pac. 474 (1911); *Weaver v. People*, 47 Colo. 617, 108 Pac. 331 (1910); *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953 (1894).

Florida.—*Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909).

Georgia.—*Thompson v. State*, 137 Ga. 164, 73 S. E. 363 (1911); *Flanagan v. State*, 135 Ga. 221, 69 S. E. 171 (1910); *Lyons v. State*, 133 Ga.

587, 66 S. E. 792 (1909); *Park v. State*, 126 Ga. 575, 55 S. E. 489 (1906); *Wheeler v. State*, 112 Ga. 43, 37 S. E. 126 (1900); *Dumas v. State*, 65 Ga. 471 (1880); *Thompson v. State*, 24 Ga. 297 (1858).

Idaho.—*State v. Yee Wee*, 7 Ida. 188, 61 Pac. 588 (1900).

Illinois.—*People v. White*, 251 Ill. 67, 95 N. E. 1036 (1911); *Simons v. State*, 150 Ill. 66, 36 N. E. 1019 (1894); *Digby v. People*, 113 Ill. 123, 55 Am. Rep. 402 (1885); *Tracy v. People*, 97 Ill. 101 (1880); *Scott v. People*, 63 Ill. 508 (1872); *Barnett v. People*, 54 Ill. 325 (1870); *Starkey v. People*, 17 Ill. 17 (1855).

Indiana.—*Gipe v. State*, 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419, 112 Am. St. Rep. 238 (1905); *Archibald v. State*, 122 Ind. 122, 23 N. E. 758 (1890); *Jones v. State*, 71 Ind. 66 (1880).

Iowa.—*State v. Johns*, 152 Iowa 383, 132 N. W. 832 (1911); *State v. Luther*, 150 Iowa 158, 129 N. W. 801 (1911); *State v. Dyer*, 147 Iowa 217, 124 N. W. 629, 29 L. R. A. (N. S.) 459 (1910); *State v. Murdy*, 81 Iowa 603, 47 N. W. 867 (1891).

Kansas.—*State v. Morrison*, 64 Kan. 669, 68 Pac. 48 (1902).

Kentucky.—*Beaty v. Com.*, 140 Ky. 230, 130 S. W. 1107 (1910); *Kelly v. Com.*, 119 S. W. 809 (1909); *Slone v. Com.*, 110 S. W. 235, 33 Ky. L. Rep. 266 (1908); *Bicker v. Com.*, 102 S. W. 1175, 31 Ky. L. Rep. 596 (1907); *Asher v. Com.*, 91 S. W. 662, 28 Ky. L. Rep. 1342 (1906); *Austin v. Com.*, 40 S. W. 905, 19 Ky. L. Rep. 474 (1897).

Louisiana.—*State v. Augustus*, 129 La. 617, 56 So. 551 (1911); *State v. Bordelon*, 113 La. 690, 37 So. 603 (1904); *State v. Harris*, 112 La. 937, 36 So. 810 (1904).

Michigan.—*People v. Olmstead*, 30 Mich. 431 (1874); *People v. Knapp*, 26 Mich. 112 (1872).

Mississippi.—*Wiltcher v. State*, 99 Miss. 374, 54 So. 726 (1911);

Guest v. State, 96 Miss. 871, 52 So. 211 (1910).

Missouri.—*State v. Gow*, 235 Mo. 307, 138 S. W. 648 (1911); *State v. Horn*, 204 Mo. 528, 103 S. W. 69 (1907); *State v. Hendricks*, 172 Mo. 654, 73 S. W. 194 (1903); *State v. Vaughan*, 152 Mo. 73, 53 S. W. 420 (1899); *State v. Mathes*, 90 Mo. 571, 2 S. W. 800 (1886).

Montana.—*State v. Crean*, 43 Mont. 47, 114 Pac. 603 (1911).

Nebraska.—*Johnson v. State*, 88 Neb. 328, 129 N. W. 281 (1911).

Nevada.—*State v. Vaughan*, 22 Nev. 285, 39 Pac. 733 (1895).

New Jersey.—*Donnelly v. State*, 26 N. J. L. 463; *affirmed* 26 N. J. L. 601 (1857).

New York.—*People v. Falletto*, 202 N. Y. 494, 96 N. E. 355 (1911); *People v. Governale*, 193 N. Y. 581, 86 N. E. 554 (1908); *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908); *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624 (1903); *People v. Burt*, 170 N. Y. 560, 62 N. E. 1099 *affirming* 51 App. Div. 106, 64 N. Y. Suppl. 417 (1902); *People v. Chase*, 79 Hun 296, 29 N. Y. Suppl. 376, 9 N. Y. Cr. Rep. 239, 61 N. Y. St. Rep. 40, *affirmed* 143 N. Y. 669, 39 N. E. 21 (1894); *People v. Green*, 1 Park Cr. Rep. 11 (1845).

North Carolina.—*State v. Laughter*, 159 N. C. 488, 74 S. E. 913 (1912); *State v. Watkins*, 159 N. C. 480, 75 S. E. 22 (1912); *State v. Quick*, 150 N. C. 820, 64 S. E. 168 (1909); *State v. Bohanon*, 142 N. C. 695, 55 S. E. 615 (1906); *State v. Teachey*, 138 N. C. 587, 50 S. E. 232 (1905).

Oklahoma.—*Smith v. State*, 5 Okla. Cr. 282, 114 Pac. 350 (1911); *Offitt v. State*, 5 Okla. Cr. Rep. 48, 113 Pac. 554 (1911); *Blair v. State*, 4 Okla. Cr. Rep. 359, 111 Pac. 1003 (1910).

Oregon.—*State v. Fuller*, 52 Oreg. 42, 96 Pac. 456 (1908); *State v. Fletcher*, 24 Oreg. 295, 33 Pac. 575

(1893); *Goodall v. State*, 1 Oreg. 333, 80 Am. Dec. 396 (1861).

Pennsylvania.—*Com. v. Birriolo*, 197 Pa. St. 371, 47 Atl. 355 (1900); *Com. v. Winkleman*, 12 Pa. Super. Ct. 497 (1900).

South Carolina.—*State v. Smalls*, 87 S. C. 550, 70 S. E. 300 (1911); *State v. Gallman*, 79 S. C. 229, 60 S. E. 682 (1908); *State v. Bradley*, 34 S. C. 136, 13 S. E. 315 (1890); *State v. Gill*, 14 S. C. 410 (1880).

Tennessee.—*Still v. State*, 125 Tenn. 80, 140 S. W. 298 (1911).

Texas.—*Lyles v. State*, (Cr. App. 1912); 142 S. W. 592; *Hunter v. State*, 54 Tex. Cr. App. 224, 114 S. W. 124 (1908); *Willis v. State*, 49 Tex. Cr. App. 139, 90 S. W. 1100 (1905); *Polk v. State*, 35 Tex. Cr. Rep. 495, 34 S. W. 633 (1896); *Cahn v. State*, 27 Tex. App. 709, 11 S. W. 723 (1889); *Garza v. State*, 3 Tex. App. 286 (1877); *Benavides v. State*, 31 Tex. 579 (1869).

Utah.—*State v. Kessler*, 15 Utah 142, 49 Pac. 293, 62 Am. St. Rep. 911 (1897).

Virginia.—*Bull v. Com.* 14 Gratt. 613 (1857); *Hill v. Com.*, 2 Gratt. 594 (1845); *Gibson v. Com.*, 2 Va. Cas. 111 (1817).

West Virginia.—*State v. Thompson*, 21 W. Va. 741 (1882).

Wisconsin.—*Hughes v. State*, 109 Wis. 397, 85 N. W. 333 (1901); *State v. Cameron*, 2 Pinn. 490, 2 Chandl. 172 (1850).

United States.—*U. S. v. Taylor*, 28 Fed. Cas. No. 16,436, 4 Cranch C. C. 338 (1833); *U. S. v. McGurk*, 26 Fed. Cas. No. 15,680, 1 Cranch C. C. 71 (1802).

England.—*Reg. v. Goddard*, 15 Cox C. C. 7 (1882); *Reg. v. Morgan*, 14 Cox C. C. 337 (1875); *Reg. v. Whitworth*, 1 F. & F. 382 (1858); *Reg. v. Howell*, 1 C. & K. 689, 1 Cox C. C. 151, 1 Den. C. C. 1, 47 E. C. L. 689 (1845); *Reg. v. Brooks*, 1 Cox C. C. 6 (1843); *Reg. v. Perkins*, 9 C. & P. 395, 2 Moody C. C. 135, 38 E. C.

L. 236 (1840); *Dingler's Case*, 1 East P. C. 356, 2 Leach C. C. 638 (1791).

Canada.—*Rex v. Loine*, 23 Can. L. T. 274, 10 B. C. R. 1 (1903); *Reg. v. Smith*, 23 U. C. C. P. 312 (1873).

Constitutional provision as to confronting accused with witnesses.—The admission of dying declarations does not contravene that provision of the constitution which declares that in all criminal prosecutions, the accused shall be confronted with the witnesses against him.

Georgia.—*Jones v. State*, 130 Ga. 274, 277, 60 S. E. 840 (1908).

Missouri.—*State v. Colvin*, 226 Mo. 446, 126 S. W. 448 (1910).

New York.—See *People v. Corey*, 157 N. Y. 332, 51 N. E. 1024 (1898).

Oklahoma.—*Mulkey v. State*, 5 Okla. Cr. App. 75, 113 Pac. 532 (1911).

Pennsylvania.—*Com. v. Winkelman*, 12 Pa. Super. Ct. 497 (1900).

Rhode Island.—*State v. Jeswell*, 22 R. I. 136, 46 Atl. 405 (1900).

Texas.—*Payne v. State*, 45 Tex. Cr. App. 564, 78 S. W. 934 (1904); *Taylor v. State*, 38 Tex. Cr. App. 552, 43 S. W. 1019 (1898).

See § 2868.

"The right of a party accused of a crime, to meet the witnesses against him, face to face, is no new principle. It is coeval with the Common Law. Its recognition in the Constitution was intended for the two-fold purposes of giving it prominence and permanence. The argument for the exclusion of the testimony, proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness. And it is as to *him* that the privileges of an oral and cross examination are secured. The admission of dying declarations in evidence, was never supposed, in England, to violate the well-established principles of the Common Law, that the witnesses against the accused should be exam-

received at the instance of the defense⁷ as well as that of the prosecution.⁸ This may occur where the dying declaration absolves the accused from responsibility, laying the blame upon another person.⁹

Presence of accused.—It is not required for the admissibility of such a statement that the accused should have been present or represented by counsel when it was made.¹⁰ He need not even

ined in his presence. The two rules have co-existed there certainly, since the trial of Ely, in 1720, and are considered of equal authority. The constant and uniform practice of all the Courts of this country, before and since the revolution, and since the adoption of the Federal Constitution, and of the respective State Constitutions, containing a similar provision, has been to receive in evidence, in cases of homicide, declarations properly made, *in articulo mortis*." Campbell v. State, 11 Ga. 353 (1852), per Lumpkin, J.

Statutes authorizing admission of such declarations are declaratory of the common law. State v. Crean, 43 Mont. 47, 114 Pac. 603 (1911).

7. *Alabama.*—Moore v. State, 12 Ala. 764, 46 Am. Dec. 276 (1848).

California.—People v. Southern, 120 Cal. 645, 53 Pac. 214 (1898).

Delaware.—State v. Uzzo, 6 Pennw. 212, 65 Atl. 775 (1907).

Florida.—Coatney v. State, 61 Fla. 19, 55 So. 285 (1911).

Georgia.—Flanagan v. State, 135 Ga. 221, 69 S. E. 171 (1910).

Kentucky.—Beaty v. Com., 140 Ky. 230, 130 S. W. 1107 (1910); Brock v. Com., 92 Ky. 183, 17 S. W. 337, 13 Ky. L. Rep. 450 (1891) 1; Chittenden v. Com., 9 S. W. 386, 10 Ky. L. Rep. 330 (1888).

Louisiana.—State v. Ashworth, 50 La. Ann. 94, 23 So. 270 (1898).

Michigan.—People v. Knapp, 26 Mich. 112 (1872).

Mississippi.—Green v. State, 89 Miss. 331, 42 So. 797 (1907).

Oregon.—State v. Saunders, 14 Oreg. 300, 12 Pac. 441 (1886).

United States.—Mattox v. U. S., 146 U. S. 140, 13 S. Ct. 50, 36 L. ed. 917 (1892).

England.—Rex v. Scaife, 2 Lew. Cr. C. 150, 1 M. & Rob. 551 (1836).

The reception of this evidence in favor of the prisoner has been questioned. People v. McLaughlin, 44 Cal. 435 (1872); R. v. Scaife, 1 M. & Rob. 551, 2 Lew. Cr. C. 150 (1836). Decedent's dying declaration that he thought it was no accident was admissible, as tending to show that he was not sure that accused intentionally shot him. Beaty v. Com., 140 Ky. 230, 130 S. W. 1107 (1910).

Rebuttal.—Should the defence rely upon parts of a dying declaration relating to a particular topic, the State is not at liberty to introduce other parts of the same declaration relating to an independent matter. Hinton v. State, (Tex. Cr. App. 1912) 144 S. W. 617.

8. To refuse this privilege has been held to be error. Green v. State, 89 Miss. 331, 42 So. 797 (1907).

The statement must, however, be receivable as a dying declaration. Delaney v. State, 148 Ala. 586, 42 So. 815 (1906).

The deceased cannot make admissions which affect the prosecution. McGowan v. Com., (Ky. 1909) 117 S. W. 387.

9. People v. Southern, 120 Cal. 645, 53 Pac. 214 (1898).

10. Shenkenberger v. State, 154 Ind.

have had notice of the time and place at which it was proposed that the deceased should make his statement.¹¹

§ 2812. Administrative Requirements; Necessity.—The administrative¹ ground for receiving secondary evidence of the *res*

630, 57 N. E. 519 (1900); *State v. Brunnetto*, 13 La. Ann. 45 (1858); *State v. Foot You*, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537, *affirmed* 24 Oreg. 61, 33 Pac. 537 (1893).

11. *People v. Beverly*, 108 Mich. 509, 66 N. W. 379 (1896).

§ 2812-1. Administration and procedure contrasted. It may be objected that this use of the word "administrative" is not in accordance with the definition of administration elsewhere given. §§ 174, 177. It will be remembered that procedure in its specific or limited sense, as contrasted with administration, is that portion of procedure as a whole, in its generic sense, including administration, which is the subject of and governed by a rule of substantive law. Administration, on the other hand, is not controlled by a rule, but by an objective. "Public administration is detailed and systematic execution of public law. Every particular application of general law is an act of administration." Wilson, Woodrow. *The Study of Administration*. In 2 *Political Science Quarterly*, 197, 212 (1887). Judicially considered, it represents the science, art or duty of reaching by the use of reason and in part by other means preappointed by law, certain definite ideals or ends prescribed in the social mandate to the judiciary. In other words, judicial administration deals with the rules of evidence, for example, and is bound to give them the weight attached to them, by the sovereign of the forum. The motive power of its every act, however, is an effort by the use of reason, employing the means at its command, which in many cases it cannot con-

trol or modify, to reach the objectives which society has ordained for it.

It may be suggested that, under such a definition, the conditions of admissibility of the exceptions to the hearsay rule are procedural, rather than administrative. Undoubtedly, this is true at the present day. They are laid down by a very definite rule. It is to be observed, however, that while procedural at this time, these regulations, and many others relating to the law of evidence, were originally administrative; and seem best understood when so considered. Between formal or medieval procedure and the procedure of later, but yet not modern, times which it has seemed proper to speak of as technical, the following distinction seems obvious. Formal procedure so far as we are able to understand it from the scanty records at our disposal seems largely a law of equivalences, the rigor of which, though often still great, appears in a process of being rationalized and ameliorated. The folk-law of the Germanic tribes was breaking up, softening and fusing into new combinations, upon being brought in contact with the Roman law, the rights and customs of conquered races more civilized than their masters. To this stage of legal evolution succeeded, not the technical procedure of sub-modern (if the expression may be permitted) times, but a period of vigorous administration as part of the executive or royal power. The natural development of the law of evidence under this influence seems to have been arrested and greatly retarded down to very recent times by two widespread influences, Wilson,

gestae of a homicide in the form of a dying declaration is a recognition of the necessity under which the prosecution as proponent often labors in proving its case.² The injured person being dead, he is no longer available as a witness. The primary proof, the testimony of the declarant, is inaccessible. Under these circumstances the charge could scarcely be made out except by the use of the declarations of the deceased concerning the facts of the transaction. Frequently, only he and the accused are cognizant

Woodrow. The Study of Administration. 2 Political Science Quarterly, 205-206 (1887), one legal, the other political, neither of which would seem to have any proper connection with the subject. The first, the legal, has been the extension of the doctrine of *stare decisis* to the law of evidence. §§ 172, 1618 n. 2. Automatically, as it were, this doctrine has hardened administrative rulings into procedural rules, ossifying the vital organism of the law of evidence. A conspicuous example appears in the unextendable list of exceptions to the rule against hearsay. The second powerful influence, the political, is, or at least was, the feeling that administration by vigorous judges had been an engine of tyranny for the oppression of the subject and that the only safety of a free people lies in the elevation of *law* above all forms of human discretion, in having a hard and fast rule and sticking to it, regardless of the hardship in a particular case. §§ 304, 305.

2. *Morgan v. State*, 31 Ind. 215 (1869); *State v. Knoll*, 69 Kan. 767, 77 Pac. 580 (1904); *People v. Falletto*, 202 N. Y. 494, 96 N. E. 355 (1911); *State v. Watkins*, (N. C. 1912) 75 S. E. 22.

"There would be the most lamentable failure of justice, in many cases, were the dying declarations of the victims of crime excluded from the jury." *People v. Glenn*, 10 Cal. 32, 36 (1858), per Burnett, J.

"The true grounds upon which the declarations are receivable as testi-

mony" are thus stated by the learned Judge Redfield: "It is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of the admission; for, if that were all that is requisite to render the declarations evidence, the apprehension of death should have the same effect, since it would place the declarant under the same restraint as if the apprehension were founded in fact. But both must concur, both the fact and the apprehension of being *in extremis*. And although it is not indispensable that there should be no other evidence of the same facts, the rule is no doubt based upon the presumption that in the majority of cases there will be no other equally satisfactory proof of the same facts. This presumption and the consequent probability of the crime going unpunished, is unquestionably the chief ground of this exception in the law of evidence. And the great reason why it could not be received generally, as evidence in all cases where facts involved should thereafter come in question, seems to be that it wants one of the most important and indispensable elements of testimony, that of an opportunity for cross-examination by the party against whom it is offered." 2 Chamberlayne's *Taylor on Ev.*, p. 470-19; 1 Greenl. *Evid.*, § 156, note.

of the real facts. The extrajudicial declarations of the injured person must be received³ unless there is to be a failure or miscarriage of justice. While these considerations have been largely instrumental in the creation of the rule, the forensic necessity may extend only to the declarant himself. That the case of the government may satisfactorily be shown in a particular instance by the evidence of eye-witnesses is not deemed a sufficient ground

3. Georgia.—Campbell v. State, 11 Ga. 375 (1852).

Illinois.—Marshall v. R. Co., 48 Ill. 476 (1868).

Indiana.—Morgan v. State, 31 Ind. 198 (1869).

Kansas.—State v. Knoll, 69 Kan. 767, 77 Pac. 580 (1904).

Kentucky.—Walston v. Com., 16 B. Monr. 15 (1855).

Missouri.—Schell v. Stephens, 50 Mo. 374 (1872).

New Jersey.—Donnelly v. State, 26 N. J. L. 617 (1857).

New York.—People v. Falletto, 202 N. Y. 494, 96 N. E. 355 (1911); Waldele v. R. Co., 95 N. Y. 274, 47 Am. Rep. 41 (1884).

North Carolina.—Rhea v. State, 75 S. E. 22 (1912).

Pennsylvania.—Railing v. Com., 110 Pa. 105, 1 Atl. 314 (1885).

South Carolina.—State v. Ferguson, 2 Hill L. 619, 27 Am. Dec. 412 (1835).

Vermont.—State v. Wood, 53 Vt. 560 (1881).

“The admission of this kind of testimony is an exception to the general rule that excludes hearsay testimony. Its admission can be justified only on the ground of absolute necessity, growing out of the fact that the murderer, by putting the witness, and generally the sole witness of his crime, beyond the power of the court, by killing him, shall not thereby escape the consequences of his crime. On no other ground can the admission of such testimony be justified.” State v. Bohan, 15 Kan. 407, 418 (1875), per Kingman, C. J.

“Such declarations are received as evidence from necessity, for furnishing the testimony which in certain cases is essential to prevent the manslayer from escaping punishment. When a death wound is inflicted in secret, as was done in this case, no person can be expected to speak to the fact except the victim of the violence.” Donnelly v. State, 26 N. J. L. 601, 617 (1857), per Ogden, J.

“This exception to the general rule excluding hearsay evidence is founded largely on what is regarded as a public necessity, and the rule yields to the exception in order to protect the innocent and punish the guilty. As the subject of the homicide cannot testify, his unsworn statement of what happened to him is considered the best evidence attainable, and, hence, is admitted as legal evidence in order to prevent injustice, after all reasonable precautions have been taken to secure a truthful statement.” People v. Falletto, 202 N. Y. 494, 500 (1911), per Vann, J.

“Although the giving in evidence of a dying declaration is against the general rule of the English law of evidence, still it is admitted to be necessary in cases of murder and manslaughter to allow proof of the crime to be made by the dying declaration of the deceased. The reason is because it may be impossible otherwise to ascertain the facts and know who was the criminal who inflicted the wound which caused the death of the person who made the dying declaration.” King v. Laurin, 6 Can. Cr. Cas. 104, 105 (1902), per Wurtele, J.

for rejecting the extrajudicial declaration.⁴ In a very illogical manner, therefore, but one quite in accordance with the methods of procedure, the evidence is received in cases of homicide though the necessity no longer continues, while it is rejected on proceedings other than those for the homicide of the declarant,⁵ though an adequate necessity for using it is shown to exist.

§ 2813. (Administrative Requirements); Relevancy.—As in other instances of the reception of secondary evidence, not only must the proponent show that it is fairly necessary to the proof of his case but also that the evidence is relevant, objectively and subjectively considered. The question of the objective relevancy of dying declarations seldom presents much difficulty. Even if the secondary evidence should be in part irrelevant, the dying declaration will still be received if otherwise competent.¹ Usually the statement made is, if believed, highly probative to the establishment of *res gestae* facts. Regarding subjective relevancy, the

4. Alabama.—*Reynolds v. State*, 68 Ala. 502 (1881).

Kansas.—*State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257 (1880).

Kentucky.—*Fuqua v. Com.*, 73 S. W. 782, 24 Ky. L. Rep. 2204 (1903); *Luker v. Com.*, 5 S. W. 354, 9 Ky. L. Rep. 385 (1887).

Michigan.—*People v. Beverly*, 108 Mich. 509, 66 N. W. 379 (1896).

Mississippi.—*Payne v. State*, 61 Miss. 161 (1883).

New Jersey.—*Donnelly v. State*, 26 N. J. L. 463; *affirmed* 26 N. J. Law 601 (1858).

New York.—*People v. Knickerbocker*, 1 Park. Cr. 302 (1851).

Oregon.—*State v. Saunders*, 14 Oreg. 300, 12 Pac. 441 (1886).

Pennsylvania.—*Com. v. Roddy*, 184 Pa. St. 274, 39 Atl. 211 (1898).

Tennessee.—*Curtis v. State*, 14 Lea 502 (1884).

Texas.—*Lyles v. State*, 48 Tex. Cr. App. 119, 86 S. W. 763 (1905).

Even where the killing is *conceded*, the use of the dying declaration is permitted. *State v. Saunders*, 14 Oreg. 305, 12 Pac. 441 (1886). There is, however, authority to the contrary.

Saylor v. Com., 97 Ky. 184, 30 S. W. 390, 17 Ky. L. Rep. 100 (1895).

“The first of these [objections] alleges that the Commonwealth was under no necessity to use the dying declarations, and therefore had no right to use them. This rests on a misapprehension of the rule relating to their admission. The ‘necessity’ to which the text-books and the cases refer is not the exigency of any particular case, but a public necessity which civilized society feels the presence of, for the protection of human life by the punishment of man slayers.” *Com. v. Roddy*, 184 Pa. 274, 289, 39 Atl. 211 (1898), per Mr. Justice Williams. See, however, *Hollywood v. State*, 19 Wyo. 493, 120 Pac. 471 (1912).

5 It may be suggested that the necessity for using this species of evidence is not so apt to arise where the proceedings are brought on account of a death other than that of the declarant. *State v. Bohan*, 15 Kan. 407 (1875). § 2825.

§ 2813-1. *State v. Privas*, 32 La. Ann. 1086, 36 Am. Rep. 293 (1880).

belief creating element of the declaration, the case is somewhat different. Its first requisite, adequate knowledge, may fairly be assumed in most instances. Credibility, therefore, centres about the remaining requisite of subjective relevancy. The crucial question is, Was there a controlling motive to misrepresent? Frequently, much may be said as to this. The answer involves an estimate in many instances of the actual inhibiting power of the fear of future punishment in preventing the conscious or unconscious gratification of hatred, revenge, or other sinister motives on the last occasion when this seems possible.

§ 2814. (*Administrative Requirements*); Subjective Relevancy; Adequate Knowledge.—In the absence of such a showing that the presiding judge is rationally justified in assuming that the deceased possessed adequate knowledge of the facts stated in his declaration affirmative proof to his satisfaction must be made by the proponent on the subject. On certain crucial points, e. g., the identification of the accused,¹ it is regarded as of special importance that the knowledge of the declarant should be shown to be adequate and his statement clear and explicit.

§ 2815. (*Administrative Requirements*; Subjective Relevancy); Absence of Controlling Motive to misrepresent.—To the mediaeval mind and even to that of later times, the absence of any controlling motive of a dying declarant to misrepresent the truth seems obvious. That a dying man was presumed to speak the truth was the belief of the times.¹ This view of the trustworthi-

See also, *State v. Carter*, 107 La. 792, 32 So. 183 (1902).

§ 2814-1. *Arkansas*.—*Jones v. State*, 52 Ark. 345, 12 S. W. 704 (1889).

California.—*People v. Wasson*, 65 Cal. 538, 4 Pac. 555 (1884); *People v. Taylor*, 59 Cal. 640 (1881).

Indiana.—*Jones v. State*, 71 Ind. 66 (1880); *Binns v. State*, 46 Ind. 311 (1874).

Kentucky.—*Green v. Com.*, 18 S. W. 515, 13 Ky. L. Rep. 897 (1892).

Mississippi.—*Jones v. State*, 79 Miss. 309, 30 So. 759 (1901).

New York.—*People v. Shaw*, 63 N. Y. 36 (1875).

North Carolina.—*State v. Williams*, 67 N. C. 12 (1872).

Pennsylvania.—*Com. v. Roddy*, 184 Pa. 274, 39 Atl. 211 (1898).

Texas.—*Warren v. State*, 9 Tex. App. 619, 35 Am. St. Rep. 745 (1880).

West Virginia.—*State v. Burnett*, 47 W. Va. 731, 35 S. E. 983 (1900).

§ 2815-1. *R. v. Dingler*, 2 Leach Cr. C. 561 (1791); *Lord Byron's Trial*, 19 How. St. Tr. 1177 (1765); *Earl Ferrers' Trial*, 19 How. St. Tr. 885 (1760); *Lord Mohun's Trial*, 12 How. St. Tr. 949, 967, 975, 987 (1692); *Earl of Pembroke's Trial*, 6 How. St. Tr. 1309, 1335 (1678); *Sir Walter*

ness of dying declarations through the exclusion of any possible motive to misrepresent under such solemn circumstances continued at a later date² and was deemed to warrant the reception of the evidence. Upon this foundation the entire superstructure of

Raleigh's Trial, 2 How. St. Tr. 18 (1603).

2. *Donnelly v. State*, 26 N. J. L. 507, 620 (1857); *R. v. Perkins*, 9 C. & P. 395 (1840).

"When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, but they are nevertheless open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination." *Ashton's Case*, 2 Lew. Cr. C. 147 (1837), per Alderson, B.

"Dying declarations are an exception to the general rule that only sworn testimony can be received, the fear of impending death being assumed to be as powerful an incentive to truth as the obligation of an oath." *Carver v. United States*, 164 U. S. 694, 695, 41 L. ed. 602 (1897), per Mr. Justice Brown.

"There are certain guaranties of the truth of dying declarations, growing out of the solemnity of the time and circumstances under which they are made, which, in contemplation of law, are supposed to compensate for the fact they are not sanctioned by an oath, and the party against whom they are used has had no opportunity to cross-examine." *Tracy v. People*, 97 Ill. 101, 106 (1880), per Mulkey, J.

"Dying declarations constitute one of the exceptions to the rule of hear-

say evidence, the rule being that hearsay evidence is ordinarily rejected. Their admission is founded on the necessity of the case and the reason that, being made in view of impending death and judgment, when the hope of life is extinguished and the retributions of eternity are at hand, they stand upon the same plane of solemnity as statements made under oath. They are admissible only when made by a person in the article of death, and great caution is necessary in the use of this kind of evidence." *Pyle v. State*, 4 Ga. App. 811, 812, 62 S. E. 540 (1908), quoting the above as a correct statement of the law.

"Dying declarations are statements of material facts concerning the cause and circumstances of the homicide, made by the victim, under the solemn conviction of impending death, and as such are to be distinguished from other admissible declarations, such as declarations which constitute a part of the *res gestae*, or declarations made in the presence of the accused." *Mulkey v. State*, 5 Okla. Cr. App. 75, 88, 113 Pac. 532 (1911), per Doyle, J.

In the case of a dying declaration the declarant speaks under as solemn a condition as exists where testimony is given under the sanctity of an oath; "he feels and knows that his death is impending, and that he will soon have to answer to the Almighty for the words which he is about to utter. A dying declaration may be given under oath, and sometimes it is; but, generally, it is not so given, and the reason why it is received when it is not made under oath is because it is made with the knowledge of the person who makes it, that

the present exception to the rule against hearsay is made to rest.³ The religious sanction is still regarded as essential⁴ although authorities to the contrary are not wanting.⁵

within a short time, perhaps within a few minutes, he will be called to answer before his Maker for the sins which he may have committed, including the possible offence of having by a false declaration under the sanction of the law caused the death, or a long and grievous imprisonment, of a fellow creature. *King v. Laurin*, 6 Can. Cr. Cas. 104, 106 (1902), per Wurtele, J.

3. *Alabama*.—*Parker v. State*, 165 Ala. 1, 51 So. 260 (1909).

Arkansas.—*Rhea v. State*, 147 S. W. 463 (1912).

Delaware.—*State v. Brooks*, 84 Atl. 225 (1912); *State v. Fleetwood*, 6 Penn. 153, 65 Atl. 772 (1906); *State v. Oliver*, 2 Houst. 585 (1858).

Georgia.—*Solomon v. State*, 2 Ga. App. 92, 58 S. E. 381 (1907); *McArthur v. State*, 120 Ga. 195, 47 S. E. 553 (1904). But see *Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540 (1908).

Illinois.—*Westbrook v. People*, 126 Ill. 81, 18 N. E. 304 (1888).

Kansas.—*State v. Knoll*, 69 Kan. 767, 77 Pac. 580 (1904).

Kentucky.—*Walston v. Com.*, 16 B. Mon. 15 (1855).

Michigan.—*People v. Olmstead*, 30 Mich. 431 (1874).

New Jersey.—*Donnelly v. State*, 26 N. J. L. 601 (1857).

New York.—*People v. Wood*, 2 Edm. Sel. Cas. 71 (1849).

England.—*Woodcock's Case*, 1 East P. C. 354, 2 Leach C. C. 563 (1789); *Drummond's Case*, 1 East P. C. 353 note, 1 Leach C. C. 378 (1784); *Rex v. Reason*, 16 How. St. Tr. 1 (1722).

Canada.—*Rex v. Magyar*, 4 W. L. R. 396 (1906).

"When dissolution is approaching, and the dying man has lost all hope of life, and the shadows of the grave are gathering in around him, and his mind is impressed with the full sense

of his condition, the solemnity of the scene and hour gives to his statements a sanctity of truth, more impressive and potential than the formalities of an oath, and such declarations ought to be received and considered by the jury, under the charge of the court, as to their effect and weight, in all cases where the evidence of fact warrant their admissibility." *Hill v. State*, 41 Ga. 484, 503 (1871), per Lochrane, C. J.

"The admissibility of dying declarations is based entirely upon the fact that they are made *in extremis*, when the person making them is at the point of death, and when every hope of this world is gone, when every motive of falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is created by a positive oath administered in the court of justice. In other words, when the person making the declaration has lost all hope of recovery, he is in the same practical state as if called on in the court of justice under sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath." *Bilton v. Territory*, 1 Okla. Cr. App. 566, 578, 99 Pac. 163 (1909).

4. "As this child was but four years old, it is quite impossible that she, however precocious in her mind, could have had that idea of a future state which is necessary to make such a declaration admissible. . . . Indeed, I think that from her age we must take it that she could not possibly have had any idea of that kind." *R. v. Pike*, 3 C. & P. 598 (1829), per Park, J.

5. *Carver v. U. S.*, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. ed. 602 (1897);

In certain instances, e. g., a statement to a physician for purposes of treatment,⁶ an independent guaranty of trustworthiness is furnished.

§ 2816. (*Administrative Requirements; Subjective Relevancy; Absence of Controlling Motive to misrepresent*); Self-serving Declarations.—That the declaration is self-serving, affects merely the probative weight to be attached to the dying statement. Early administration, if not that of later years assumes that in view of the awful nature of the situation confronting the declarant the influence of self-interest in¹ perverting the truth will shrink into insignificance, leaving no controlling motive to misrepresent. No ground, therefore, is afforded for rejecting the evidence itself.²

Two administrative considerations admit the evidence of unsworn self-serving declarations, (1) The canon of completeness, (2) the necessities of proof.

(1) Where the inculpatory portion of a conversation or correspondence has been given in evidence against the prosecution, the latter may insist that the self-serving portion should be received also³ so far as may be necessary to satisfy the canon of completeness.⁴

(2) Where the party's case is such that no better or more conclusive evidence can be offered, the right of a litigant to prove his case in the best way that he can⁵ has been regarded as paramount and sufficient to admit evidence of this unsatisfactory class.⁶

Nesbit v. State, 43 Ga. 238 (1871), per Lochrane, C. J.

6. Omberg v. U. S. Mutual Acc. Assoc., 101 Ky. 303, 40 S. W. 909, 19 Ky. L. Rep. 462, 72 Am. St. Rep. 413 (1897); Barber v. Merriam, 11 Allen (Mass.) 322 (1865).

§ 2816-1. § 2819.

2. *Alabama*.—Moore v. State, 12 Ala. 764, 46 Am. Dec. 276 (1848).

Kentucky.—Brock v. Com., 92 Ky. 183, 17 S. W. 337, 13 Ky. L. Rep. 450 (1891); Com. v. Matthews, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505 (1889).

Michigan.—Hurd v. People, 25 Mich. 405 (1872).

Oregon.—State v. Saunders, 14 Oreg. 300, 12 Pac. 441 (1886).

United States.—Mattox v. U. S. 146 U. S. 140, 13 Sup. Ct. 50, 36 L. ed. 917 (1892).

3. Crosbie v. Leary, 6 Bosw. (N. Y.) 312 (1860).

4 §§ 488, 541.

5. §§ 334 *et seq.*

6. Willis v. Mackey, 15 Ky. L. Rep. 815 (1894); Applegate v. McClung's Heirs, 3 A. K. Marsh. (Ky.) 304 (1821); Darby v. Rice, 2 Nott & M. (S. C.) 596 (1820); Jones v. Robertson, 2 Munf. (Va.) 187 (1811).

§ 2817. (*Administrative Requirements; Subjective Relevancy; Absence of Controlling Motive to misrepresent*); *Self-disserving Statements*.—That the declarant should assert that he is himself responsible for his own death or that the fatal result was caused by accident¹ or, as the earlier law used to say, by misadventure, may be within the proper scope of a dying declaration² and even add to its probative force. To be received in evidence, a self-disserving statement must, however, fulfil the conditions laid down for the reception of a dying declaration. The declaration cannot be received as an *admission*.³ While a distinct assertion of a fact favorable to the accused, as that another committed the crime with which he stands charged, made in a dying declaration has been seen⁴ to be admissible on behalf of the latter, mere general expressions of opinion, as that the defendant was not at fault,⁵ has done nothing wrong cannot avail the defendant.⁶ 'The deceased is not a party to the action, still less is he in control of it as *litis magistra* and his evidence of a forgiving spirit, however creditable to himself, cannot be permitted to forestall the proper work of the court and jury.'⁷

§ 2818. (*Administrative Requirements; Subjective Relevancy; Absence of Controlling Motive to misrepresent*); *Friendship to Others*.—That any misleading quality in a dying declaration should arise from hostility to the accused is by no means a necessary conclusion. The perverting influence may be

§ 2817-1. *Beatty v. Com.*, 140 Ky. 230, 130 S. W. 1107 (1910); *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333, 11 Ky. Rep. 505 (1889). Compare *Kearney v. State*, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344 (1897).

2. *McGowan v. Com.*, (Ky. 1909) 117 S. W. 387.

3. *McGowan v. Com.* (Ky. 1909) 117 S. W. 387.

4 § 2811.

5. *Alabama*.—*Williams v. State*, 130 Ala. 107, 30 So. 484 (1900).

Georgia.—*Sweat v. State*, 107 Ga. 712, 33 S. E. 422 (1899); *Ratteree v. State*, 53 Ga. 570 (1875).

Iowa.—*State v. Sale*, 119 Iowa 1, 92 N. W. 680, 95 N. W. 193 (1902) (declared to blame); *State v.*

Wright, 112 Iowa 436, 84 N. W. 541 (1900) (crazy, did not intend to kill him).

Louisiana.—*State v. Harris*, 112 La. 937, 36 So. 810 (1904).

Missouri.—*State v. Nelson*, 101 Mo. 464, 14 S. W. 712 (1890).

6. *Moeck v. People*, 100 Ill. 242, 39 Am. Rep. 38 (1881); *Adams v. People*, 47 Ill. 376 (1868).

7. *Sullivan v. State*, 102 Ala. 135, 142, 15 So. 264, 48 Am. St. Rep. 22 (1893) (I pray God to forgive him); *Slone v. Com.*, 33 Ky. L. Rep. 266, 110 S. W. 235 (1908); *State v. Harris*, 112 La. 937, 36 So. 810 (1904); *State v. Evans*, 124 Mo. 397, 28 S. W. 8 (1894).

friendship to others. A dying declarant may seek to do a last favor for one in whom he is interested at the expense of his own future happiness and at the sacrifice of the life of an innocent man. With the object of shielding a friend the declarant may falsely accuse himself of having been the aggressor in the encounter from the effects of which he is suffering.¹

§ 2819. (*Administrative Requirements; Subjective Relevancy*); Modern Scepticism.—The treatment at present accorded by judicial administration to the hearsay exception relating to dying declarations, the limiting, clipping, repressing to which it is exposed, seem intelligible only on the basis of serious modern doubt as to the actual absence of a controlling motive to misrepresent on the part of such a declarant. Taking men as they are at present, the world as it is, are the guarantees for truth-telling in case of dying declarations to be placed quite so high as early administration was inclined to rate them? The original argument in favor of the establishment of the exception, that a sense of impending death created a sanction equivalent to the administration of an oath may be conceded. Is it quite certain, however, that the sanction of the oath remains the same at the present time as in earlier days? Changes in religious teaching, a growing disbelief in the once universally accepted doctrine of eternal punishment for wrong-doing can hardly fail to find themselves registered in an increasing disregard for the solemnity of the oath. Yet, regardless of the fact, the old religious test of a belief in a state of future punishment is still insisted on, with apparent confidence in its efficiency. At no period of its use have the results of oath-taking seemed perfectly satisfactory. Perjury has always been a curse of judicial administration. If the remedy for it is attainable it is yet to be discovered. Something deeper than the formal repetition of a set of words has always been necessary to prevent it. Even under the ordeal theories of the middle ages,¹ perjury was rampant. At the present time it is safe to assume that it is probably not less so. To say, therefore, of a

§ 2818-1. See *Boyd v. State*, 84 Miss. 414, 36 So. 525 (1904).

§ 2819-1. "Very ancient law seems to be not quite certain whether it ought to punish perjury at all. Will

it not be interfering with the business of the gods? . . . And so our ancestors perjured themselves with impunity." 2 Pollock & M., *Hist. Eng. Law*, pp. 539, 541.

species of extrajudicial statement that the solemnity of the circumstances under which it is made supplies a guaranty of truth-telling equivalent to that of an oath,² is by no means an unqualified indorsement.³ Both assurances for truth-telling, though of equal force, may have fallen below the level of effective judicial service.

Not only is there apparently much modern doubt as to whether this may not be so, but the general possibility of establishing satisfactory ratings of entire classes of evidence, declaring one worthy of all credit and another less so, is a relic of formal procedure judicially viewed with increasing suspicion. That an administrative necessity will continue to permit the use of dying declarations cannot be doubted. But that such extrajudicial statements can properly be classified as being all good or all bad, when compared with the standard of an oath or any other way is not being believed. The probative value is felt to vary with the declarant, with the circumstances of the case.

More than this, that which makes the dying declarations secondary evidence and exposes the defendant to hardship is not the absence of an oath. The presence of a practically equivalent sanction for truth-telling is not, therefore, of much administrative consequence. That which usually checks wilful false statement is not so much the moral sanction of the oath as the dread of exposure under an effective cross-examination. Of the latter, in case of a dying declaration, nothing supplies the place. Like the East Indian of Sir James FitzJames Stephen,⁴ the dying declarant may exercise his last opportunity for "getting even" with his enemy and die content, reckless as to anything which may follow.

2. *Josey v. State*, (Ga. 1912) 74 S. E. 282; *State v. Fleetwood*, 6 Pennewill's (Del.) 153, 65 Atl. 772 (1906); *State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660n. (1908).

The dying declarations of a deceased person, introduced in evidence in a criminal case, are entitled to as much credibility as if made under the obligations of an oath duly and formally administered in a court of justice. *State v. Fleetwood*, 6 Pennewill's Rep. 153, 65 Atl. 772 (1906).

3. *Rhea v. State*, (Ark. 1912) 147 S. W. 463.

4. "As a curious and instructive instance of the way in which rules of evidence vary in their effect, I may mention the following circumstances: A Punjab district officer lately told me that it had come to be commonly known in the Peshawur division that a dying declaration as to the cause of the declarant's death is admitted in proof of the matter stated. The effect of this was, that whenever a man was mortally wounded, and found himself dying (a very common inci-

§ 2820. (*Administrative Requirements*); Completeness demanded.—In respect to that which it purports to cover, a dying declaration must be complete.¹ Administration by no means requires that the extrajudicial statement must, in order to be admissible, be a full account of the entire *res gestae*, properly so-called, of the fatal meeting.² What is demanded is that the declarant should be shown, or rationally assumed, to have said all which he intended to say on the topic which he has spoken about. No modification which the speaker regarded as essential to the accuracy of his statement can properly be omitted. Should there be reasonable ground for believing that some such qualification has failed to appear, the dying declaration will be rejected as incomplete.³ That the making of a dying statement was inter-

dent in that part of the world), he took the opportunity of making a dying declaration calculated to pay off as many old scores of vengeance as possible. The supposed ground of the English rule is, that the solemn thoughts connected with approaching death are equivalent to the sanction of an oath. This is very far indeed from being the way in which a dying Punjabee looks at the subject. His reflection on such an occasion is, 'This is my last chance of doing So-and-so, my old family enemy, a bad turn, and I will on no account miss it.'" Stephen, Dig. Law Ev., 3rd ed. Pref. 21n.

§ 2820-1. *Alabama*.—McLean v. State, 16 Ala. 672 (1849).

California.—People v. Chin Mook Sow, 51 Cal. 597 (1877).

Connecticut.—State v. Cronin, 64 Conn. 293, 29 Atl. 536 (1894).

Iowa.—State v. Murdy, 81 Iowa 603, 47 N. W. 867 (1891); State v. Clemons, 51 Iowa 274, 1 N. W. 546 (1879); State v. Nettlebush, 20 Iowa 257 (1866).

Missouri.—State v. Johnson, 118 Mo. 491, 504, 24 S. W. 229, 40 Am. St. Rep. 405 (1893).

Vermont.—State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200 (1873).

Virginia.—Jackson v. Com., 19

Gratt. 656 (1870); Vass' Case, 3 Leigh 786, 24 Am. Dec. 695 (1831).

"The declaration, however, in this case, was complete, and it is not shown that he intended or desired to connect it with any other fact or circumstance, explanatory of it." McLean v. State, 16 Ala. 672, 675 (1849), per Chilton, J.

2. State v. Nettlebush, 20 Iowa 257 (1866); State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200 (1873).

"What we understand by the expression, that the statement 'must be complete in itself,' is not that the declarant must state every thing that constituted the *res gestae* of the subject of his statement, but that his statement of any given fact should be a full expression of all that he intended to say as conveying his meaning as to such fact." State v. Patterson, 45 Vt. 308, 313, 12 Am. Rep. 200 (1873), per Barrett, J.

Use of Questions.—If the declaration is complete in itself, it is no objection that the deceased is unable, by reason of weakness, to answer a subsequent question. McLean v. State, 16 Ala. 672 (1849).

3. *Louisiana*.—State v. Giroux, 26 La. Ann. 582 (1874).

Mississippi.—Brown v. State, 32 Miss. 433 (1856).

rupted, by conversation on a different subject⁴ or in some other way,⁵ is not ground for excluding the evidence. Nor is it a sufficient reason for rejecting the declaration, that parts of it, if standing alone, would be inadmissible.⁶ To supplement the

Tennessee.—*Fitzgerald v. State*, 1 Leg. Rec. Rep. 53, 1 Tenn. Cas. 505 (1875).

Texas.—*Drake v. State*, 25 Tex. App. 293, 7 S. W. 868 (1888).

Virginia.—*Vass v. Com.*, 3 Leigh 786, 24 Am. Dec. 695 (1831).

A dying declaration, so far as incomplete, may be rendered admissible by supplementing evidence furnished by the defendant. *Mattox v. U. S.*, 146 U. S. 140, 152, 13 Sup. Ct. 50, 36 L. ed. 917 (1892).

Incorporation by reference.—The knowledge of a third person or other fact extrinsic to the declaration may be incorporated in it by a reference. *Wagoner v. Terr.*, 5 Ariz. 175, 51 Pac. 145 (1897) ("you know why").

See, however, *Sanford v. State*, 143 Ala. 78, 39 So. 370 (1905).

The burden is on the proponent to prove that the statement is a complete one, within the meaning of the rule. Where, therefore, the circumstances are such as to raise a reasonable question as to whether the declaration is complete it may properly be rejected. Thus, where the deceased was in a stupor from which he had to be aroused in order to answer questions, the answers to which were taken down by the attending physician so far as the statements were deemed by him material, the declarant being aroused to hear the whole read to him and finally, the declaration being signed in the decedent's name, by the doctor, a sufficient foundation for admissibility is not presented. *Cooper v. State*, 89 Miss. 351, 42 So. 666 (1907).

4. *State v. Ashworth*, 50 La. Ann. 94, 23 So. 270 (1898).

A fortiori, a temporary interruption, followed by the finishing of the

statement to its full completion, will not affect the admissibility of the declaration. *Park v. State*, 126 Ga. 575, 55 S. E. 489 (1906).

5. *U. S. v. Heath*, 20 D. C. 272 (1891); *Park v. State*, 126 Ga. 575, 55 S. E. 489 (1906).

Where deceased, in reply to a question said he was too weak to talk further, but would tell in the morning, it was decided that an expectation of living was not thus expressed which would bar his declaration as to the shooting, he having continually stated his belief that he would die. *State v. McCoomer*, 79 S. C. 63, 60 S. E. 237 (1908).

6. *State v. Bonar*, 71 Kan. 800, 81 Pac. 484 (1905) (affidavit); *State v. Blount*, 124 La. 202, 50 So. 12 (1909); *State v. Carter*, 106 La. 407, 30 So. 895, 107 La. 792, 32 So. 183 (1902); *State v. Wilson*, 121 Mo. 434, 26 S. W. 357 (1894); *Com. v. Spahr*, 211 Pa. 542, 60 Atl. 1084 (1905) (prior threats).

An interruption of a few minutes, in what is practically a continuous conflict, does not affect the proper scope of the dying declaration. *U. S. v. Heath*, 20 D. C. 272 (1891).

Inference.—Where, in a prosecution for homicide, a dying declaration contains unimportant expressions of opinion, which, taken in connection with the entire declaration, are not prejudicial, the entire declaration is admissible. *Cleveland v. Com.*, 31 Ky. L. Rep. 115, 101 S. W. 931 (1907).

Dying declarations must go in as a whole, though some of the statements, if standing alone, would be inadmissible. *State v. Blount*, 124 La. 202, 50 So. 12 (1909).

dying declaration, introduced by the prosecution, by other statements made at the same time⁷ is clearly within the rights of the defendant. This rule will not be affected by the fact that the deceased himself declared that the portions intended by him to have been added were "immaterial." "If too much has been said, the narrative may be as damaging to the accused as if it was partial. If it needs correcting, the defect—the error to be corrected—may be as injurious as if it were partial and incomplete."⁸

§ 2821. (Administrative Requirements; Completeness demanded); Exact Words not essential.—A dying declaration need not be reported to the tribunal in the exact words of the deceased,¹ even where the statement is in written form.² Nor does judicial administration insist that the statements of the dying declaration should be submitted to the court in the precise order of their utterance.³ While it is obviously sound administration to prevent incomplete and misleading memoranda of what a declarant has said in his dying declaration, it has been held in certain cases that only the *substance* of his language need be given,⁴

7. *Mattox v. U. S.*, 146 U. S. 140, 152, 13 Sup. Ct. 50, 36 L. ed. 917 (1892).

8. *Drake v. State*, 25 Tex. App. 293, 314, 7 S. W. 868 (1888), per Hurt, J.

§ 2821-1. *Georgia*.—*Park v. State*, 126 Ga. 575, 55 S. E. 489 (1906).

Illinois.—*Murphy v. People*, 37 Ill. 447 (1865).

Indiana.—*Ward v. State*, 8 Blackf. 101 (1846).

Ohio.—*Montgomery v. State*, 11 Ohio 424 (1842).

Washington.—*State v. Baldwin*, 15 Wash. 15, 45 Pac. 650 (1896).

2. See, however, *R. v. Mitchell*, 17 Cox Cr. C. 503 (1892).

3. *King v. State*, 34 Tex. Cr. App. 228, 29 S. W. 1086 (1895).

4. *Georgia*.—*Park v. State*, 126 Ga. 575, 55 S. E. 489 (1906).

Illinois.—*Murphy v. People*, 37 Ill. 447 (1865).

Indiana.—*Ward v. State*, 8 Blackf. 101 (1846).

Mississippi.—*Brown v. State*, 32 Miss. 433 (1856); *Nelms v. State*, 13

Sm. & M. 500 (1850).

Missouri.—*State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405 (1893).

New York.—*People v. Chase*, 79 Hun 296, 29 N. Y. Suppl. 376, 9 N. Y. Cr. R. 239, 61 N. Y. St. Rep. 40 affirmed 143 N. Y. 669, 39 N. E. 21 (1894).

Ohio.—*Montgomery v. State*, 11 Ohio 424 (1842).

Texas.—*Krebs v. State*, 8 Tex. App. 1 (1880); *Roberts v. State*, 5 Tex. App. 141 (1878).

"It is clear from the authorities that a dying declaration need not be in writing, and if evidence of such a declaration were being given by a person who heard it, he could not be expected to give the exact words with any degree of accuracy, but what he would give necessarily would be in his own words, the substance of what was said to the best of his recollection." *Rex v. Magyar*, 4 West. Law R. (Canada) 396, 400 (1906), per Harvey, J.

in case the witness is unable to state his exact words. This permission is accorded whether the dying declaration be proved by oral testimony or be presented in written form, accompanied by the formal or informal assent of the deceased.⁵ On the other hand, the *substance* of the declarant's statement made in response to questions has been deemed unsatisfactory, it being required that the words of the speaker should themselves be given, as well as the questions actually put in order to determine how much of what was stated has been suggested by the examiner.⁶ Great care should be exercised to make sure that the statements attributed to the declarant were actually made by him.⁷

§ 2822. (*Administrative Requirements*); Rule strictly construed.—Distrust of the soundness of the judicial reasoning, upon which the admissibility of this particular exception to the hearsay rule was established and is still maintained, has naturally led to the formulation of an extremely restricted rule on the subject of dying declarations. It is said that they should be received with great caution.¹ Extension by interpretation and intendment is not favored. Unless an extrajudicial statement can be brought strictly within the rule, the judicial impulse is to reject it. The prevailing line of administrative thought on this subject is thus stated by the Supreme Court of South Carolina:² "For the reason that the admission of such statements is exceptional, they ought always to be excluded unless they come within the rule in

The order in which the statements of a dying declaration are made may be a subject on which the witness may be required to show himself accurate. *King v. State*, 34 Tex. Cr. App. 228, 29 S. W. 1086 (1895) (Chinese).

5. *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650 (1896); *State v. Clark*, 64 W. Va. 625, 63 S. E. 402 (1908).

6. This is the rule in England as established by the case of *Reg. v. Mitchell*, 17 Cox C. C. 503 (1892), which has been followed in that country. *R. v. Smith*, (1901) 65 J. P. 426, 17 T. L. R. 522. In Canada, however, this view has not met with favor. *Rex v. Magyar*, 4 West. Law R. 396

(1906); *King v. Louie*, 7 Can. Cr. Cas. 347 (1903).

7. *State v. Peacock*, 58 Wash. 41, 107 Pac. 1022, 27 L. R. A. (N. S.) 702 n. (1910).

§ 2822-1. *Gardner v. State*, 55 Fla. 25, 45 So. 1028 (1908); *Smith v. State*, 9 Ga. App. 403, 71 S. E. 606 (1911); *Lipscomb v. State*, 75 Miss. 559, 23 So. 210 (1897).

"It is necessary in these cases to take the strictest care that these declarations are not admitted unless they come strictly within the rules." *R. v. Smith*, (1901) 65 J. P. 426, per Bruce, J.

2. *State v. Belcher*, 13 S. C. 459 (1880).

every respect." This strictness of construction tends rather to increase than to diminish.

In brief, a dying declaration is received only in criminal actions for homicide,³ where the death of the declarant is the subject of the charge⁴ and the circumstances of the killing form the basis of the declaration,⁵ the latter having been made under a sense of immediately impending death.⁶ After stating these conditions in substance, the Supreme Court of Kansas says:⁷ "It may be affirmed that no well-considered case has varied from these rules, and that the tendency is to greater stringency, rather than to any relaxation in applying them to cases."⁸

§ 2823. (Administrative Requirements; Rule strictly construed); Civil Cases.—In accordance with the strict construction given the rule, the use of dying declarations is confined to criminal proceedings connected with homicide, murder in some degree or manslaughter. The evidence is not received, according to the course of the common law, in civil actions,¹ illegal acts implying an assault even in case of those which, like abortion, result in death. Thus, no use can be made in evidence of the dying

3. §§ 2823, 2824.

4. § 2825

5. §§ 2849 *et seq.*

6. §§ 2831 *et seq.*

7. *State v. Medicott*, 9 Kan. 257, 283 (1872), per Kingman, C. J.

8. This species of evidence, however, seems to have had judicial admirers, not in favor of its being restricted in application. *Wooten v. Wilkins*, 39 Ga. 223, 99 Am. Dec. 456 (1869); *State v. Wagner*, 61 Me. 178 (1873); *Caujolle v. Ferrie*, 23 N. Y. 90 (1861); *McFarland v. Shaw*, 4 N. C. 200, 2 Car. Law Repts. (N. C.) 102 (1815).

§ 2823-1. *Connecticut*.—*Daily v. New York, etc.*, R. Co., 32 Conn. 356, 87 Am. Dec. 176 (1865).

Georgia.—*East Tennessee, etc. R. Co. v. Maloy*, 77 Ga. 237, 2 S. E. 941 (1886); *Wooten v. Wilkins*, 39 Ga. 223, 99 Am. Dec. 456 (1869).

Illinois.—*Marshall v. Chicago, etc.*, R. Co., 48 Ill. 475, 95 Am. Dec. 561 (1868) (railroad accident).

Indiana.—*Duling v. Johnson*, 32 Ind. 155 (1869).

Massachusetts.—*Thayer v. Lombard*, 165 Mass. 174, 42 N. E. 563, 52 Am. St. Rep. 507 (1896).

Missouri.—*Brownell v. Pacific R. Co.*, 47 Mo. 239 (1871).

New York.—*Waldele v. New York Central, &c., R. R.*, 19 Hun 69 (1879) (railroad accident); *Wilson v. Boerem*, 15 Johns. 286 (1818); *Jackson v. Kniffen*, 2 John. 36 (1806).

North Carolina.—*Pettiford v. Mayo*, 117 N. C. 27, 23 S. E. 252 (1895); *Barfield v. Britt*, 47 N. C. 41, 62 Am. Dec. 190 (1854).

Pennsylvania.—*Friedman v. Railroad Co.*, 7 Phila. 203 (1870).

England.—*Stobart v. Dryden*, 1 M. & W. 615 (1836).

The earlier law admitted the dying declaration in civil cases. *Jackson v. Vredenburg*, 1 John. 159, 163 (1806). Thus, it has been received where a subscribing witness, being *in extremis*, acknowledged the forgery of a will,

statement of the victim of a railroad accident,² although made under a sense of impending death.

§ 2824. (*Administrative Requirements; Rule strictly construed*); Criminal Cases other than Homicide.—Although the earlier law admitted the evidence in case of other crimes,¹ it is now settled that the dying declaration is admissible only in cases for homicide.² With regard to other unlawful acts, though death result, the statement is excluded.³

Wright v. Littler, 3 Burr. 1244 (1761).

So of the statement of a dying woman with regard to the paternity of her child. "Would she have died with a lie in her mouth and perjury in her right hand." Douglas Peerage Case, 2 Harg. Coll. Jur. 387, 389, 397 (1796). Thus, in an action for seduction, the dying statement of the injured woman that the defendant was the father of her unborn child has been received. McFarland v. Shaw, 4 N. C. 200, 2 Carolina Law Repository 102 (1815). The precise point has been decided to the contrary effect by the Supreme Court of Georgia, Wooten v. Wilkins, 39 Ga. 223, 99 Am. Dec. 456 (1869), the court remarking as to McFarland v. Shaw, *supra*, "It is directly contrary to the whole current of authority."

"An opinion prevailed (which is now properly exploded) that any declaration *in extremis* was admissible, on the ground that the solemnity of the occasion was equivalent to a declaration on oath." Stobart v. Dryden, 1 M. & W. 615, 626 (1836), per Parke, B.

2. Daily v. New York, etc., R. R., 32 Conn. 356, 87 Am. Dec. 176 (1865); East Tennessee, etc., R. R. v. Maloy, 77 Ga. 237, 2 S. E. 941 (1886); Marshall v. Chicago, etc., R. R., 48 Ill. 475, 95 Am. Dec. 561 (1868).

§ 2824-1. R. v. Drummond, Leach Cr. L. 4th ed. 337 (1784) (robbery).

2. People v. Schiavi, 89 N. Y. Suppl. 564, 96 App. Div. 479 (1904) (assault).

"Such evidence is admissible, in cases of homicide, only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations." People v. Davis, 56 N. Y. 95, 103 (1874), per Grover, J.

3. *Alabama*.—Johnson v. State, 50 Ala. 456 (1874) (rape).

Delaware.—See State v. Lodge, 9 Houst. 542, 33 Atl. 312, 1 Hardesty 166 (1892).

Iowa.—See State v. Baldwin, 79 Iowa 714, 45 N. W. 297 (1890); State v. Leeper, 70 Iowa 748, 30 N. W. 501 (1886).

Kentucky.—See People v. Com., 87 Ky. 487, 9 S. W. 509, 810, 10 Ky. L. Rep. 517 (1888).

Maryland.—See Worthington v. State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 353 (1901).

Minnesota.—See State v. Pearce, 56 Minn. 226, 57 N. W. 652, 1065 (1894).

Ohio.—State v. Barker, 28 Ohio St. 583 (1876).

Pennsylvania.—See Com. v. Bruce, 16 Phila. 510 (1884).

Tennessee.—Hudson v. State, 3 Coldw. 355 (1866) (robbery).

West Virginia.—Crookham v. State, 5 W. Va. 510 (1871) (assault with intent to kill).

As an administrative matter, the establishment by the proponent of an adequate necessity for using this species of evidence, in connection with the proof of other crimes, would warrant its admission.⁴

§ 2825. (Administrative Requirements; Rule strictly construed); Indictment must be for death of Declarant.—Not only is the reception of a dying declaration confined to indictment or equivalent proceedings for homicide, but the death, on account of

England.—*R. v. Lloyd*, 4 C. & P. 233 (1830) (robbery); *R. v. Mead*, 2 B. & C. 605 (1824) (perjury).

Criminal proceedings for abortion.—In prosecutions for homicide by causing the death of a woman by an attempt at abortion her dying declaration has been, in general, rejected.

New Jersey.—*State v. Meyer*, 64 N. J. L. 382, 45 Atl. 779 (1900), reversed 65 N. J. Law 237, 47 Atl. 486, 86 Am. St. Rep. 634, 52 L. R. A. 346 (1900).

New York.—*People v. Davis*, 56 N. Y. 95 (1874).

Ohio.—*State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596 (1878).

Pennsylvania.—*Railing v. Com.*, 110 Pa. 100, 1 Atl. 314 (1885).

Wisconsin.—*State v. Dickinson*, 41 Wis. 299 (1877).

England.—*R. v. Hind*, 8 Cox Cr. 300 (1860); *R. v. Hutchinson*, 2 B. & C. 608 n. (1822) (drugs).

There is authority to the contrary.

Indiana.—*Seifert v. State*, 160 Ind. 464, 67 N. E. 100, 98 Am. St. Rep. 340 (1903).

Maryland.—*Hawkins v. State*, 98 Md. 355, 57 Atl. 27 (1904).

Missouri.—*State v. Gow*, 235 Mo. 307, 138 S. W. 648 (1911).

Nebraska.—*Johnson v. State*, 88 Neb. 328, 129 N. W. 281 (1911).

New Jersey.—*State v. Meyer*, 65 N. J. L. 237, 47 Atl. 486 (1900).

Texas.—*Jackson v. State*, 55 Tex. Cr. App. 79, 115 S. W. 262 (1908).

Statutory provisions may permit

the introduction of the dying declaration of the injured woman in cases of abortion. *Com. v. Thompson*, 159 Mass. 56, 33 N. E. 1111 (1893); *Com. v. Homer*, 153 Mass. 343, 26 N. E. 872 (1891).

"We conclude, where death results from the unlawful attempt to produce an abortion, that death is the subject of the inquiry, and that dying declarations are competent. If we adopt any other view, we shall sacrifice principle to a mere form of words. . . . We regard the statute as clearly intending that death shall be deemed a controlling element of the offence." *Montgomery v. State*, 80 Ind. 338, 345, 41 Am. Rep. 815 (1881), per Elliott, C. J.; *State v. Fuller*, 52 Ore. 42, 96 Pac. 456 (1908); *Reg. v. Sparham*, 25 U. C. C. P. 143 (1875). See also, *Stats. of N. Y.*, 1875, c. 352; *Stats. of Pa.* 1895, June 26, Pub. L. 387, § 1.

That the declaration should be received, it must be shown to have been made under a sense of immediate impending death. *People v. Fritch*, (Mich. 1912) 136 N. W. 493.

4. The dying declarations of a woman on whom an abortion has been performed are not admissible where her death is not an essential ingredient of the offence which is complete without it, but where her death is, by statute, an indispensable element of the crime charged, her dying declarations are admissible. *State v. Fuller*, 52 Or. 42, 96 Pac. 456 (1908).

which proceedings are instituted, must be that of the declarant. The declarations are not received to establish the facts attending the killing of any other person than the speaker,¹ even where the

§ 2825-1. *Alabama*.—Johnson v. State, 50 Ala. 456 (1873); Johnson v. State, 47 Ala. 9 (1872).

Colorado.—Mora v. People, 19 Colo. 255, 262, 25 Pac. 179 (1893) (statements by accomplice).

Florida.—Johnson v. State, 58 So. 540 (1912).

Georgia.—Taylor v. State, 120 Ga. 857, 48 S. E. 361 (1904).

Iowa.—State v. Westfall, 49 Iowa 328 (1878).

Kansas.—State v. Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262 (1889); State v. Bohan, 15 Kan. 407 (1875); State v. Medlicott, 9 Kan. 257 (1872).

Kentucky.—Mitchell v. Com., 14 S. W. 489, 12 Ky. L. Rep. 458 (1890).

Louisiana.—State v. Simon, 59 So. 975 (1912).

Mississippi.—Brown v. State, 32 Miss. 433 (1856).

Missouri.—State v. Jefferson, 77 Mo. 136 (1882).

New York.—People v. Schiari, 96 App. Div. 479, 89 N. Y. Suppl. 564, 18 N. Y. Cr. Rep. 465, *appeal dismissed* 180 N. Y. 546, 73 N. E. 1129 (1904).

Oregon.—State v. Fitzhugh, 2 Oreg. 227, 232 (1867) (killed in same affray).

Pennsylvania.—Brown v. Com., 73 Pa. St. 321, 13 Am. Rep. 740 (1873); Com. v. Reed, 5 Phila. 528 (1864); *Republica v. Langcake*, 1 Yeates 415 (1795).

Tennessee.—Poteete v. State, 9 Baxt. 261, 40 Am. Rep. 90 (1878) (person killed in same encounter); Hudson v. State, 3 Coldw. 355 (1866).

Texas.—Craven v. State, 49 Tex. Cr. App. 78, 90 S. W. 311, 122 Am. St. Rep. 799 (1905); Radford v. State, 33 Tex. Cr. App. 520, 526, 27

S. W. 143 (1894); Wright v. State, 41 Tex. 246 (1874).

West Virginia.—Crookham v. State, 5 W. Va. 510 (1871).

England.—Reg. v. Hind, Bell C. C. 253, 8 Cox C. C. 300, 6 Jur. (N. S.) 514, 29 L. J. M. C. 147, 2 L. T. Rep. (N. S.) 253, 8 Wkly. Rep. 421 (1860); Reg. v. Newton, 1 F. & F. 641 (1859); Rex v. Lloyd, 4 C. & P. 233, 19 E. C. L. 491 (1830); Rex v. Mead, 2 B. & C. 605, 4 D. & R. 120, 26 Rev. Rep. 484, 9 E. C. L. 265 (1824).

The familiar statement of the rule is to the effect that:

"The decided weight of authority on the subject seems to be to the effect that it is a general rule that dying declarations, although made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. The admission of dying declarations as evidence being in derogation of the general rule which subjects the testimony of witnesses as ordinarily received to the two important 'tests of truth,' an oath and a cross-examination, it is obvious that such evidence should be admitted only upon grounds of necessity and public policy, and should be restricted to the act of killing and the circumstances immediately attending it and forming a part of the *res gestae*." Leiber v. Com., 9 Bush (Ky.) 11, 13 (1872), per Hardin, J.

See also,

New York.—People v. Davis, 56 N. Y. 95 (1874).

Ohio.—State v. Harper, 35 Ohio St. 78, 35 Am. Rep. 596 (1878).

Pennsylvania.—Railing v. Com., 110 Pa. St. 100, 1 Atl. 314 (1885).

same defendant is accused of, and is being tried for, homicide of a person said to have been killed as part of the same transaction in which the declarant was injured.² It has, however, been held by other courts that in the case supposed, where C. is alleged to have killed both A. and B. as part of the same occurrence, the dying declaration of A. is admissible against C. on an indictment for the killing of B., on the ground that the two homicides might properly have been joined in the same indictment.³

South Carolina.—State v. Banister, 35 S. C. 290 (1891).

Wisconsin.—Miller v. State, 25 Wis. 384 (1870).

2. *Colorado.*—Mora v. People, 19 Colo. 255, 262, 35 Pac. 179 (1893).

Florida.—Johnson v. State, 58 So. 540 (1912).

Georgia.—Miliken v. State, 8 Ga. App. 478, 69 S. E. 915 (1911); Taylor v. State, 120 Ga. 857, 48 S. E. 361 (1904).

Iowa.—State v. Westfall, 49 Iowa 328 (1878).

Louisiana.—State v. Simon, 59 So. 975 (1912).

Oregon.—State v. Fitzhugh, 2 Oreg. 227 (1867).

Pennsylvania.—Brown v. Com., 73 Pa. St. 321, 13 Am. Rep. 740 (1873).

Tennessee.—Poteete v. State, 9 Baxt. 261, 40 Am. Rep. 90 (1878); Hudson v. State, 3 Cold. 355 (1866).

Texas.—Radford v. State, 33 Tex. Cr. App. 520, 27 S. W. 143 (1894); Krebs v. State, 3 Tex. App. 348 (1877).

In an Iowa case where several persons had been killed at about the same time, in a general fight with revolvers between two families in an attempt to settle a family feud, the dying declarations of one son that the defendant killed him was held not to be admissible on an indictment for the murder of his brother, though the wounds were apparently made by the same instrument. "They were clearly hearsay declarations, relating to a crime for which defendant was not on trial. This illegal testimony could

not have been otherwise than prejudicial to the defendant. Its admission was erroneous." State v. Westfall, 49 Iowa 328, 332 (1878), per Beck, J.

Where husband and wife were apparently killed in the same attempt at robbery of their house, the dying declarations of the wife are not competent on an indictment for the murder of the husband. "We do not think such declarations can be received, except as coming from the deceased person for whose murder the prisoners are indicted." State v. Fitzhugh, 2 Oreg. 227, 233 (1867), per Boise, J.

3. State v. Wilson, 23 La. Ann. 558 (1871); State v. Wagner, 61 Me. 178 (1873); State v. Terrell, 12 Rich. L. (S. C.) 321 (1859); Rex v. Baker, 2 M. & Rob. 53 (1837).

Poisoning.—The practice has been applied where it is alleged that two persons were poisoned at the same (1873); State v. Terrell, 12 Rich. L. (S. C.) 321 (1859); R. v. Baker, 2 M. & Rob. 53 (1837).

Circumstantial evidence.—The rule under consideration has apparently no proper application to spontaneous utterances made during the progress of the *res gestae*, using that phrase in its proper sense, § 2582, or to independently relevant statements circumstantially probative. The distinction, however, is one which it is easy to overlook. Where several persons were murdered on "Smutty Nose" Island, off the coast of Maine, on an indictment for the murder of one, the

Where a *conspiracy* is shown, the dying declarations of deceased will be received as against a defendant who did not fire the fatal

outcries of a prior victim were held admissible. "The doctrine which we hold," say the court, "is this: The outcries of a person deceased during the perpetration of the assault which results in death, or upon the approach of the assailant, are competent evidence upon the trial of a party charged with the murder of such person, and may be considered by the jury with other circumstances and testimony upon the question of the identity of the accused. The outcries of another person who was murdered by the same party a few minutes previously during the perpetration of one and the same burglary, but on another part of the premises, are admissible under like circumstances for the same purpose upon such trial. Such outcries certainly partake much of the nature of *res gestae*, more distinctly so than the statement in *Com. v. McPike* [3 Cush. 181 (1849)], which accompanied the sending for a physician; but we think that the precise ground upon which their admission should be placed in a case like this, is substantially the same as that upon which dying declarations are declared admissible. Speaking of dying declarations, Roscoe says (*Crim. Ev.*, p. 30): 'Evidence of this kind which is peculiar to the case of homicide has been considered by some to be admissible from necessity, since it often happens that there is no third person present to be an eye-witness to the fact, and the usual witness in other felonies, viz., the party injured himself, is got rid of; but it is said by Eyre, C. B., that the general principle upon which evidence of this kind is admitted is that it is of declarations made in extremity, when the party is at the point of death, . . . when every motive to falsehood is silenced, and the mind is induced by the most

powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court.' Roscoe adds: 'Probably it is the concurrence of both these reasons which led to the admission of this species of evidence.' Both these conditions exist in the case at bar. There is as truly a necessity to corroborate the testimony of a surviving witness, whose testimony to the identity of the murderer and the accused may be attacked on the ground that in the darkness and excitement she was liable to mistake, as there is to furnish evidence when no person who witnessed the assault remains alive. Moreover, it is the danger that no surviving witness can be found, which operates to establish the rule, which is of general application, and the fact that in the particular case one did survive would not abrogate it. And as to the second condition, no one can doubt that the exclamations of these two women embodied the truth as it appeared to each, and that the cries of alarm or supplication uttered by any and all human beings under similar circumstances, would express their perceptions of existing facts as truly as if backed by the sanction of all the oaths known in Christendom. To reject the evidence afforded by the agonized entreaties of one standing face to face with death in the person of a murderer with uplifted weapon, when we would accept the account of the affair afterwards given by the enfeebled victim, with perceptions and recollections darkened and dimmed by the mists and shadows of approaching dissolution, would be, we think, but a bad sample of the perfection of human reason. It is not to such ex-

shot, but was present on the scene actively assisting in the perpetration of the crime.⁴

Confession by third person.—The confession of a third person that he himself committed the crime for which defendant is being tried cannot be received.⁵

Statements by the accused.—It follows from the present limitation upon the admissibility of dying declarations that it is not allowable for the *accused* to prove his own statements relative to the homicide, although made immediately thereafter, and while he supposed himself to be mortally wounded.⁶

§ 2826. (Administrative Requirements); Uncertainty Fatal.—Guess work has no proper place in a dying declaration. Any statement contained in one, which does not lead, by a clear inference, to proof of some facts in the *res gestae* (using *res gestae* in the English sense), should be rejected.¹ There should be no ambiguity as to the connection of the accused with the offence.² Mere ejaculations from which no connected meaning can rationally be gathered will not be received as dying declarations.³ Nor, as has been seen,⁴ is an uncertainty on the part of the declarant as to the speedy coming of death permissible. After some little fluctuation of opinion,⁵ it is settled that the speaker must not only regard his speedy death as possible or even as highly probable,⁶

clamations that any of the substantial objections to hearsay testimony can be held to apply. Those outcries were as plainly circumstances proper for the consideration of the jury in the attempt to ascertain whether the prisoner was guilty of that crime, as any other portion of the circumstantial evidence in the case." *State v. Wagner*, 61 Me. 178, 194 (1873).

4. *People v. Moran*, 144 Cal. 48, 77 Pac. 777 (1904).

5. *West v. State*, 76 Ala. 98 (1884). See also § 2703.

6. *Brabston v. State*, 68 Miss. 208, 8 So. 326 (1890).

§ 2826-1. *Scott v. People*, 63 Ill. 508 (1872); *State v. Center*, 35 Vt. 378 (1862).

2. *Glover v. State*, 137 Ga. 82, 72 S. E. 926 (1911) ("laid the killing on

some one else"); *State v. Baldwin*, 79 Iowa 714, 45 N. W. 297 (1890).

That the deceased accused of having shot him someone whose name sounded to the witness "like Cast-rando or something like that," is not admissible as a dying declaration on an indictment against one named Castillo. *Castillo v. State*, (Tex. Cr. App. 1902) 69 S. W. 517.

3. *State v. Perigo*, 80 Iowa 37, 45 N. M. 399 (1890); *Luby v. Com.*, 12 Bush (Ky.) 1 (1876); *People v. Olmstead*, 30 Mich. 431 (1874).

4. §§ 2831, 2833a.

5. *R. v. Perkins*, 9 C. & P. 395 (1840); *Lord Byron's Trial*, 19 How. St. Tr. 1177, 1205, 1206 (1765).

6. See, however, the following case in which the words "it is in full view of my probable death that I make

but as certain and inevitable.⁷

§ 2827. (Administrative Requirements); Who are competent as Declarants.—Speaking generally, any person is a competent declarant who would be received as a witness. In other words, anyone who would, if living, be competent to testify, may be the declarant in a dying declaration.¹ Conversely, in case the maker

these statements," were held sufficient to admit the evidence. *People v. Weaver*, 108 Mich. 649, 650, 66 N. W. 567 (1896), per Moore, J.

7. The person making the declaration "shall have a complete conviction that death is at hand. . . . Death, shortly to ensue, must be an absolute certainty, so far as the consciousness of the person making the accusation is concerned." *Peak v. State*, 50 N. J. L. 179, 12 Atl. 701 (1888), per Beasley, C. J.

"The result of the decisions is, that there must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die." *R. v. Jenkins*, L. R. 1 Cr. R. 187, 192 (1869), per Kelly, C. B.

"There must be a settled, hopeless expectation of death in the declarant." *R. v. Peel*, 2 F. & F. 21 (1860), per Wiles, J.

"These declarations would not be evidence unless she was under a clear impression that she was in a dying state." *R. v. Mooney*, 5 Cox Cr. C. 318 (1851), per Pigot, C. B.

§ 2827-1. *Alabama*.—*Shell v. State*, 88 Ala. 14, 7 So. 40 (1889).

Arkansas.—*Walker v. State*, 39 Ark. 221 (1882).

California.—*People v. Chin Mook Sow*, 51 Cal. 597 (1877); *People v. Sanford*, 43 Cal. 29 (1872); *People v. Sanchez*, 24 Cal. 17 (1864), per Sanderson, C. J.

Illinois.—*North v. People*, 139 Ill. 81, 28 N. E. 966 (1891).

Kentucky.—*Martin v. Com.*, 78 S. W. 1104, 25 Ky. Lew Rep. 1928 (1904).

Louisiana.—*State v. Brunetto*, 13 La. Ann. 45 (1858); *State v. Hannah*, 10 La. Ann. 131 (1855).

Mississippi.—*Lambeth v. State*, 23 Miss. 322 (1852).

New Jersey.—*Donnelly v. State*, 26 N. J. L. 463; *affirmed* 26 N. J. L. 601 (1857).

North Carolina.—*State v. Williams*, 67 N. C. 12 (1872).

Oregon.—*State v. Ah Lee*, 8 Ore. 214 (1878).

Washington.—*State v. Baldwin*, 15 Wash. 15, 45 Pac. 650 (1896).

England.—*R. v. Perkins*, 9 C. & P. 395, 2 Moody C. C. 135, 38 E. C. L. 236 (1840).

"As to their admissibility, the declarations of deceased persons, in cases of homicide, stand upon the same footing as the testimony of a witness sworn in the case, and are governed by the same rules, except as to the manner of conducting the examination." *People v. Sanchez*, 24 Cal. 17, 26 (1864), per Sanderson, C. J.

"They are substitutes for sworn testimony, and must be such narrative statements as a witness might properly give on the stand if living." *People v. Olmstead*, 30 Mich. 431, 435 (1874), per Campbell, J.

Delirium.—Though it may appear that at times the declarant was delirious, his declaration may nevertheless be received if he appear to have been rational at the time of making it. *Keith v. Com.*, 92 S. W. 599, 29 Ky. L. Rep. 158 (1906).

Disbelief in God and in future rewards and punishments has not been regarded as unfavorable to admissibility. *State v. Hood*, 63 W. Va. 182,

of the dying statement would, if alive, be incompetent as a witness,² his dying declaration would be rejected.³ Included in this general

59 S. E. 971, 15 L. R. A. (N. S.) 448, 129 Am. St. Rep. 964 (1907). It would seem, however, that the existence of such a disbelief would greatly affect the weight of the declaration. One of the grounds of the admissibility of such statements is the fact as announced by the earlier judges and reiterated in later decisions, that such declarations are received with a credit almost, if not entirely, equivalent to that accorded testimony under the sanction of an oath. The reason for this is attributed to the solemnity of the occasion, the speaker being at the threshold of death, conscious thereof and of the fact that he is about to meet his God. Therefore, with the existence of this disbelief the controlling element which induced the reception of such evidence and gave it the probative force accorded to it has been eliminated.

Opiates.—Although the deceased was partially under the influence of opiates his dying declaration may be received. *Walker v. State*, 139 Ala. 56, 35 So. 1011 (1904). The court, however, in such a case should guard the effect of the admission by proper instructions. *Roberts v. State*, 48 Tex. Cr. App. 378, 88 S. W. 221 (1905).

The use of profanity at the time of making the statement has not been regarded as fatal to its admissibility as a dying declaration. *Kirby v. State*, 151 Ala. 66, 44 So. 38 (1907).

It would seem, however, that the use of language of such a character would be a factor to be considered at least as affecting the weight of the declaration if not the question of its admissibility. As is said in the opinion in an Illinois case: "Assuming that the deceased was a believer in a future state of rewards and punishments, and such is the presumption

where nothing appears to the contrary, the use of profane language immediately preceding the statement is hardly to be reconciled with the assumption that he was at the time of sound mind. To say the least of it, it was a fact which, if proved, would have tended strongly to negative that hypothesis, and should therefore have been received and considered by the court in connection with the other facts and circumstances bearing upon the question. It is hard to realize how any sane man who believes in his accountability to God can be indulging in profanity when at the same time he really believes that in a few short hours at most he will be called upon to appear before Him to answer for the deeds done in the body." *Tracy v. People*, 97 Ill. 101, 105, 106 (1880) per Mulkey, J.

2. *R. v. Drummond*, 1 Leach Cr. L. 4th ed. 337 (1784) (convict).

3. *Arkansas*.—*Walker v. State*, 39 Ark. 221 (1882).

Kentucky.—*Martin v. Com.*, 78 S. W. 1104, 25 Ky. L. Rep. 1928 (1904.)

Mississippi.—*Lambeth v. State*, 23 Miss. 322 (1852).

New Jersey.—*Donnelly v. State*, 26 N. J. L. 463 affirmed 26 N. J. Law 601 (1857).

North Carolina.—*State v. Williams*, 67 N. C. 12 (1872).

Washington.—*State v. Baldwin*, 15 Wash. 15, 45 Pac. 650 (1896).

England.—*Reg. v. Perkins*, 9 C. & P. 395, 2 Moody C. C. 135, 38 E. C. L. 236 (1840); *Drummond's Case*, 1 East P. C. 353 note, 1 Leach C. C. 378 (1784).

"Whatever would disqualify a witness, would make such declarations incompetent testimony." *Donnelly v. State*, 26 N. J. L. 601, 620 (1857), per Ogden, J.

statement is the fact that where the declarant, by reason of infancy,⁴ insanity,⁵ or other cause,⁶ would have been incompetent to have testified as a witness, his declaration made *in extremis* will not be received. As an ex-convict is a competent witness, his dying declaration is admissible.⁷

§ 2828. (Administrative Requirements; Who are competent as Declarants); Administrative Assumptions.—The action of the court in dealing with dying declarations is frequently modified by the use of administrative assumptions. Should the evidence before the judge, for example, establish the fact that the declarant was, or thought he was, *in extremis* and spoke under the conviction of impending death, the existence of the mental feelings appropriate to such situation, and which the law deems as sufficient sanction for trustworthiness, is assumed¹ precisely as, in case of one duly sworn as a witness, it would be taken for granted that he was properly impressed by the obligation of the oath administered to him. In either event, the party against whom the evidence is offered will be permitted to show that the assumption is not in accordance with the fact. In case of a dying declaration, the judge may exclude the statement, if satisfied that the ordinary assumption cannot properly be made in that particular instance.² In other respects, administrative assumptions may be indulged

4. *Hunter v. State*, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910) (10 years); *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650 (1896); *R. v. Pike*, 3 C. & P. 598, 14 E. C. L. 735 (1829) (4 years); *Drummond's Case*, 1 Leach. C. C. 378 (1784).

See, also, *Hunter v. State* (Tex. Cr. App. 1908) 114 S. W. 124 (10 years).

5. *Guest v. State*, 96 Miss. 871, 52 So. 211 (1910); *Lipscomb v. State*, 75 Miss. 559, 23 So. 210 (1897); *State v. Reed*, 137 Mo. 125, 38 S. W. 574 (1897); *Tex. C. Cr. P.*, § 788 (1895).

The burden of evidence is usually placed upon the accused in the first instance. *State v. Reed*, 137 Mo. 125, 38 S. W. 574 (1897).

6. *Jackson v. Vredenburgh*, 1 Johns. 159, 163 (1806) (interest).

7. *State v. Blount*, 124 La. 202, 50 So. 12 (1909).

Effect of pardon.—Should the fact of a conviction for crime and confinement in the penitentiary be shown in order to impeach the decedent, the prosecution cannot rebut this evidence by producing a pardon. *Martin v. Com.*, 78 S. W. 1104, 25 Ky. L. Rep. 1928 (1904) (grand larceny).

Misdemeanors.—Proof of the commission of a misdemeanor will not be received to impeach the declarant. *Martin v. Com.*, 78 S. W. 1104, 25 Ky. L. Rep. 1928 (1904).

§ 2828-1. *Lambeth v. State*, 23 Miss. 322, 358 (1852); *People v. Craft*, 148 N. Y. 631, 43 N. E. 80 (1896).

2. *Lambeth v. State*, 23 Miss. 322, 358 (1852).

as to the capacity of a dying declarant. Thus, if the latter were an infant of tender years³ the judge may properly assume that the speaker would be incompetent as a witness, throwing upon the proponent of his dying declaration the burden of evidence to show competency. On the other hand, in case of an older child⁴ or of an adult,⁵ the reversed assumption may properly be made⁶ regarding his mental faculties⁷ or other qualifications as a witness, the accused being given an opportunity to show, if he can, that the declarant would have been in point of fact incompetent as a witness.⁸

§ 2829. (Administrative Requirements); Function of the Court.—The dying declaration is not permitted by judicial administration to go directly to the jury.¹ Whether the conditions essential to its admissibility have been shown to exist in a particular case is an administrative question² and frequently, in view

3. *State v. Frazier*, 109 La. Ann. 458, 33 So. 561 (1903); *Rex v. Pike*, 3 C. & P. 598, 14 E. C. L. 735 (1829) (four years).

4. *State v. Frazier*, 109 La. 458, 33 So. 561 (1903) (ten years old).

5. *State v. Reed*, 137 Mo. 125, 38 S. W. 574 (1897); *State v. Ah Lee*, 8 Oreg. 214 (1880).

6. *People v. Chin Mook Sow*, 51 Cal. 597 (1877); *Lambeth v. State*, 23 Miss. 322 (1852); *Donnelly v. State*, 26 N. J. L. 463 (1857).

7. *State v. Reed*, 137 Mo. 125, 38 S. W. 574 (1897) (insanity).

8. *People v. Chin Mook Sow*, 51 Cal. 597 (1877); *Lambeth v. State*, 23 Miss. 322 (1852); *Donnelly v. State*, 26 N. J. L. 463 (1857).

§ 2829-1. *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405 (1893).

"It cannot be left to the jury to say whether the deceased thought he was dying or not, for that must be decided by the judge, before he permits the declaration to be given in evidence." *People v. Smith*, 104 N. Y. 491, 504, 10 N. E. 873, 58 Am. Rep. 537 (1887), per Finch, J.

2. *Alabama*.—*Sims v. State*, 139 Ala. 74, 36 So. 138, 101 Am. St. Rep. 17 (1903); *Tarver v. State*, 137 Ala. 29, 34 So. 627 (1902); *Fuller v. State*, 117 Ala. 36, 23 So. 638 (1897); *Justice v. State*, 99 Ala. 180, 13 So. 658 (1892); *Johnson v. State*, 94 Ala. 35, 10 So. 667 (1891); *Faire v. State*, 58 Ala. 74 (1877).

Arkansas.—*Evans v. State*, 58 Ark. 47, 22 S. W. 1026 (1893); *Campbell v. State*, 38 Ark. 498 (1881); *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54 (1839).

California.—*People v. Thomson*, 145 Cal. 717, 79 Pac. 435 (1905); *People v. Lem You*, 97 Cal. 224, 32 Pac. 11 (1893); *People v. Glenn*, 10 Cal. 32 (1858).

Colorado.—*Brennan v. People*, 37 Colo. 256, 86 Pac. 79 (1906); *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018 (1905).

Delaware.—*State v. Cornish*, 5 Harr. 502 (1853).

Florida.—*Lester v. State*, 37 Fla. 382, 20 So. 232 (1896); *Roten v. State*, 31 Fla. 514, 12 So. 910 (1893); *Dixon v. State*, 13 Fla. 636 (1869).

Georgia.—*Josey v. State*, 137 Ga.

of the momentous consequences to the defendant, one of difficulty and nicety. The court cannot, it is said, properly leave to the

769, 74 S. E. 282 (1912); *Smith v. State*, 110 Ga. 255, 34 S. E. 204 (1899); *Kearney v. State*, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344 (1897); *Whitaker v. State*, 79 Ga. 87, 3 S. E. 403 (1887).

Illinois.—*Westbrook v. State*, 126 Ill. 81, 18 N. E. 304 (1888); *Digby v. People*, 113 Ill. 123, 55 Am. Rep. 402 (1885); *Starkey v. People*, 17 Ill. 17 (1855).

Indiana.—*Gipe v. State*, 165 Ind. 433, 1 L. R. A. (N. S.) 419, 75 N. E. 881 (1905); *Green v. State*, 154 Ind. 655, 57 N. E. 637 (1900); *Doles v. State*, 97 Ind. 555 (1884).

Iowa.—*State v. Kuhn*, 117 Iowa 216, 90 N. W. 733 (1902); *State v. Baldwin*, 79 Iowa 714, 45 N. W. 297 (1890); *State v. Leeper*, 70 Iowa 748, 30 N. W. 501 (1886); *State v. Elliott*, 45 Iowa 486 (1877); *State v. Gillick*, 7 Iowa 287 (1858).

Kansas.—*State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322 (1894); *State v. Aldrich*, 50 Kans. 666, 32 Pac. 408 (1893).

Kentucky.—*Coyle v. Com.*, 93 S. W. 584, 29 Ky. L. Rep. (1906).

Louisiana.—*State v. Molisse*, 36 La. Ann. 920 (1884); *State v. Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293 (1880).

Massachusetts.—*Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560 (1896).

Michigan.—*People v. Olmstead*, 30 Mich. 431 (1874).

Mississippi.—*Bell v. State*, 72 Miss. 507, 17 So. 232 (1895); *Owens v. State*, 59 Miss. 547 (1882); *Lambeth v. State*, 23 Miss. 322 (1852); *McDaniel v. State*, 8 Sm. & M. 401, 47 Am. Dec. 93 (1847).

Missouri.—*State v. Crone*, 209 Mo. 316, 108 S. W. 555 (1908); *State v. Sexton*, 147 Mo. 89, 48 S. W. 452 (1898); *State v. Reed*, 137 Mo. 125, 38 S. W. 574 (1897); *State v. Noc-ton*, 121 Mo. 537, 26 S. W. 551

(1894); *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 48 Am. St. Rep. 405 (1893); *State v. Rider*, 90 Mo. 54, 1 S. W. 825 (1886).

Nebraska.—*Basye v. State*, 45 Nebr. 261, 63 N. W. 811 (1895).

New Jersey.—*Donnelly v. State*, 26 N. J. L. 463, *affirmed* 26 N. J. Law 601 (1857).

New York.—*People v. Brecht*, 105 N. Y. Suppl. 436, 120 App. Div. 769 (1907); *People v. Kraft*, 148 N. Y. 631, 43 N. E. 80, *affirming* 91 Hun 474, 36 N. Y. Suppl. 1034 (1896); *Maine v. People*, 9 Hun 113 (1876); *People v. Anderson*, 2 Wheel. Cr. 390 (1824).

North Carolina.—*State v. Williams*, 67 N. C. 12, 17 (1872); *State v. Poll*, 8 N. C. 442, 9 Am. Dec. 655 (1821).

Ohio.—*Robbins v. State*, 8 Ohio St. 131 (1857); *Montgomery v. State*, 11 Ohio 424 (1842).

Oklahoma.—*Bilton v. Territory*, 1 Okla. Cr. App. 566, 99 Pac. 163 (1909); *Willoughby v. Territory*, 16 Okla. 577, 86 Pac. 56 (1906) ("as a matter of law").

Oregon.—*State v. Fuller*, 52 Oreg. 42, 96 Pac. 406 (1908); *State v. Foot You*, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 637 *affirmed* 24 Oreg. 61, 33 Pac. 537 (1893); *State v. Shaffer*, 23 Oreg. 555, 32 Pac. 545 (1893); *State v. Ah Lee*, 7 Oreg. 237 (1879).

Pennsylvania.—*Com. v. Sullivan*, 13 Phila. 410, 36 Leg. Int. 434, *affirmed* 93 Pa. 284 (1879); *Kehoe v. Com.*, 85 Pa. St. 127 (1877).

Rhode Island.—*State v. Jeswell*, 22 R. I. 136, 46 Atl. 405 (1900).

South Carolina.—*State v. Banister*, 35 S. C. 290, 14 S. E. 678 (1891); *State v. Quick*, 15 Rich. L. 342 (1868); *State v. Ferguson*, 2 Hill 619, 27 Am. Dec. 412 (1835).

Tennessee.—*Baxter v. State*, 15 Lea 657 (1885); *Bolin v. State*, 9 Lea

jury the question of the admissibility of a dying declaration.³ Where, however, the court as a matter of law passes upon the competency of dying declarations and admits them, but the evidence is conflicting regarding a fact which determines the admissibility of the statement, the presiding judge may reasonably regard the administrative expedient of again submitting the question of the competency of the declarations to the jury under appropriate alternative instructions.⁴

§ 2830. (Administrative Requirements; Function of the Court); Action of Appellate Courts.—The sound administrative doctrine would seem to be that the action of the trial court, in

516 (1882); *Brakefield v. State*, 1 Sneed 215 (1853); *Smith v. State*, 9 Humphr. 9 (1848); *Anthony v. State*, Meigs 265, 33 Am. Dec. 143 (1838).

Texas.—*Bateson v. State*, 46 Tex. Cr. App. 34, 80 S. W. 88 (1904).

Vermont.—*State v. Center*, 35 Vt. 378 (1862); *State v. Howard*, 32 Vt. 380 (1859).

Virginia.—*Bull v. Com.*, 14 Gratt. 613 (1857); *Hill v. Com.*, 2 Gratt. 594 (1845); *Vass v. Com.*, 3 Leigh 786, 24 Am. Dec. 695 (1831).

Wisconsin.—*State v. Cameron*, 2 Pinn. 490, 2 Chandl. 172 (1850).

England.—*Reg. v. Goddard*, 15 Cox Cr. C. 7 (1882); *Reg. v. Reany*, 7 Cox Cr. C. 209, Dears. & B. 151, 3 Jur. (N. S.) 191, 26 L. J. M. C. 43, 5 Wkly. Rep. 252 (1857); *Rex v. Hucks*, 1 Stark. 521, 2 E. C. L. 198 (1816); *Johns' Case*, 1 East P. C. 357 (1790). See, however, *R. v. Woodcock*, Leach Cr. L., 3d ed., 500 (1789).

"It is the duty of the court to determine, in the first place, upon the admissibility of such declarations, and then it is for the jury to determine upon the weight, or credibility of them." *Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276 (1848), per Dargan, J.

"The court must draw a rational conclusion from all that was said, taken in connection with such surrounding circumstances as must have

been known to the declarant, as to whether said declarant was in such condition of mind as would render his declaration competent." *Winfrey v. State*, 41 Tex. Cr. App. 538, 540, 56 S. W. 919 (1900), per Davidson, J.

3. *Roten v. State*, 31 Fla. 514, 12 So. 910 (1893); *State v. Zorn*, 202 Mo. 12, 100 S. W. 591 (1907); *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405 (1893); *Willoughby v. Territory*, 16 Okla. 577, 86 Pac. 56 (1906); *State v. Center*, 35 Vt. 378 (1862).

4. *Willoughby v. Territory*, 16 Okla. 577, 86 Pac. 56 (1906).

"Where but one deduction can reasonably be drawn from the testimony, and it is to the effect that the declaration was made *in extremis*, under a sense of impending death, the court must admit the declaration; and its admission is conclusive upon the jury, which, under such circumstances, should be so instructed. But, if the predicate for the dying declaration appears doubtful, and of such character that men of average reason and prudence might draw different conclusions therefrom, the inquiry then becomes one of fact, and must finally be submitted to the jury." *State v. Doris*, 51 Oreg. 136, 147, 94 Pac. 44, 16 L. R. A. (N. S.) 660 (1903), per King, C.

See §§ 544 *et seq.*

dealing with the admissibility of dying declarations, should be final if reason has been employed, and such is the holding of certain courts under what may be regarded as the prevailing rule.¹ Language, treating the action of the trial judge as being more nearly a finality, is also to be found in the decisions.² In other tribunals the action of the trial judge has been held reviewable generally.³ That is, between two rationally permissible views, the appellate court claims the right to select that which it prefers.

§ 2831. Expectation of Death.—The subjective sense of impending dissolution, on the part of the deceased at the time of making his statement, must be proved to the satisfaction of the presiding judge, if the dying declaration is to be received.¹ It is

§ 2830-1. Kentucky.—*Baker v. Com.*, 106 Ky. 212, 50 S. W. 54, 20 Ky. L. Rep. 1778 (1899).

Massachusetts.—*Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560 (1896).

Nebraska.—*Basye v. State*, 45 Nebr. 261, 63 N. W. 811 (1895).

New Jersey.—*State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 (1906).

Oregon.—*State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 (1908) (reviewable only for abuse of discretion).

South Carolina.—*State v. Franklin*, 80 S. C. 332, 60 S. E. 953 (1908).

It will be assumed, in the absence of evidence to the contrary, that a proper predicate or foundation for the admissibility of a dying declaration was laid in the trial court. *Mayes v. State*, 108 Ga. 787, 33 S. E. 811 (1899).

On appeal the action of the trial court will not be reversed unless there has been an abuse of discretion, *State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 (1908), or manifest error. *Williams v. State*, 168 Ind. 87, 79 N. E. 1079 (1907); *State v. Franklin*, 80 S. C. 332, 60 S. E. 953 (1908); *State v. Clark*, 64 W. Va. 625, 63 S. E. 402 (1908).

2. *Baker v. Com.*, 106 Ky. 212, 50 S. W. 54, 20 Ky. L. Rep. 1778

1899); *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560 (1896); *Basye v. State*, 45 Nebr. 261, 63 N. W. 811 (1895).

3. *Com. v. Roberts*, 108 Mass. 296 (1871); *Donnelly v. State*, 26 N. J. L. 463, affirmed 26 N. J. Law 601 (1857); *Rex v. Lunfield*, 10 Ont. W. R. 1010, 15 O. L. R. 252 (1907).

"It was a ruling in matter of law; and the life of a defendant may be involved in a ruling on this point. In many of the cases reported, the court have discussed the evidence on which the question turned." *Com. v. Roberts*, 108 Mass. 296, 302 (1871), per *Chapman, C. J.*

§ 2831-1. Alabama.—*Ingram v. State*, 173 Ala. 724, 54 So. 699 (1911); *Patterson v. State*, 171 Ala. 2, 54 So. 696 (1911); *Twitty v. State*, 168 Ala. 59, 53 So. 308 (1910); *Lang v. State*, 166 Ala. 22, 52 So. 340 (1910); *Dumas v. State*, 159 Ala. 42, 49 So. 224, 113 Am. St. Rep. 17 (1909); *Delaney v. State*, 148 Ala. 586, 42 So. 815 (1906); *Wilson v. State*, 140 Ala. 43, 37 So. 93 (1904).

Arkansas.—*Jackson v. State*, 145 S. W. 559 (1912); *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54 (1839).

California.—*People v. Hayes*, 9 Cal. App. 301, 99 Pac. 386 (1908); *People v. Sanchez*, 24 Cal. 17 (1864).

Colorado.—*Jamison v. People*, 119

not sufficient to render the statement admissible that the declarant

Pac. 474 (1911); *Brennan v. People*, 37 Colo. 256, 86 Pac. 79 (1906); *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018 (1905).

Florida.—*Coatney v. State*, 61 Fla. 19, 55 So. 285 (1911); *Fails v. State*, 60 Fla. 8, 53 So. 612 (1910); *Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909); *Gardner v. State*, 55 Fla. 25, 45 So. 1028 (1908); *Dixon v. State*, 13 Fla. 636 (1869).

Georgia.—*Cobb v. State* (App. 1912), 74 S. E. 702; *Glover v. State*, 137 Ga. 82, 72 S. E. 926 (1911); *Perdue v. State*, 135 Ga. 277, 69 S. E. 184 (1910); *Southerland v. State*, 121 Ga. 190, 48 S. E. 915 (1904); *Campbell v. State*, 11 Ga. 353 (1852).

Illinois.—*People v. Cassesse*, 251 Ill. 422, 96 N. E. 274 (1911); *Collins v. People*, 194 Ill. 506, 62 N. E. 902 (1902).

Indiana.—*Watson v. State*, 63 Ind. 548 (1878); *Morgan v. State*, 31 Ind. 193 (1869).

Kansas.—*State v. Knoll*, 69 Kan. 767, 77 Pac. 580 (1904); *State v. Furney*, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262 (1889); *State v. Medicott*, 9 Kan. 257 (1872).

Kentucky.—*Gleason v. Com.*, 145 Ky. 128, 140 S. W. 63 (1911); *McGowan v. Com.*, 117 S. W. 387 (1909); *Cleveland v. Com.*, 31 Ky. L. Rep. 115, 101 S. W. 931 (1907); *Coyle v. Com.*, 122 Ky. 781, 93 S. W. 584, 29 Ky. L. Rep. 340 (1906); *Fuqua v. Com.*, 73 S. W. 782, 24 Ky. L. Rep. 2204 (1903); *Walston v. Com.*, 16 B. Mon. 15 (1855).

Louisiana.—*State v. Augustus*, 129 La. 617, 56 So. 551 (1911); *State v. Fletcher*, 127 La. 602, 53 So. 877 (1910); *State v. Daniels*, 115 La. 59, 38 So. 894 (1905); *State v. Wilson*, 23 La. Ann. 558 (1871).

Mississippi.—*Guest v. State*, 96 Miss. 871, 52 So. 211 (1910); *Ashley v. State*, 37 So. 960 (1905); *McLean v. State*, 12 So. 905 (1893); *Lewis v. State*, 9 Sm. & M. 115 (1847).

Missouri.—*State v. Colvin*, 226 Mo. 446, 126 S. W. 448 (1910); *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405 (1893); *State v. Dominique*, 30 Mo. 585 (1860).

Montana.—*State v. Russell*, 13 Mont. 164, 32 Pac. 854 (1893).

New Jersey.—*Donnelly v. State*, 26 N. J. L. 601 (1857).

New York.—*People v. Governale*, 193 N. Y. 581, 86 N. E. 554 (1908); *People v. Stacy*, 192 N. Y. 577, 85 N. E. 1114 (1908); *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908); *People v. Brecht*, 120 App. Div. 769, 105 N. Y. Suppl. 436 (1907); *People v. Chase*, 79 Hun 296, 29 N. Y. Suppl. 376, 9 N. Y. Cr. Rep. 239, 61 N. Y. St. Rep. 40, *affirmed* 143 N. Y. 669, 39 N. E. 21 (1894); *People v. Wood*, 2 Edm. Sel. Cas. 71 (1849).

North Carolina.—*State v. Bagley*, 158 N. C. 608, 73 S. E. 995 (1912); *State v. Baldwin*, 155 N. C. 494, 71 S. E. 212 (1911).

Oklahoma.—*Morris v. State*, 6 Okl. Cr. App. 29, 115 Pac. 1030 (1911); *Bilton v. Territory*, 1 Okla. Cr. App. 566, 99 Pac. 163 (1909).

Oregon.—*State v. Fletcher*, 24 Oreg. 295, 33 Pac. 575 (1893).

Pennsylvania.—*Com. v. Silcox*, 161 Pa. St. 484, 29 Atl. 105 (1894); *Kilpatrick v. Com.*, 31 Pa. St. 198, 3 Phila. 237 (1858).

South Carolina.—*State v. Taylor*, 56 S. C. 360, 34 S. E. 939 (1899).

South Dakota.—*State v. Swenson*, 26 S. D. 589, 129 N. W. 119 (1910).

Tennessee.—*Still v. State*, 125 Tenn. 80, 140 S. W. 298 (1911).

Texas.—*Figaroa v. State*, 58 Tex. Cr. App. 611, 127 S. W. 193 (1910); *Morgan v. State*, 54 Tex. Cr. App. 542, 113 S. W. 934 (1908); *Wilson v. State*, 49 Tex. Cr. App. 50, 90 S. W. 312 (1905); *Lyles v. State*, 48 Tex. Cr. App. 119, 86 S. W. 763 (1905); *Crockett v. State*, 45 Tex. Cr. App. 276, 77 S. W. 4 (1903).

Virginia.—*Patterson v. Com.*, 75 S.

should be aware that he is certain ultimately to die of his in-

E. 737 (1912); *Hill v. Com.*, 2 Gratt. 594 (1845); *King v. Com.*, 2 Va. Cas. 78 (1817).

United States.—*W. S. v. Woods*, 28 Fed. Cas. No. 16,760, 4 Cranch. C. C. 484 (1834).

England.—*R. v. Abbott* (1903) 67 J. P. 151; *R. v. Spilsbury*, 7 C. & P. 187 (1835).

Canada.—*R. v. Smith*, 23 C. P. U. C. 312 (1873).

"While it is not essential to show that the declarant affirmatively said he was in a dying condition, to render a dying declaration admissible in evidence, yet it must appear from the attendant circumstances that the declarant was in *articulo mortis*, and conscious of his condition, at the time of making the declaration." *Glover v. State*, 137 Ga. 82, 72 S. E. 926, 927 (1911), per *Evans*, P. J.

"As this class of evidence forms an exception to the general rule; as there can be no cross-examination of the declarant; as the accused cannot often meet his accuser face to face; and as there must of necessity exist great danger of abuse; it must clearly appear that the statements offered in evidence have been made under a full realization that the solemn hour of death has come." *Morgan v. State*, 31 Ind. 193, 198 (1869), per *Ray*, J.

"We allow the declaration of persons in *articulo mortis* to be given in evidence, if it appear that the person making such declaration was then under the deep impression that he was soon to render an account to his Maker." *R. v. Pike*, 3 C. & P. 598 (1829), per *Park*, J.

Being in *extremis* does not mean that the declarant should actually be breathing his last. *State v. Byrd*, 41 Mont. 585, 111 Pac. 407 (1910); *R. v. Perry* [1909] 2 K. B. 697, 78 L. J. K. B. 1034, 101 L. T. 127, 73 J. P. 456, 25 T. L. R. 676, 53 Sol. Jo. 810, 22 Cox Cr. C. 154.

"The rule requiring it to be shown that the declarations were made while the declarant was in *extremis* does not require that it be shown that they were made while the declarant was literally breathing her last. The rule is satisfied when it is shown that the declarant died in the course of the illness from which she was suffering at the time they were made, and that the illness from which she was suffering was the direct and proximate result of the original injury which the declarations tend to illustrate. As to the second part of the objection, it is true it was not shown that the declarant said, in so many words, that she believed she was going to die, or that she could not live longer, but this was not necessary. The question to be determined here is, was the trial court justified in believing, from the nature of the evidence, that the declarant believed she was about to die, and was without hope or expectation of recovery? This conclusion must be drawn from the entire statement and the conditions surrounding the declarant, and not from any specific words she may have used." *State v. Power*, 24 Wash. 34, 44, 63 Pac. 1112, 63 L. R. A. 903 (1901), per *Fullerton*, J.

A predicate laid for the introduction of evidence of a dying declaration made on one day cannot be used as a basis for the admission of evidence of another dying declaration made the next day. *Coatney v. State*, 61 Fla. 19, 55 So. 285 (1911).

The opinion of a witness as to whether the deceased in making a dying declaration apparently believed that she could not live has been admitted. "Ordinarily expressions of bare opinion are not allowed, but in receiving declarations of this character, where death follows the wound, they are by that fact deemed to be supported and supplemented, and are

jury.² He must be conscious³ that the hand of death rests upon him, that the grim visitor has arrived, that there is absolutely no

given the character of positive evidence." *State v. Quinn*, 56 Wash. 295, 105 Pac. 818 (1909), per Chadwick, J.

2. Illinois.—*People v. Cassesse*, 251 Ill. 422, 96 N. E. 274 (1911); *Brom v. People*, 216 Ill. 148, 74 N. E. 790 (1905).

Kansas.—*State v. Knoll*, 69 Kan. 767, 77 Pac. 580 (1904).

Mississippi.—*Brandon v. State*, 99 Miss. 784, 56 So. 165 (1911).

Ohio.—*Wade v. State*, 25 Ohio Cir. Ct. R. 279 (1903).

Oklahoma.—*Bilton v. Territory*, (Cr. App. 1909), 99 Pac. 163.

Tennessee.—*Brakefield v. State*, 1 Sneed 215 (1853).

See, however, *Sanders v. State*, 2 Ala. App. 13, 56 So. 69 (1911).

"Neither would it be sufficient that the declarant despaired of ultimate recovery, because that is consistent with the hope of indefinite continuance of life. But exactly how immediate must be the expectation of death, the authorities do not seem agreed or clear. Some would seem to confine the rule of admissibility to those made at the very point of death. The weight of authority, however, does not seem to require so strict a rule, but to justify the admissions if the declarant does not expect to survive the injury from which he actually dies, and the injury is such that it must be expected to result speedily in death." *U. S. v. Schneider*, 21 D. C. 331, 403 (1893), per Cox, J.

"It may be affirmed that no well considered case has varied from these rules, and that the tendency is to greater stringency, rather than to any relaxation in applying them to cases." *State v. Medlicott*, 9 Kans. 257, 283 (1872), per Kingman, C. J.

"As there can be no cross-examination of the declarant, as the accused

can rarely meet his accuser face to face, and as there must of necessity exist great danger of abuse, it should clearly appear that the statements offered in evidence have been made under a full realization that the solemn hour of death has come, and the court should be satisfied that the declaration was made under an impression of almost immediate dissolution." *State v. Simon*, 50 Mo. 370, 374 (1872), per Wagner, J.

3. Alabama.—*Vincenzo v. State*, 1 Ala. App. 62, 55 So. 451 (1911); *Greer v. State*, 156 Ala. 15, 47 So. 300 (1908).

Colorado.—*Brennan v. State*, 37 Colo. 256, 86 Pac. 79 (1906).

Georgia.—*Cobb v. State*, (App. 1912), 74 S. E. 702; *Smith v. State*, 9 Ga. App. 403, 71 S. E. 606 (1911); *Lyens v. State*, 133 Ga. 587, 66 S. E. 792 (1909); *Jones v. State*, 130 Ga. 274, 60 S. E. 840 (1908); *Lee v. State*, 2 Ga. App. 481, 58 S. E. 676 (1907); *Anderson v. State*, 122 Ga. 161, 50 S. E. 46 (1905) (issues of fact).

Iowa.—*State v. Brumo*, 153 Iowa 7, 132 N. W. 817 (1911).

Texas.—*Hunter v. State*, 54 Tex. Cr. App. 224, 114 S. W. 124 (1908); *Mathews v. State*, (Cr. App. 1903), 77 S. W. 218.

Washington.—*State v. Bridgham*, 51 Wash. 18, 97 Pac. 97 (1908).

"They are only admissible where the party making them knows or thinks that he is in a dying state." *Dixon v. State*, 13 Fla. 636 (1870), per Randall, C. J.

Proof of the consciousness of impending death may be dispensed with where the witness does not know what the term means. *McMillan v. State*, 128 Ga. 25, 57 S. E. 309 (1907).

A witness has apparently been permitted to testify that the declarant

chance of anything for him but immediate death.⁴ All hope and

"realized" that he was in a dying condition. *Davis v. State*, 120 Ga. 843, 48 S. E. 305 (1904).

Alabama.—*Phillips v. State*, 3 Ala. App. 218, 57 So. 1033 (1912); *Patterson v. State*, 171 Ala. 2, 54 So. 696 (1911); *Titus v. State*, 117 Ala. 16, 23 So. 77 (1898); *McHugh v. State*, 31 Ala. 317 (1858).

Colorado.—*Weaver v. People*, 47 Colo. 617, 108 Pac. 331 (1910).

District of Columbia.—*U. S. v. Schneider*, 21 D. C. 381, 404 (1893).

Florida.—*Fails v. State*, 60 Fla. 8, 53 So. 612 (1910); *Lester v. State*, 37 Fla. 382, 20 So. 232 (1896).

Georgia.—*Owens v. State*, (App. 1912), 75 S. E. 519; *Cobb v. State*, (App. 1912), 74 S. E. 702; *Josey v. State*, 137 Ga. 769, 74 S. E. 282 (1912); *Darby v. State*, 9 Ga. App. 700, 72 S. E. 182 (1911); *Brown v. State*, 8 Ga. App. 382, 69 S. E. 45 (1910); *Robinson v. State*, 130 Ga. 361, 60 S. E. 1005 (1908).

Illinois.—*People v. Cassesse*, 251 Ill. 422, 96 N. E. 274 (1911); *Brom v. People*, 216 Ill. 148, 74 N. E. 790 (1905).

Indiana.—*Williams v. State*, 168 Ind. 87, 79 N. E. 1079 (1907).

Iowa.—*State v. Brumo*, 153 Iowa 7, 132 N. W. 817 (1911).

Kentucky.—*Gleason v. Com.*, 145 Ky. 128, 140 S. W. 63 (1911); *Tibbs v. Com.*, 138 Ky. 558, 128 S. W. 871, 28 L. R. A. (N. S.) 665n. (1910); *Saylor v. Com.*, 97 Ky. 184, 30 S. W. 390, 17 Ky. L. Rep. 100 (1895).

Louisiana.—*State v. Fletcher*, 127 La. 602, 53 So. 877 (1910); *State v. Ashworth*, 50 La. Ann. 94, 23 So. 270 (1898).

Massachusetts.—*Com. v. Brewer*, 164 Mass. 577, 42 N. E. 92 (1895).

Michigan.—*People v. Fritch*, 170 Mich. 258, 136 N. W. 493 (1912).

Mississippi.—*Guest v. State*, 96 Miss. 871, 52 So. 211 (1910); *Brown v. State*, 78 Miss. 637, 29 So. 519, 84

Am. St. Rep. 541 (1901); *Lipscomb v. State*, 75 Miss. 559, 23 So. 210 (1897).

Missouri.—*State v. Lovell*, 235 Mo. 343, 138 S. W. 523 (1911); *State v. Colvin*, 226 Mo. 446, 126 S. W. 448 (1910); *State v. Welsor*, 117 Mo. 570, 579, 21 S. W. 443 (1893).

New York.—*People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908).

North Carolina.—*State v. Laughter*, 159 N. C. 488, 74 S. E. 913 (1912); *State v. Baldwin*, 155 N. C. 494, 71 S. E. 212 (1911).

Rhode Island.—*State v. Dalton*, 20 R. I. 114, 37 Atl. 673 (1897).

South Carolina.—*State v. McCoomer*, 79 S. C. 63, 60 S. E. 237 (1908).

South Dakota.—*State v. Swenson*, 26 S. D. 589, 129 N. W. 119 (1910).

England.—*R. v. Gloster*, 16 Cox Cr. 471, 477 (1888); *R. v. Osman*, 15 Cox Cr. 1, 3 (1881).

"The standard required for the admissibility of the declaration is that the declarant should have believed that she was about to die, that she made the declaration under the belief that she would not recover, and that she did die of the illness from which she was suffering as the direct and proximate result of the original injury which the declaration tended to illustrate." *State v. Bridgham*, 51 Wash. 18, 20, 97 Pac. 1096 (1908), per Hadley, C. J.

"In order to make a dying declaration admissible, there must be an expectation of impending and almost immediate death from the causes then operating. The authorities shew that there must be no hope whatever." *R. v. Jenkins*, L. R. 1 Cr. C. R. 187, 193 (1869), per Byles, J.

"A man may receive an injury from which he may think that he shall ultimately 'never recover,' but still that would not be sufficient to dispense with an oath." *R. v. Van*

expectation of living must have been abandoned.⁵ The declarant

Butchell, 3 C. & P. 629, 631 (1829), per *Hullock*, B.

5. *Alabama*.—*Kirklin v. State*, 168 Ala. 83, 53 So. 253 (1910); *Pate v. State*, 150 Ala. 10, 43 So. 343 (1907).

Arkansas.—*Dunn v. State*, 2 Ark. 229, 55 Am. Dec. 54 (1839).

California.—*People v. Hayes*, 9 Cal. App. 301, 99 Pac. 386 (1908).

Colorado.—*Brennan v. State*, 37 Colo. 256, 86 Pac. 79 (1906); *Graves v. People*, 18 Colo. 170, 176, 32 Pac. 63 (1893).

Florida.—*Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909); *Gardner v. State*, 55 Fla. 25, 45 So. 1028 (1908); *Lester v. State*, 37 Fla. 382, 20 So. 232 (1896).

Georgia.—*Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540 (1908).

Indiana.—*Williams v. State*, 168 Ind. 87, 79 N. E. 1079 (1907).

Iowa.—*State v. Brumo*, 153 Iowa 7, 132 N. W. 817 (1911).

Kansas.—*State v. Knoll*, 69 Kan. 767, 77 Pac. 580 (1904); *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257 (1880).

Kentucky.—*Biggs v. Com.*, 150 S. W. 803 (1912); *Com. v. Griffith*, 149 Ky. 405, 149 S. W. 825 (1912); *Kelly v. Com.*, 119 S. W. 809 (1909); *Johnson v. Com.*, 32 Ky. L. Rep. 1117, 107 S. W. 768 (1908).

Louisiana.—*State v. Daniels*, 115 La. 59, 38 So. 894 (1905); *State v. Gianfala*, 113 La. 463, 37 So. 30 (1904); *State v. Newhouse*, 39 La. Ann. 862, 2 So. 799 (1887); *State v. Keenan*, 38 La. Ann. 660 (1886).

Mississippi.—*Fannie v. State*, 58 So. 2 (1912); *Brandow v. State*, 99 Miss. 784, 56 So. 165 (1911); *Guest v. State*, 96 Miss. 871, 52 So. 211 (1910).

Missouri.—*State v. Lovell*, 235 Mo. 343, 138 S. W. 523 (1911); *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470 (1907).

Nevada.—*State v. Roberts*, 82 Pac. 100 (1905).

New York.—*People v. Falletto*, 202 N. Y. 494, 96 N. E. 355 (1911); *People v. Madas*, 201 N. Y. 349, 94 N. E. 857 (1911); *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908); *People v. Brecht*, 105 N. Y. Suppl. 436, 120 App. Div. 769 (1907) (abortion).

Oklahoma.—*Bilton v. Territory*, 1 Okla. Cr. 566, 99 Pac. 163 (1909).

Rhode Island.—*State v. Dalton*, 20 R. I. 114, 37 Atl. 673 (1897).

South Carolina.—*State v. Gallman*, 79 S. C. 229, 60 S. E. 682 (1908).

Texas.—*Willis v. State*, 49 Tex. Cr. App. 139, 90 S. W. 1100 (1905).

Virginia.—*Bowles v. Com.*, 103 Va. 816, 48 S. E. 527 (1904).

England.—*R. v. Perry* [1909] 2 K. B. 697, 78 L. J. K. B. 1034, 101 L. T. 127, 73 J. P. 456, 25 T. L. R. 676, 53 Sol. J. 810, 22 Cox Cr. C. 154.

Canada.—*Queen v. Davidson*, 1 Can. Cr. Cas. 351, 358, 30 N. S. R. 349 (1898).

"That the declaration would be inadmissible if there is evidence of any expressed or clearly visible hope of recovery, is undoubtedly true, since the obligation to speak the truth would not be that supposed to be created when every hope of this world is gone, and is not in legal contemplation equal to that imposed by a positive oath in a court of justice." *Hawkins v. State*, 98 Md. 355, 358 (1904), per *Pearce*, J.

"Before a dying declaration can be admitted it must clearly appear that the person making it was, in her own opinion, beyond all hope of recovery." *R. v. Smith*, (1901) 65 J. P. 426, per *Bruce*, J.

"The person who makes the dying declaration must be thoroughly convinced that he is about to die; he must have no hope, nor glimmer of hope. It is not a matter merely of thinking, but it must be a matter of solemn conviction that he is going soon to die, and he must have no hope whatever of recovery. It is under

these circumstances alone that the law allows dying declarations to be admitted in evidence. To emphasize these principles, I repeat that dying declarations to be admissible as evidence must be made by a person who is fully convinced that he is going to die, that death is close at hand, and who is without any hope of recovery or of continuance of life. There must be an unqualified belief in the nearness and certainty of death, and no hope whatever of escaping it." *King v. Laurin*, 6 Can. Cr. Cas. 104, 106 1902, per Wurtelle, J.

"The essential element is the abandonment of hope of recovery, and it is necessary in each case to examine the evidence to ascertain whether there is that absence of all hope which alone renders such a declaration admissible." *Rex v. Magyar*, 4 West. Law R. (Canada) 396, 399 (1906), per Harvey, J.

That a declarant thinks he will not recover is not sufficient to render his declaration admissible. *People v. Cassesse*, 251 Ill. 422, 96 N. E. 274 (1911).

Repeated Statements.—A declaration which, at the time when made, did not possess the necessary conditions of admissibility, because some spark of hope still remained in the bosom of the declarant, may be received in evidence if repeated or confirmed by the injured person after all hope had been abandoned by him.

Alabama.—*Sims v. State*, 139 Ala. 74, 36 So. 138, 101 Am. St. Rep. 17 (1904); *Johnson v. State*, 102 Ala. 1, 16 So. 99 (1893).

California.—*People v. Crews*, 102 Cal. 174, 36 Pac. 367 (1894).

Kentucky.—*Smith v. Com.*, 113 Ky. 19, 67 S. W. 32, 23 Ky. L. Rep. 2271 (1902); *Wilson v. Com.*, 60 S. W. 400, 22 Ky. L. Rep. 1251 (1901); *Million v. Com.*, 25 S. W. 1059, 16 Ky. L. Rep. 17 (1894).

Mississippi.—*Brown v. State*, 32 Miss. 433 (1856).

Missouri.—*State v. Garth*, 164 Mo. 553, 65 S. W. 275 (1901); *State v. Evans*, 124 Mo. 397, 28 S. W. 8 (1894).

South Carolina.—*State v. McEvoy*, 9 S. C. 208 (1877).

Texas.—*Bryant v. State*, 35 Tex. Cr. App. 394, 33 S. W. 978, 36 S. W. 79 (1896); *Snell v. State*, 29 Tex. App. 236, 15 S. W. 722, 25 Am. St. Rep. 723 (1890).

England.—*R. v. Steele*, 12 Cox. Cr. C. 168 (1872).

A statement, however, in writing which purports to be a dying declaration, but which was not signed by the person at the time, under the sense of impending death, and was prepared with the intent that he would sign it when he came to think he would die has been refused admission as a dying declaration.

"We think a declaration prepared by a person in full possession of his mental faculties, and in confident hope of recovery, to be signed in the possible event of a subsequent conviction of a fatal termination, is too much tainted to be admissible in evidence. Such a paper at the time of its preparation goes for nothing, of course; and, when the time comes for execution of it, the tendency of human nature *in extremis* to be consistent and follow a formula, without effort, vitiates it. Such an instrument cannot be said to be the free and voluntary act of the person, originated and executed under a solemn sense of impending death." *Harper v. State*, 79 Miss. 575, 576, 56 L. R. A. 372n. (1901), per Calhoun, J.

Where the question is one of life and death to a man suddenly stricken down by a gunshot wound, and whose mind is shown to have been busy with the idea of prosecuting those by whom he has been injured, proof that all hope has left his breast is not convincing unless it comes in the form of a specific

should be possessed by a fixed feeling that he must die at once.⁶ The existence of this psychological state or, as Mr. Gulson calls

admission from the man himself. *State v. Daniels*, 115 La. 59, 38 So. 894 (1905).

See also §§ 2826, 2833a.

6. *Alabama*.—*Ingram v. State*, 54 So. 699 (1911); *Lang v. State*, 166 Ala. 22, 52 So. 340 (1910); *Milton v. State*, 134 Ala. 42, 32 So. 653 (1902); *Titus v. State*, 117 Ala. 16, 23 So. 77 (1897); *Cole v. State*, 105 Ala. 76, 16 So. 762 (1894); *Blackburn v. State*, 98 Ala. 63, 13 So. 274 (1893).

Arkansas.—*Jackson v. State*, 145 S. W. 559 (1912); *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54 (1839).

California.—*People v. Cipolla*, 155 Cal. 224, 100 Pac. 252 (1909); *People v. Hayes*, 9 Cal. App. 301, 99 Pac. 386 (1908); *People v. Fuhrig*, 127 Cal. 412, 59 Pac. 693 (1899); *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549 (1882); *People v. Taylor*, 59 Cal. 648 (1881); *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30 (1880); *People v. Sanchez*, 24 Cal. 17 (1864).

Colorado.—*Jamison v. People*, 119 Pac. 474 (1911); *Weaver v. People*, 47 Colo. 617, 108 Pac. 331 (1910); *Brennan v. People*, 37 Colo. 256, 86 Pac. 79 (1906); *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953 (1894); *Graves v. People*, 18 Colo. 170, 32 Pac. 63 (1893).

Delaware.—*State v. Buchanan*, 110ust. Cr. Cas. 79 (1859).

District of Columbia.—*U. S. v. Schneider*, 21 D. C. 381, 404 (1893).

Florida.—*Coatney v. State*, 55 So. 285 (1911); *Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909); *Green v. State*, 43 Fla. 552, 30 So. 798 (1901); *Lester v. State*, 37 Fla. 382, 20 So. 232 (1896); *Dixon v. State*, 13 Fla. 636 (1869).

Georgia.—*Cobb v. State*, (App. 1912) 74 S. E. 702; *Glover v. State*, 137 Ga. 82, 72 S. E. 926 (1911); *Sutherland v. State*, 121 Ga. 190, 48

S. E. 915 (1904); *Whitaker v. State*, 79 Ga. 87, 3 S. E. 403 (1887); *Campbell v. State*, 11 Ga. 353 (1852).

Illinois.—*People v. Cassesse*, 251 Ill. 422, 96 N. E. 274 (1911); *Collins v. People*, 194 Ill. 506, 62 N. E. 902 (1902); *Westbrook v. People*, 126 Ill. 81, 18 N. E. 304 (1888); *Tracy v. People*, 97 Ill. 101 (1880).

Indiana.—*Williams v. State*, 168 Ind. 87, 79 N. E. 1079 (1907); *Watson v. State*, 63 Ind. 548 (1878); *Morgan v. State*, 31 Ind. 193 (1869).

Iowa.—*State v. Bruno*, 153 Iowa 7, 132 N. W. 817 (1911); *State v. Phillips*, 118 Iowa 660, 92 N. W. 876 (1902); *State v. Nash*, 7 Iowa 347 (1858).

Kansas.—*State v. Knoll*, 69 Kan. 767, 77 Pac. 580 (1904); *State v. Furney*, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262 (1889); *State v. Medlicott*, 9 Kan. 257 (1872).

Kentucky.—*Gleason v. Com.*, 145 Ky. 128, 140 S. W. 63 (1911); *Kelly v. Com.*, 119 S. W. 809 (1909); *Fuqua v. Com.*, 73 S. W. 782, 24 Ky. L. Rep. 2204 (1903); *Smith v. Com.*, 113 Ky. 19, 67 S. W. 32, 23 Ky. L. Rep. 2271 (1902); *Barnes v. Com.*, 110 Ky. 348, 61 S. W. 733, 22 Ky. L. Rep. 1802 (1901).

Louisiana.—*State v. Augustus*, 129 La. 617, 56 So. 551 (1911); *State v. Gianfala*, 113 La. 463, 37 So. 30 (1904); *State v. Sadler*, 51 La. Ann. 1397, 26 So. 390 (1899); *State v. Ashworth*, 50 La. Ann. 94, 23 So. 270 (1898).

Maryland.—*Worthington v. State*, 92 Md. 222, 48 Atl. 355, 56 L. R. A. 353, 84 Am. St. Rep. 506 (1901).

Massachusetts.—*Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560 (1896); *Com. v. Roberts*, 108 Mass. 296 (1871).

Michigan.—*People v. Fritch*, 170 Mich. 258, 136 N. W. 493 (1912);

it, phase of the mind, may be established by any relevant evidence.

People v. Beverly, 108 Mich. 509, 66 N. W. 379 (1896).

Mississippi.—*Guest v. State*, 96 Miss. 871, 52 So. 211 (1910); *Harper v. State*, 79 Miss. 575, 31 So. 195, 56 L. R. A. 372 (1901); *Brown v. State*, 78 Miss. 637, 29 So. 519, 84 Am. St. Rep. 641 (1900); *Joslin v. State*, 75 Miss. 838, 23 So. 515 (1898).

Missouri.—*State v. Lovell*, 235 Mo. 343, 138 S. W. 523 (1911); *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405 (1893); *State v. Welsor*, 117 Mo. 570, 579, 21 S. W. 443 (1893); *State v. Partlow*, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31 (1886).

Nebraska.—*Collins v. State*, 46 Nebr. 37, 64 N. W. 432 (1895); *Rakes v. People*, 2 Nebr. 157 (1870).

New Jersey.—*Peak v. State*, 50 N. J. L. 179, 12 Atl. 701 (1888); *State v. Peake*, 10 N. J. L. J. 177 (1887).

New York.—*People v. Governale*, 193 N. Y. 581, 86 N. E. 554 (1908); *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908); *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624 (1903); *People v. Kraft*, 91 Hun 474, 36 N. Y. Suppl. 1034, 11 N. Y. Cr. Rep. 39, 72 N. Y. St. Rep. 436, *affirmed* 148 N. Y. 631, 43 N. E. 80 (1895); *People v. Evans*, 40 Hun 492, 4 N. Y. Cr. Rep. 218, *reversed* 106 N. Y. 658, 13 N. E. 933 (1886); *People v. Robinson*, 1 Park. Cr. Rep. 649 (1855), *affirmed* 2 Park. Cr. Rep. 235.

North Carolina.—*State v. Bagley*, 158 N. C. 608, 73 S. E. 995 (1912); *State v. Baldwin*, 155 N. C. 494, 71 S. E. 212 (1911).

Ohio.—*Wade v. State*, 25 Ohio Cir. Ct. Rep. 279 (1903); *Robbins v. State*, 8 Ohio St. 131 (1857); *Montgomery v. State*, 11 Ohio 424 (1842).

Oklahoma.—*Morris v. State*, 6 Okla. Cr. App. 29, 115 Pac. 1030 (1911).

Oregon.—*State v. Garrand*, 5 Oreg. 216 (1874).

Pennsylvania.—*Com. v. Britton*, 1 Leg. Gaz. Rep. 513 (1871).

Rhode Island.—*State v. Dalton*, 20 R. I. 114, 37 Atl. 673 (1897).

South Carolina.—*State v. McCoomer*, 79 S. C. 63, 60 S. E. 237 (1908); *State v. Jaggars*, 58 S. C. 41, 36 S. E. 434 (1900); *State v. Taylor*, 56 S. C. 360, 34 S. E. 939 (1899); *State v. Banister*, 35 S. C. 290, 14 S. E. 678 (1891).

South Dakota.—*State v. Swenson*, 26 S. D. 589, 129 N. W. 119 (1910).

Tennessee.—*Still v. State*, 125 Tenn. 80, 140 S. W. 298 (1911); *Stewart v. State*, 2 Lea 598 (1879); *Brakefield v. State*, 1 Sneed 215 (1853); *Smith v. State*, 9 Humphr. 9 (1848); *Logan v. State*, 9 Humphr. 24 (1847).

Texas.—*Figaroa v. State*, 58 Tex. Cr. App. 611, 127 S. W. 193 (1910); *Wilson v. State*, 49 Tex. Cr. App. 50, 90 S. W. 312 (1905); *Ex p. Meyers*, 33 Tex. Cr. App. 204, 26 S. W. 196 (1894); *Irby v. State*, 25 Tex. App. 203, 7 S. W. 705 (1888); *Ledbetter v. State*, 23 Tex. App. 247, 5 S. W. 226 (1887).

Vermont.—*State v. Centre*, 35 Vt. 378 (1862).

Virginia.—*Patterson v. Com.*, 75 S. E. 737 (1912); *Bowles v. Com.*, 103 Va. 816, 48 S. E. 527 (1904); *Jackson v. Com.*, 19 Gratt. 656 (1869); *King v. Com.*, 2 Va. Cas. 78 (1817).

United States.—*Carver v. U. S.*, 160 U. S. 553, 16 Sup. Ct. 338, 40 L. ed. 532 (1896); *Kelly v. U. S.*, 27 Fed. 616 (1885); *U. S. v. Woods*, 28 Fed. Cas. No. 16,760, 4 Cranch C. C. 484 (1834).

England.—*R. v. Abbott*, (1903) 67 J. P. 151; *Reg. v. Mitchell*, 17 Cox Cr. C. 503 (1892); *Reg. v. Gloster*, 16 Cox Cr. C. 471 (1888); *Reg. v. Osman*, 15 Cox Cr. C. 1 (1881); (*a set-*

As the fact does not admit of direct observation, the range of proof conceded by judicial administration is a wide one.⁷ Not only may it be shown by the extrajudicial statements of the declarant himself,⁸ or the statements made to him by physicians and others,⁹ but his conduct, so far as probative, may be exhibited¹⁰ and legitimate inferences to be drawn from his physical condition¹¹ will be received. That he actually is dying furnishes no ground for admitting his statement unless he knows or thinks he knows such to be the fact.¹²

Admissions by Conduct.—A form of statement frequently confused with dying declarations is the so-called admission by conduct. The deceased, after receiving the wound which turns out to be mortal, makes a statement in the presence and hearing of the accused, in the truth of which the latter, if he does not deny it, will be taken by his silence to have acquiesced.¹³ Where the circumstances of the case are such that silence may rationally be taken as proof of acquiescence, the statement in the presence of the accused may properly be received.¹⁴ The declarant, in such case, need not be shown to have been impressed by a consciousness of impending dissolution.

tled hopeless expectation of immediate death); *R. v. Craven*, 1 Lew. Cr. C. 77 (1826).

Canada.—*Reg. v. Sparham*, 25 U. C. C. P. 143 (1875).

"Fully conscious of that fact, not as a thing of surmise and conjecture or apprehension, but as a fixed and inevitable fact," is the requirement made as to the mental state of the declarant. *Smith v. State*, 9 Humph. (Tenn.) 9 (1848), per Turley, J.

7. § 1741e.

8. § 2837.

9. § 2840.

10. § 2836.

11. § 2839.

12. *Starr v. Com.*, 30 S. W. 397, 97 Ky. 193, 16 Ky. Law Rep. 843 (1895).

"It is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible." *Vaughn v. Com.*, 86 Ky. 431, 435, 6 S. W. 153, 9 Ky.

Law Rep. 644 (1887), per Bennett, J.

13. §§ 1401 *et seq.*

14. *Alabama.*—*Simmons v. State*, 129 Ala. 41, 29 So. 929 (1900).

Iowa.—*State v. Nash*, 7 Iowa 347 (1858); *State v. Gillick*, 7 Iowa, 287 (1858).

Louisiana.—*State v. Brunetto*, 13 La. Ann. 45 (1858).

Mississippi.—*Powers v. State*, 74 Miss. 777, 21 So. 657 (1897).

Nebraska.—*O'Hearn v. State*, 79 Neb. 513, 113 N. W. 130 (1907).

New Jersey.—*Donnelly v. State*, 26 N. J. L. 463 (1857).

New York.—*People v. Wood*, 2 Edm. Sel. Cas. 71 (1849).

A statement by the deceased which was not coincident in point of time with the attack upon him, but which was uttered in the presence and hearing of the accused and under such circumstances that he might have been reasonably ex-

Spontaneous Statements.—When an unsworn statement is made as a part of the *res gestae*, properly so called,¹⁵ or under such other circumstances as to make it a spontaneous one, this is in itself a sufficient ground of admissibility,¹⁶ and it need not be further shown that the assertion is also a dying declaration because made under a fixed sense of impending dissolution.¹⁷ Where this element of spontaneity is lacking,³ as it well may be,¹⁸ e. g., an account of a meeting be given several hours after its occurrence,¹⁹ a mere narrative statement is presented which cannot be received by virtue of any rule properly connected with the *res gestae*.²⁰

§ 2832. (*Expectation of Death*); Administrative Details.—Prominent among the facts which a trial judge, in pursuance of his executive function of determining whether a dying declaration should be submitted to the jury,¹ is as to the existence of an adequate sense of immediately impending death at the time the declaration was made.² Nothing further than a *prima facie* show-

pected to make some answer or remark in reply thereto is admissible. *Gilbert v. Rex*, 38 Can. S. C. 284, 27 C. L. T. 240, 12 Can. C. R. Cas. 127 (1907), affirming 5 W. L. R. 295, 6 Terr. L. R. 396.

Ante mortem statements of deceased relating to the issues, made in the presence of the accused, are admissible, where she was at the time in another room with the door open within easy hearing, and they were made under such circumstances that she would without doubt have replied thereto if she did not wish to acquiesce therein; but statements made after the door between the rooms was closed, while the accused was engaged in conversation, although she might have heard and denied the same, are not made in her presence or under circumstances calling for a reply. *State v. Baruth*, 47 Wash. 283, 91 Pac. 977 (1907).

15. § 2984. *Com. v. Van Horn*, (Pa.) 4 Lack. Leg. N. (Pa.) 63 (1897).

16. It may add to the probative force of the statement that the

bodily condition of the declarant was such that it might fairly be assumed that he was unable to invent a story. *Jones v. State*, (Tex. Cr. App. 1907) 106 S. W. 345.

17. *Healy v. People*, 163 Ill. 372, 45 N. E. 230 (1896); *Goodall v. State*, 1 Oreg. 333, 80 Am. Dec. 396 (1861).

18. *Hunter v. State*, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910).

19. *Com. v. Densmore*, 12 Allen (Mass.) 535 (1866).

20. § 2992.

§ 2832-1. § 2829.

2. *Alabama*.—*Sims v. State*, 139 Ala. 74, 36 So. 138, 101 Am. St. Rep. 17 (1904).

Arkansas.—*Motley v. State*, 152 S. W. 140 (1912); *Robinson v. State*, 99 Ark. 208, 137 S. W. 831 (1911); *Jones v. State*, 88 Ark. 579, 115 S. W. 166 (1909); *Evans v. State*, 58 Ark. 47, 22 S. W. 1026 (1893).

California.—*People v. Cord*, 157 Cal. 562, 108 Pac. 511 (1910).

Colorado.—*Brennan v. People*, 37 Colo. 256, 86 Pac. 79 (1906).

ing, one upon which the jury might rationally act, need be made by the proponent.³ So much must be proved to the reasonable

Florida.—*Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909).

Georgia.—*Josey v. State*, 137 Ga. 769, 74 S. E. 282 (1912); *Smith v. State*, 9 Ga. App. 403, 71 S. E. 606 (1911); *Anderson v. State*, 122 Ga. 161, 50 S. E. 46 (1905).

Illinois.—*People v. White*, 251 Ill. 67, 95 N. E. 1036 (1911).

Indiana.—*Williams v. State*, 168 Ind. 87, 79 N. E. 1079 (1907).

Kentucky.—*Allen v. Com.*, 134 Ky. 110, 119 S. W. 795 (1909); *Coyle v. Com.*, 122 Ky. 781, 93 S. W. 584, 29 Ky. L. Rep. 340 (1906).

Mississippi.—*Gurley v. State*, 57 So. 565 (1912); *Guest v. State*, 96 Miss. 871, 52 So. 211 (1910); *Lipscomb v. State*, 75 Miss. 559, 23 So. 210 (1897).

Missouri.—*State v. Gow*, 235 Mo. 307, 138 S. W. 648 (1911); *State v. Crone*, 209 Mo. 316, 108 S. W. 555 (1908); *State v. Zorn*, 202 Mo. 12, 100 S. W. 591 (1907).

Nebraska.—*Johnson v. State*, 88 Neb. 328, 129 N. W. 281 (1911).

New Jersey.—*State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 (1906).

North Carolina.—*State v. Tilghman*, 11 Ired. L. 512 (1850).

Oklahoma.—*Hawkins v. United States*, 3 Okla. Cr. 651, 108 Pac. 561 (1910); *Bilton v. Territory*, 1 Okla. Cr. 566, 99 Pac. 163 (1909); *Willoughby v. Territory*, 16 Okla. 577, 86 Pac. 56 (1906).

Oregon.—*State v. Fuller*, 52 Oreg. 42, 96 Pac. 456 (1908); *State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 (1908).

South Carolina.—*State v. Franklin*, 80 S. C. 332, 60 S. E. 953 (1908).

Texas.—*Bateson v. State*, 46 Tex. Cr. App. 34, 80 S. W. 88 (1904).

Washington.—*State v. Peacock*, 58 Wash. 41, 107 Pac. 1022, 27 L. R. A. (N. S.) 702 (1910).

Canada.—*Queen v. Davidson*, 1

Can. Cr. Cas. 351, 30 N. S. R. 349 (1898); *Queen v. Woods*, 2 Can. Cr. Cas. 159, 5 B. C. R. 585 (1897).

"The question whether circumstances exist which make declarations admissible as dying declarations, is a preliminary fact to be determined by the court, * * * it cannot be left to the jury to say whether the deceased thought he was dying or not, for that must be decided by the judge, before he permits the declarations to be given in evidence." *People v. Smith*, 104 N. Y. 491, 504, 10 N. E. 873, 58 Am. Rep. 537 (1887), per Andrews, J., in dissenting opinion. "The question whether alleged dying declarations are made under such circumstances as to render them admissible in evidence is to be determined by the court upon the preliminary proof, and if admitted their credibility is exclusively for the jury, whose province it is to consider the circumstances and give them such credit as they may think they deserve. If the proof does not satisfy the court, beyond a reasonable doubt, that the declaration was made in extremity and was a dying declaration, it should not be permitted to go to the jury." *People v. White*, 251 Ill. 67, 75, 95 N. E. 1036 (1911), per Mr. Justice Cartwright.

The trial judge in determining whether the conditions required for admissibility existed at the time a statement was made must have regard to the whole of the surrounding circumstances. *Queen v. Davidson*, 1 Can. Cr. Cas. 351, 30 N. S. R. 349 (1898).

3. *California*.—*People v. Thomson*, 145 Cal. 717, 79 Pac. 435 (1905); *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772 (1899).

Delaware.—*State v. Frazier, Houst.* Cr. Cas. 176 (1865).

satisfaction of the judge,⁴ by any relevant evidence,⁵ inside or out-

Georgia.—Cook v. State, 134 Ga. 347, 67 S. E. 812 (1910); Lowe v. State, 132 Ga. 341, 63 S. E. 1114 (1909); Jones v. State, 130 Ga. 274, 60 S. E. 840 (1908); Robinson v. State, 130 Ga. 361, 60 S. E. 1005 (1908); Moody v. State, 1 Ga. App. 772, 58 S. E. 262 (1907); Findley v. State, 125 Ga. 579, 54 S. E. 106 (1906).

Louisiana.—State v. Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293 (1880).

Missouri.—State v. Hendricks, 172 Mo. 654, 73 S. W. 194 (1903).

New York.—People v. Wood, 2 Edm. Sel. Cas. 71 (1849).

Oregon.—State v. Fuller, 52 Ore. 42, 96 Pac. 456 (1908).

Pennsylvania.—Com. v. Williams, 2 Ashm. 69 (1839); Com. v. Murray, 2 Ashm. 41 (1834).

South Carolina.—State v. Banister, 35 S. C. 290, 14 S. E. 678 (1891).

West Virginia.—State v. Clark, 64 W. Va. 625, 63 S. E. 402 (1908).

Wisconsin.—State v. Cameron, 2 Pinn. 490, 2 Chandl. 172 (1850).

Reasonable doubt.—It has been required that the existence of the sense of impending death should be proved beyond a reasonable doubt. Guest v. State, 96 Miss. 871, 52 So. 211 (1910).

Slight preliminary proof will justify the judge in *prima facie* admitting dying declarations. Moody v. State, 1 Ga. App. 772, 58 S. E. 262 (1907).

4. *California*.—People v. Sanchez, 24 Cal. 17 (1864).

Colorado.—Graves v. People, 18 Colo. 170, 32 Pac. 63 (1893).

Georgia.—Wallace v. State, 90 Ga. 117, 15 S. E. 700 (1892).

Massachusetts.—Com. v. Bishop, 165 Mass. 148, 42 N. E. 560 (1896).

Missouri.—State v. Nocton, 121 Mo. 537, 26 S. W. 551 (1894).

New York.—People v. Del Vermo,

192 N. Y. 470, 85 N. E. 690 (1908).

Ohio.—Montgomery v. State, 11 Ohio 424 (1842).

Pennsylvania.—Kilpatrick v. Com., 31 Pa. St. 198, 215, 3 Phila. 237 (1858).

South Carolina.—State v. Gallman, 79 S. C. 229, 60 S. E. 682 (1908).

The statement must be admitted where it is shown to the satisfaction of the judge that there was a "settled, hopeless expectation of death." R. v. Whitmarsh, (1898) 62 J. P. 680.

It is not enough that deceased was actually in a dying condition and nodded his head when so informed. People v. Perry, 8 Abb. Prac. (N. S.) 27, 34 (1870).

Whether or not one making a dying declaration was without hope of recovery is a question of fact for the trial court. People v. Cord, 157 Cal. 562, 108 Pac. 511 (1910).

5. *Alabama*.—McEwan v. State, 152 Ala. 38, 44 So. 619 (1907).

California.—People v. Shehadey, 12 Cal. App. 648, 108 Pac. 146 (1910).

Colorado.—Weaver v. People, 47 Colo. 617, 108 Pac. 331 (1910); Brennan v. People, 37 Colo. 256, 86 Pac. 79 (1906).

Georgia.—Jones v. State, 130 Ga. 274, 60 S. E. 840 (1908); Oliver v. State, 129 Ga. 777, 59 S. E. 900 (1907).

Montana.—State v. Crean, 43 Mont. 47, 114 Pac. 603 (1911).

New York.—People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690 (1908).

Oregon.—State v. Ju Nun, 97 Pac. 96, judgment affirmed on rehearing 98 Pac. 513 (1908); State v. Fuller, 52 Ore. 42, 96 Pac. 456 (1908).

Texas.—Morgan v. State, 54 Tex. Cr. App. 542, 113 S. W. 934 (1908).

It is sufficient if the evidence shows such statements or circumstances as would convince a reason-

side⁵ the statement itself.⁷ On the other hand, it may be sound administration, when there is a disputed question of fact, upon which the jury are well qualified to pass, decisive of the competency of the declaration, to leave the entire question of the credit to which it is entitled to the jury under instructions requiring them to give weight to the evidence or refuse to give it, according as they find that the fact does or does not exist. For example, should a witness testify that the dying declaration was made under the required sense of impending death, it may be good administration for the judge to leave the entire question of the competency of the statement of the deceased to the jury, asking them to credit it if they believe the witness, otherwise not.⁸ For stronger administrative reasons, a similar course may rationally be adopted where the evidence is in conflict in relation to the existence of some material fact connected with the making of the dying declaration.⁹ The presiding judge by no means possesses the discretion of a jury when sitting for the trial of actions in a mixed tribunal. He cannot properly, for instance, finally reject a dying declaration because the reporting witness has made a statement at another time inconsistent with his present testimony.¹⁰

Burden of evidence.—The burden of evidence to establish the competency of a fact offered in evidence lies upon the proponent.¹¹ In case of a dying declaration the burden rests upon the prosecution to prove compliance with all legal conditions. In case of a written¹² declaration the court need not hear the defence either in argument or by evidence before ruling upon the question of com-

able mind that declarant believed at the time that she was *in extremis*. *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096 (1908).

6. *State v. Crean*, 43 Mont. 47, 114 Pac. 603 (1911).

7. It has been said that but slight preliminary proof would be needed to authorize a judge in accepting a dying declaration. *Moody v. State*, 1 Ga. App. 772, 58 S. E. 262 (1907).

Subsequent doubts of admissibility developed by the later testimony do not render the previous admission erroneous. *Lowe v. State*, 132 Ga. 341, 63 S. E. 1114 (1909).

8. *Robinson v. State*, 130 Ga. 361,

60 S. E. 1005 (1908); *Bird v. State*, 128 Ga. 253, 57 S. E. 320 (1907); *State v. Leo*, 80 N. J. L. 21, 77 Atl. 523 (1910).

9. *Com. v. Lawson*, 119 Ky. 765, 80 S. W. 206, 25 Ky. L. Rep. 2187 (1904).

See, however, *Sims v. State*, 139 Ala. 74, 36 So. 138, 101 Am. St. Rep. 17 (1904).

10. *Carter v. State*, 2 Ga. App. 254, 58 S. E. 532 (1907).

11. § 985.

12. *State v. Frazier*, *Houst. Cr. Cas.* (Del.) 176 (1865); *Figaroa v. State*, 58 Tex. Cr. App. 611, 127 S. W. 193 (1910).

petency. The power of the court to permit the defence to be heard at the stage of *voir dire* is not questioned. The judge, however, is not at liberty, when the reception of dying declarations is objected to by the defendant who moves to exclude them, to refuse to pass on the motion until after all the evidence in the case is in, compelling the defendant to proceed with his defense, and then, after the evidence in the case is closed, deny the defendant's motion, excluding only a part of the dying declarations to which objection was made.¹³

Opinion.—The question of the rejection of a given statement by the deceased as being an inference, conclusion or judgment is one to be decided by the trial judge.¹⁴

Presence of the Jury.—Whether the preliminary proof of the competency of dying declarations should be offered in the presence of the jury is also a matter of administration, to be determined by the court.¹⁵ A fear lest, if the dying declarations are rejected, the jury may hear incompetent evidence, highly injurious to the accused, may be a sufficient warrant for ordering the withdrawal of the jury¹⁶ while the judge hears the preliminary evidence.

13. *Johnson v. State*, 47 Ala. 9 (1872).

"No accused person should be required to make his defense until he is informed what the evidence against him is. Common justice requires this and common justice is common law." *Johnson v. State*, 47 Ala. 9 (1872).

14. *Jones v. State*, 79 Miss. 309, 30 So. 759 (1901).

15. *Alabama.*—*Johnson v. State*, 47 Ala. 9 (1872).

Indiana.—*Doles v. State*, 97 Ind. 555 (1884).

Missouri.—*State v. Crone*, 209 Mo. 316, 108 S. W. 555 (1908).

New York.—*People v. Smith*, 58 Am. St. Rep. 537, 41 Hun 641, reversed 104 N. Y. 491, 10 N. E. 873 (1887).

Oregon.—*State v. Shaffer*, 23 Oreg. 555, 32 Pac. 545 (1893).

Texas.—*Sims v. State*, 36 Tex. Cr. App. 154, 36 S. W. 256 (1896).

Virginia.—*Swisher v. Com.*, 26

Gratt. 963, 21 Am. Dec. 330 (1875); *Hill v. Com.*, 2 Gratt. 594 (1845).

16. *North v. People*, 139 Ill. 81, 28 N. E. 966 (1891); *Wilson v. Com.*, 141 Ky. 341, 132 S. W. 557 (1910); *Coyle v. Com.*, 122 Ky. 781, 29 Ky. L. Rep. 340, 93 S. W. 584 (1906); *State v. Finley*, (Mo. 1912) 150 S. W. 1051; *Hawkins v. United States*, 3 Okla. Cr. App. 651, 108 Pac. 561 (1910).

Cross-examination by defendant's attorney.—A presiding judge, to effectuate his intentions as to the presence of the jury, may call upon the defendant's attorney to perform duties usually discharged by the prosecuting officers.

For example, where, in a prosecution for homicide, the jury were excused in order that the competency of the evidence of a witness excepted to, testifying to dying declarations of the deceased, might be passed on before the evidence was heard by the jury, but the prosecuting attorney refused to interrogate the witness in

Time consumed in repetition may be economized, should the evidence be admitted, and this fact a court will consider in pursuance of its administrative duty to expedite trials.¹⁷ Under these circumstances, as the jury will have to hear and weigh the evidence in the end, it may well be deemed best to have them hear it in the beginning.¹⁸ On the other hand, should the jury have been withdrawn during the proof of admissibility and the declarations are admitted, it is necessary to submit to them the evidence upon which the declarations were received, for it is the clear right of the jury and of the accused that the jurors, in judging of the probative force of the declarations,¹⁹ should be aware of the circumstances attending their making, including the facts relating to the declarant's sense of impending death.²⁰ Should the accused, by objecting to the admissibility of dying declarations, compel witnesses to testify to the sanity of the declarant, the solemn conviction of death under which he spoke and other circumstances tending to enhance the probative force of what was said he has no just cause for complaint.²¹

Hearing accused on voir dire.—The presiding judge, in the absence of statutory or judicial restriction, is entitled to pass upon the sufficiency of the dying declaration, availing himself only of the evidence produced by the prosecution, making the preliminary ruling without receiving the evidence on the part of the defendant.²² Should it appear improbable that the evidence produced by the accused could seriously modify the showing made by the state, a good administrative reason is furnished for declining to hear the defendant at this stage.²³ His right to allow the accused

the absence of the jury, the court should have permitted defendant's counsel to do so, that the witness might be admonished not to make an objectionable statement. *State v. Minor*, 193 Mo. 597, 92 S. W. 466 (1906).

17. §§ 544 *et seq.*

18. *North v. People*, 139 Ill. 81, 28 N. E. 996 (1891).

19. § 2858.

20. *Mitchell v. State*, 71 Ga. 128 (1883); *Campbell v. State*, 11 Ga. 353 (1852); *Martin v. State*, 17 Ohio Cir. Ct. Rep. 406, 9 Ohio Cir. Dec. 621 (1898).

21. *Lyles v. State*, (Tex. Cr. App. 1912) 142 S. W. 592.

22. *State v. Frazier*, *Houst. Cr. Cas. (Del.)* 176 (1880). See also *Johnson v. State*, 47 Ala. 9 (1872).

The same procedure has been reasonably adopted where the presiding judge feels that the evidence in favor of admissibility is practically incontrovertible. *State v. Zorn*, 202 Mo. 12, 100 S. W. 591 (1907); *State v. Gallman*, 79 S. C. 229, 60 S. E. 682 (1908).

23. *State v. Gallman*, 79 S. C. 229, 60 S. E. 682 (1908).

to submit evidence upon any particular point is, however, undoubted, and it has even been suggested that it is his duty to do so.²⁴ On principle, the matter is one entirely of administration.²⁵

§ 2833. (*Expectation of Death*); Feelings of Others.—Should it appear that the declarant knew or thought he knew that he was under the shadow of death without hope of escape, his statement is admissible as a dying declaration, although the physician¹ and other persons in attendance regarded him as one having a chance for recovery² and even so assured him.³ The feeling on the part of the family that the declarant is sure to recover from his injuries is unimportant with regard to the admissibility of his declaration.⁴

§ 2833a. (*Expectation of Death*); Scintilla of Hope Fatal.—Should it appear that the declarant entertained the least hope of recovery, his declaration will be rejected.¹ The consideration that he had no rational basis for such a hope is not material. Were he at the moment in the very act of dying, his statement is not re-

24. *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405 (1893).

"The court does not discharge this duty by simply hearing the evidence produced upon the part of the State. Evidence, if offered, should be received upon the part of the defendant, and it should be weighed upon the determination of the question of admissibility. The declarations of a dying man are admitted on a supposition that in his awful situation, on the confines of a future world, he had no motive to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice. Roscoe's Criminal Evidence, p. 35. Before the judge decides the question of admissibility he hears all the deceased said respecting the danger in which he considered himself, and he should be satisfied that the declaration was made under an impression of almost immediate dissolution." *State v. El-*

liott, 45 Iowa 486, 488 (1877), per Day, C. J.

25. *State v. Zorn*, 202 Mo. 12, 100 S. W. 591 (1907).

§ 2833-1. *People v. Stacy*, 119 App. Div. 743, 101 N. Y. Suppl. 615 (1907); *Jackson v. State*, 55 Tex. Cr. App. 79, 115 S. W. 262 (1908) (abortion); *Reg. v. Peel*, 2 F. & F. 21 (1860) (surgeon).

2. *People v. Simpson*, 48 Mich. 474, 12 N. W. 662 (1882); *State v. Bradley*, 34 S. C. 136, 13 S. E. 315 (1890); *Reg. v. Reaney*, 7 Cox Cr. C. 209, Dears. & B. 151, 3 Jur. (N. S.) 191, 26 L. J. M. C. 43, 5 Wkly. Rep. 252 (1857).

3. *Pitts v. State*, 140 Ala. 70, 37 So. 101 (1904).

4. *Sylvester v. State*, 72 Ala. 201 (1882).

§ 2833a-1. *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30 ("realizing that I may not recover") (1880).

See also § 2831.

ceivable if he entertained the least expectation of recovery.² As the Supreme Judicial Court of Massachusetts say:³ "If he [the declarant] had any expectation or hope of recovery, however slight it may have been, and though death ensued in one hour afterwards, the declarations are inadmissible." On the other hand, should the conscious sense of impending death continue to exist, the fact that the declarant asks for time before making his statement, in order to recover his strength a little, furnishes no ground for excluding the subsequent statement.⁴

§ 2834. (Expectation of Death); Subsequent Occurrences not Material.—Should the declarant be shown to have made his declaration while in the condition of mind contemplated by the rule, the fact that death does not actually come as anticipated cannot affect the admissibility of the statement as a dying declaration.¹ It will be received although subsequent events show that the speaker was mistaken at the immediate approach of death.²

2. Alabama.—*Johnson v. State*, 102 Ala. 1, 16 So. 99 (1893). See also, *Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276 (1848).

Florida.—*Gardner v. State*, 55 Fla. 25, 45 So. 1028 (1908).

Kentucky.—*Coyle v. Com.*, 122 Ky. 781, 29 Ky. L. Rep. 340, 93 S. W. 584 (1906).

Louisiana.—*State v. Daniels*, 30 So. 894 (1905).

Massachusetts.—*Com. v. Brewer*, 164 Mass. 577, 42 N. E. 92 (1895).

Mississippi.—*Brandon v. State*, 99 Miss. 784, 56 So. 165 (1911). See also *Brown v. State*, 32 Miss. 433 (1856).

New York.—*People v. Brecht*, 120 App. Div. 769, 105 N. Y. Suppl. 436 (1907). See also, *People v. Knickerbocker*, 1 Parker Cr. Rep. 302 (1851).

Oregon.—*State v. Fuller*, 52 Ore. 42, 96 Pac. 456 (1908).

See also *Starkey v. People*, 17 Ill. 17 (1885); *Smith v. State*, 9 Humph. (Tenn.) 9 (1848); *State v. Center*, 35 Vt. 378 (1862).

3. Com. v. Roberts, 108 Mass. 296 (1871).

4. State v. McCoomer, 79 S. C. 63, 60 S. E. 237 (1908).

§ 2834-1. *Johnson v. State*, 102 Ala. 1, 16 So. 99 (1893).

The length of time which elapses after the declaration is made up to the occurrence of the deceased's death is not material if made under conviction of impending death, *State v. Brumo*, 153 Iowa 7, 132 N. W. 817 (1911) (nineteen days), the state of mind at time of making the declaration being the controlling element. *People v. Falletto*, 202 N. Y. 494, 96 N. E. 355 (1911) (one day).

"The time when they are made in relation to the death furnishes no guide as to the admissibility or non-admissibility of such declarations, though it is a circumstance for consideration. Indeed, declarations made 10 or 11 days before death have been admitted, and declarations made a few minutes only before death have been rejected." *Rex v. Magyar*, 4 W. L. R. 396, 398 (1906), per Harvey, J.

2. Kelly v. Com., (Ky. 1909) 119 S. W. 809.

"In truth, the question does not

He may linger for several days,³ reviving⁴ and even entertaining some hope of recovery,⁵ and the declaration still be received in evidence. Intervals of considerable period may intervene between the statement and actual death without affecting the admissibility

depend upon the length of interval between the death and the declaration, but on the state of the man's mind at the time of making the declaration, and his belief that he is in a dying state." *R. v. Reaney*, 7 Cox Cr. C. 209, 212 (1857), per Pollock, C. B.

"The fact that death does not take place until some time after will not make the declaration inadmissible in evidence; the time at which the death may afterwards take place is immaterial, provided it occurs with certain proximity and is the result of the crime committed; it may take place immediately after the declaration is made, or within a few moments or in a few hours, or it may take place some days or even some weeks after. The things to be ascertained are in the first place the state of the mind of the declarant at the time the dying declaration was made, and in the next place the fact that death subsequently occurred and was the result of the crime charged against the accused, either murder or manslaughter." *King v. Laurin*, 6 Can. Cr. Cas. 104, 106 (1902), per Wurtele, J.

The suggestion has apparently been made that the declarant must be actually dying as well as believe that he is so. *Darby v. State*, 9 Ga. App. 700, 72 S. E. 182 (1911); *Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540 (1908); *State v. Johns*, 152 Iowa 383, 132 N. W. 832 (1911); *State v. Knoll*, 69 Kan. 767, 77 Pac. 580 (1904); *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908).

3. *State v. Brown*, 111 La. 696, 35 So. 818 (1904); *Com. v. Latampa*, 226 Pa. 23, 74 Atl. 736 (1909) (four days).

4. *People v. Cord*, 157 Cal. 562, 108 Pac. 511 (1910); *State v. Nash*, 7 Iowa 347 (1858); *State v. Tilghman*, 33 N. C. 513 (1850).

5. *Alabama*.—*Rose v. State*, 144 Ala. 114, 42 So. 21 (1905).

California.—*People v. Cord*, 157 Cal. 562, 108 Pac. 511 (1910).

Kansas.—*State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322 (1894).

Missouri.—*State v. Turlington*, 102 Mo. 642, 15 S. W. 141 (1890); *State v. Kilgore*, 70 Mo. 546 (1879).

Nebraska.—*Fitzgerald v. State*, 11 Nebr. 577, 10 N. W. 495 (1881).

Oregon.—*State v. Shaffer*, 23 Ore. 555, 32 Pac. 545 (1893).

Texas.—*Highsmith v. State*, 41 Tex. Cr. App. 32, 50 S. W. 723, 51 S. W. 919 (1899).

Virginia.—*Swisher v. Com.*, 26 Gratt. 963, 21 Am. Dec. 330 (1875).

England.—*Reg. v. Hubbard*, 14 Cox Cr. C. 565 (1881).

"It is the apprehension of his condition, at the time of the declaration, which, when it is followed by death, makes the statement of a dying person admissible. That being so, the fact that such a person subsequently entertains a hope of recovery is irrelevant, except in so far as it may be evidence of his state of mind at the time of the declaration." *Queen v. Davidson*, 1 Can. Cr. Cas. 351, 361, 30 N. S. R. 349 (1898), per Henry, J.

Statements of a physician.—Under these circumstances, the statement of an attending physician, made to the declarant, to the effect that the latter has a chance of recovery, is not material. *Thompson v. State*, 137 Ga. 164, 73 S. E. 363 (1911).

of the dying declaration, there being no rule established as to the length of time which may suffice to exclude it.⁶

6. Alabama.—*Titus v. State*, 117 Ala. 16, 23 So. 77 (1897); *Boulden v. State*, 102 Ala. 78, 84, 15 So. 341 (1893) (two months); *Kilgore v. State*, 74 Ala. 1 (1883). See also *Boulden v. State*, 102 Ala. 78, 15 So. 341 (1893).

California.—*People v. Cord*, 157 Cal. 562, 108 Pac. 511 (1910), (two weeks); *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49 (1868).

Delaware.—*State v. Oliver*, 2 Houst. 585 (1855), (twenty-five days).

Georgia.—*Harper v. State*, 129 Ga. 770, 59 S. E. 792 (1907) (four days).

Indiana.—*Jones v. State*, 71 Ind. 66 (1880) (fourteen days).

Iowa.—*State v. Brumo*, 153 Iowa 7, 132 N. W. 817 (1911) (nineteen days); *State v. Nash*, 7 Iowa 347 (1858). See also *State v. Schmidt*, 73 Iowa 469, 35 N. W. 590 (1887).

Kentucky.—*Kelly v. Com.*, 119 S. W. 809 (1909) (two days); *Kennedy v. Com.*, 100 S. W. 242, 30 Ky. L. Rep. 1063 (1907); *Burton v. Com.*, 70 S. W. 831, 24 Ky. L. Rep. 1162 (1902) (eleven days).

Louisiana.—*State v. Brown*, 111 La. 696, 35 So. 818 (1904); *State v. Daniel*, 31 La. Ann. 91 (1879) (seventeen days).

Massachusetts.—*Com. v. Haney*, 127 Mass. 455 (1879); *Com. v. Roberts*, 108 Mass. 296 (1871); *Com. v. Cooper*, 5 Allen 495, 81 Am. Dec. 762 (1862).

Michigan.—*People v. Weaver*, 108 Mich. 649, 66 N. W. 567 (1896).

Mississippi.—*McDaniel v. State*, 8 Sm. & M. 401, 47 Am. Dec. 93 (1847).

Missouri.—*State v. Colvin*, 226 Mo. 446, 126 S. W. 448 (1910); *State v. Wilson*, 121 Mo. 434, 26 S. W. 357 (1894); *State v. Crabtree*, 111 Mo. 136, 20 S. W. 7 (1892).

New York.—*People v. Falletto*, 202

N. Y. 494, 96 N. E. 355 (1911) (a day); *People v. Grunzig*, 2 Edm. Sel. Cas. 236, 1 Parker Cr. Rep. 299 (1851) (forty days).

North Carolina.—*State v. Watkins*, 159 N. C. 480, 75 S. E. 22 (1912); *State v. Poll*, 8 N. C. 442, 9 Am. Dec. 655 (1821). See also *State v. Craine*, 120 N. C. 601, 27 S. E. 72 (1897) (five months).

Pennsylvania.—*Com. v. Britton*, 1 Leg. Gaz. Rep. 513, 2 Leg. Gaz. Rep. 26 (1871).

South Carolina.—*State v. Banister*, 35 S. C. 290, 14 S. E. 678 (1891); *State v. Belcher*, 13 S. C. 459 (1880).

Tennessee.—*Moore v. State*, 96 Tenn. 209, 33 S. W. 1046 (1896) (five days before death); *Baxter v. State*, 15 Lea (Tenn.) 657 (1885) (sixteen days); *Lowry v. State*, 12 Lea 142 (1883).

Texas.—*Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750 (1890).

Vermont.—*State v. Centers*, 35 Vt. 378 (1860) (twelve days).

Virginia.—*Swisher's Case*, 26 Gratt. 963, 21 Am. Dec. 330 (1875).

Washington.—*State v. Webster*, 21 Wash. 63, 57 Pac. 361 (1899); *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650 (1896).

England.—*Reg. v. Bernadotti*, 11 Cox Cr. C. 316 (1869) (nearly three weeks); *R. v. Bonner*, 6 Car. & P. 386 (1834); *Mosley's Case*, 1 Lew. C. C. 79, 1 Moody C. C. 97 (1825).

"Our judgment concurs with that of the English court of criminal appeal, as expressed by Chief Baron Pollock, in the latter of those cases. (*R. v. Reaney*, 7 Cox Cr. C. 209 (1857).) 'In order,' he says, 'to render such a declaration admissible, it is necessary that it should be made under the apprehension of death. The books certainly speak of near approaching death; but there is no case in which any particular inter-

§ 2835. (*Expectation of Death*); Modes of Proof.— That the declarant, believing himself to be *in extremis*, made his statement under the solemn sense of inevitable and impending death can be shown in any of several ways. The only requirement imposed by judicial administration is that the presiding judge should be reasonably satisfied that the declaration was made under the sanction required by law.¹ The fact to be established being psychological,

val, any number of hours or days, is specified as the limit. In truth, the question does not depend upon the length of interval between the death and declaration, but on the state of the man's mind at the time of making the declaration, and his belief that he is in a dying state.'” Com. v. Cooper, 5 Allen (Mass.) 495, 497, 81 Am. Dec. 762 (1862), per Metcalf, J.

Probative effect of interval.— While the length of time between the dying declaration and the actual death furnishes, as has been said, no rule as to the admissibility, it may serve as one of the exponents of the deceased's belief that his dissolution was or was not impending. Ward v. State, 85 Ark. 179, 107 S. W. 677 (1908); Jones v. State, 130 Ga. 274, 60 S. E. 840 (1908); State v. Colvin, 226 Mo. 446, 126 S. W. 448 (1910); State v. Craig, 190 Mo. 332, 88 S. W. 641 (1905); State v. Clark, 64 W. Va. 625, 63 S. E. 402 (1908). See also Wilson v. State, 49 Tex. Cr. App. 50, 90 S. W. 312 (1905).

§ 2835-1. *Alabama*.— Pitts v. State, 140 Ala. 70, 37 So. 101 (1903); Wilson v. State, 140 Ala. 43, 37 So. 93 (1903); Gregory v. State, 140 Ala. 16, 37 So. 259 (1903); Walker v. State, 139 Ala. 56, 35 So. 1011 (1903); Stevens v. State, 138 Ala. 71, 35 So. 122 (1902).

Arkansas.— Newberry v. State, 68 Ark. 355, 58 S. W. 351 (1900); Evans v. State, 58 Ark. 47, 22 S. W. 1026 (1893); Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54 (1839).

California.— People v. Dobbins, 138 Cal. 694, 72 Pac. 339 (1903); People

v. Lem Deo, 132 Cal. 199, 64 Pac. 265 (1901); People v. Yokum, 118 Cal. 437, 50 Pac. 686 (1897); People v. Hawes, 98 Cal. 648, 33 Pac. 791 (1893); People v. Bemmerly, 87 Cal. 117, 25 Pac. 266 (1890).

Connecticut.— State v. Cronin, 64 Conn. 293, 29 Atl. 536 (1894).

Delaware.— State v. Trusty, 1 Pennew. 319, 40 Atl. 766 (1898); State v. Cornish, 5 Harr. 502 (1853).

District of Columbia.— U. S. v. Schneider, 21 D. C. 381. (1893).

Florida.— Green v. State, 43 Fla. 552, 30 So. 798 (1901); Clemmons v. State, 43 Fla. 200, 30 So. 699 (1901); Richard v. State, 42 Fla. 528, 29 So. 413 (1900); Lester v. State, 37 Fla. 382, 20 So. 232 (1896).

Georgia.— Davis v. State, 120 Ga. 843, 48 S. E. 305 (1904); Grant v. State, 118 Ga. 804, 45 S. E. 603 (1903); Anderson v. State, 117 Ga. 255, 43 S. E. 835 (1903); Young v. State, 114 Ga. 849, 40 S. E. 1000 (1902); Wallace v. State, 90 Ga. 117, 15 S. E. 700 (1892).

Idaho.— State v. Wilmbusse, 8 Ida. 608, 70 Pac. 849 (1902).

Illinois.— Kirkham v. People, 170 Ill. 9, 48 N. E. 465 (1897); Simon v. People, 150 Ill. 66, 36 N. E. 1019 (1894); Starkey v. People, 17 Ill. 17 (1854).

Indiana.— Green v. State, 154 Ind. 655, 57 N. E. 637 (1900).

Iowa.— State v. Dennis, 119 Iowa 688, 94 N. W. 235 (1903); State v. McKnight, 119 Iowa 79, 93 N. W. 63 (1903); State v. Young, 104 Iowa 730, 74 N. W. 693 (1898); State v. Baldwin, 79 Iowa 714, 45 N. W. 297

the difficulty of proof authorizes, if not requires, an extended

(1890); *State v. Schmidt*, 73 Iowa 469, 35 N. W. 590 (1887).

Kansas.—*State v. Aldrich*, 50 Kan. 666, 32 Pac. 408 (1893).

Kentucky.—*Rowsey v. Com.*, 116 Ky. 617, 76 S. W. 409, 25 Ky. L. Rep. 841 (1903); *Arnett v. Com.*, 114 Ky. 593, 71 S. W. 635, 24 Ky. L. Rep. 1440 (1903); *Pennington v. Com.* 68 S. W. 451, 24 Ky. L. Rep. 321 (1902); *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505 (1889); *Pace v. Com.*, 89 Ky. 204, 12 S. W. 271, 11 Ky. L. Rep. 407 (1889).

Louisiana.—*State v. Sadler*, 51 La. Ann. 1397, 26 So. 390 (1899); *State v. Smith*, 48 La. Ann. 533, 10 So. 452 (1896); *State v. Jones*, 47 La. Ann. 1524, 18 So. 515 (1895); *State v. Black*, 42 La. Ann. 861, 8 So. 594 (1890); *State v. Jones*, 38 La. Ann. 792 (1886).

Maryland.—*Hawkins v. State*, 98 Md. 355, 57 Atl. 27 (1904); *Worthington v. State*, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 353 (1901).

Massachusetts.—*Com. v. Brewer*, 164 Mass. 577, 42 N. E. 92 (1895). See also *Com. v. Thompson*, 159 Mass. 56, 33 N. E. 1111 (1893).

Michigan.—*People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277 (1899); *People v. Simpson*, 48 Mich. 474, 12 N. W. 662 (1882).

Minnesota.—*State v. Cantieny*, 34 Minn. 1, 24 N. W. 458 (1885).

Mississippi.—*Lipscomb v. State*, 75 Miss. 559, 23 So. 210, 230 (1897); *Bell v. State*, 72 Miss. 507, 17 So. 232 (1895); *Owens v. State*, 59 Miss. 547 (1882); *Dillard v. State*, 58 Miss. 368 (1880); *Brown v. State*, 32 Miss. 433 (1856).

Missouri.—*State v. Parker*, 172 Mo. 191, 72 S. W. 650 (1902); *State v. McMullin*, 170 Mo. 608, 71 S. W. 221 (1902); *State v. Garrison*, 147 Mo. 548, 49 S. W. 508 (1899); *State*

v. Evans, 124 Mo. 397, 28 S. W. 8 (1894); *State v. Wilson*, 121 Mo. 434, 26 S. W. 357 (1894).

Montana.—*State v. Gay*, 18 Mont. 51, 44 Pac. 411 (1896); *State v. Russell*, 13 Mont. 164, 32 Pac. 854 (1893).

Nebraska.—*Collins v. State*, 46 Nebr. 37, 64 N. W. 432 (1895); *Fitzgerald v. State*, 11 Nebr. 577, 10 N. W. 495 (1881).

Nevada.—*State v. Vaughan*, 22 Nev. 285, 39 Pac. 733 (1895).

New Jersey.—*State v. Peake*, 10 N. J. L. J. 177 (1887).

New York.—*People v. Smith*, 172 N. Y. 210, 64 N. E. 814 (1902); *Brotherton v. People*, 75 N. Y. 159 (1878); *Maine v. People*, 9 Hun 113 (1876); *People v. Grunzig*, 1 Park. Cr. Rep. 299 (1851).

North Carolina.—*State v. Boggan*, 133 N. C. 761, 46 S. E. 111 (1903); *State v. Dixon*, 131 N. C. 808, 42 S. E. 944 (1902); *State v. Caldwell*, 115 N. C. 794, 20 S. E. 523 (1894); *State v. Mills*, 91 N. C. 581 (1884); *State v. Peace*, 46 N. C. 251 (1854).

Oregon.—*State v. Gray*, 43 Oreg. 446, 74 Pac. 927 (1904).

Pennsylvania.—*Com. v. Birriolo*, 197 Pa. St. 371, 47 Atl. 355 (1900); *Com. v. Mika*, 171 Pa. St. 273, 33 Atl. 65 (1895); *Small v. Com.*, 91 Pa. St. 304 (1879); *Kehoe v. Com.*, 85 Pa. St. 127 (1877); *Kilpatrick v. Com.*, 31 Pa. St. 198, 3 Phila. 237 (1858).

South Carolina.—*State v. Head*, 60 S. C. 516, 39 S. E. 6 (1901); *State v. Johnson*, 26 S. C. 152, 1 S. E. 510 (1886); *State v. Nance*, 25 S. C. 168 (1886); *State v. Freeman*, 1 Speers 57, 61 (1842).

Tennessee.—*Baxter v. State*, 15 Lea, 657 (1885); *Curtis v. State*, 14 Lea, 502 (1884); *Brakefield v. State*, 1 Sneed 215 (1853); *Nelson v. State*, 7 Humphr. 542 (1847); *Anthony v.*

range of evidence.² What particular form this rationally belief-compelling proof should take is, therefore, not material.³ The conduct of the declarant may be such as to show that he considered his condition hopeless, thinking that death was at hand.⁴ His declarations may clearly show, in an independently relevant way,⁵ what was his mental state, and so reasonably satisfy the judge upon the point.⁶ The court may also be able to infer from the physical condition of the deceased,⁷ the statements made to him⁸ and other circumstances⁹ that the speaker must have known that death was inevitable and hanging over him.

State, Meigs 265, 33 Am. Dec. 143 (1838).

Texas.—Connell v. State, 46 Tex. Cr. App. 259, 81 S. W. 746 (1904); Keaton v. State, 41 Tex. Cr. App. 621, 57 S. W. 1125 (1900); Winfrey v. State, 41 Tex. Cr. App. 538, 56 S. W. 919 (1900); Jones v. State (Cr. App. 1897), 38 S. W. 992; Sims v. State, 36 Tex. Cr. App. 154, 36 S. W. 256 (1896).

Virginia.—O'Boyle v. Com., 100 Va. 785, 40 S. E. 121 (1901); Hall v. Com., 89 Va. 171, 15 S. E. 517 (1893); Hill v. Com., 2 Gratt. 594 (1845).

Washington.—State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902 (1901); Klehn v. Territory, 1 Wash. 584, 21 Pac. 31 (1889).

United States.—*In re Orpen*, 86 Fed. 760 (1898); Kelly v. U. S., 27 Fed. 616 (1885).

England.—Reg v. Goddard, 15 Cox Cr. C. 7 (1882); Reg. v. Mackay, 11 Cox Cr. C. 148 (1868); Reg. v. Reaney, 7 Cox Cr. C. 209, Dears & B. 151, 3 Jur. (N. S.) 191, 26 L. J. M. C. 43, 5 Wkly. Rep. 252 (1857); Rex v. Spilsbury, 7 C. & P. 187, 32 E. C. L. 565 (1835); Rex v. Bonner, 6 C. & P. 386, 25 E. C. L. 487 (1834).

Canada.—Reg. v. Sparham, 25 U. C. C. P. 143 (1875); Reg. v. Smith, 23 U. C. C. P. 312 (1873).

2. § 1741e.

3. The medieval conception of what was possible in proof of men-

tal states has been expressed in a single sentence which might well be the motto for the early history of criminal law. "The thought of man shall not be tried, for the devil himself knoweth not the thought of man." Q. B. 7 Edw. IV, f. 2 (Pasch. pl. 2), per Brian, C. J., quoted in 2 Pollock and M. Hist. of Eng. Law 473.

4. § 2836.

5. §§ 2643 et seq.

6. § 2837.

7. § 2839.

8. § 2840.

9. *Alabama*.—McEwen v. State, 152 Ala. 38, 44 So. 619 (1907).

California.—People v. Shehadey, 12 Cal. App. 648, 108 Pac. 146 (1910).

Florida.—Copeland v. State, 58 Fla. 26, 50 So. 621 (1909).

Georgia.—Jones v. State, 130 Ga. 274, 60 S. E. 840 (1908); Oliver v. State, 129 Ga. 777, 59 S. E. 900 (1907).

Missouri.—State v. Colvin, 226 Mo. 446, 126 S. W. 448 (1910).

North Carolina.—State v. Watkins, 159 N. C. 480, 75 S. E. 22 (1912); State v. Bagley, 158 N. C. 608, 73 S. E. 995 (1912).

Oregon.—State v. Fuller, 52 Oreg. 42, 96 Pac. 456 (1908).

"In order to admit declarations of the deceased as dying declarations, it is unnecessary to prove by direct testimony that he was in the article of death and conscious of his condition,

§ 2836. (*Expectation of Death; Modes of Proof*); (1) Conduct of Declarant.—The declarant's sense of impending death may be gathered from his conduct.¹ Naturally, the probative facts thus supplied may show great variety.

Calling for prayers,² asking the Lord to save his soul,³ consenting to an operation,⁴ saying good-bye to one's wife,⁵ betrothed,⁶

but circumstances may be shown from which these facts may be inferred. Whenever such circumstances make a *prima facie* case, it is the duty of the court to admit the testimony." *Jones v. State*, 130 Ga. 274, 276, 60 S. E. 840 (1908), per Holden, J.

§ 2836-1. *Arkansas*.—*Ward v. State*, 85 Ark. 179, 107 S. W. 677 (1908).

Colorado.—*Weaver v. People*, 47 Colo. 617, 108 Pac. 331 (1910).

Nevada.—*State v. Roberts*, 28 Nev. 350, 82 Pac. 100 (1905).

Oregon.—*State v. Ju Nun*, 53 Oreg. 1, 97 Pac. 96, *affirmed* on rehearing 98 Pac. 513 (1908).

South Dakota.—*State v. Swenson*, 26 S. D. 589, 129 N. W. 119 (1910).

Texas.—*Morgan v. State*, 54 Tex. Cr. App. 542, 113 S. W. 934 (1908).

Washington.—*State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096 (1908).

"This may be shown, not only by what the injured person said, but by his conduct and condition, and by the nature and extent of his wounds, and it is sufficient if these show that the declarations were made without expectation of recovery and under a sense of impending death, notwithstanding the declarant may not have said that he was without hope or that he was going to die." *State v. Roberts*, 28 Nev. 350, 370, 82 Pac. 100 (1905), per Talbot, J.

2. *White v. State*, 111 Ala. 92, 21 So. 330 (1896); *Ward v. State*, 35 Ark. 179, 107 S. W. 677 (1908) (prayed); *Lyens v. State*, 133 Ga.

587, 66 S. E. 792 (1909) (prayed); *State v. Spencer*, 30 La. Ann. 362 (1878)

That the declarant is praying and in severe pain does not constitute a sufficient ground for admitting his declaration. *Cole v. State*, 105 Ala. 76, 16 So. 762 (1894).

Calling on one's Maker for mercy is not necessarily conclusive as to the existence of a sense of impending death. *State v. Daniels*, 115 La. 59, 38 So. 894 (1905).

3. *Ward v. State*, 85 Ark. 179, 107 S. W. 677 (1908).

See, however, *R. v. Mooney*, 5 Cox Cr. 318 (1851) (commending soul to God; excluded).

4. *State v. Watkins*, 159 N. C. 480, 75 S. E. 22 (1912); *State v. Thompson*, 49 Oreg. 46, 88 Pac. 583, 124 Am. St. Rep. 1015 n. (1907).

On the contrary, the element of hope implied in such a course may serve to render the declaration inadmissible. *State v. Gianfala*, 113 La. 463, 37 So. 30 (1904); *Peak v. State*, 50 N. J. L. 179, 221, 12 Atl. 701 (1888).

5. *Rice v. State*, 51 Tex. Cr. App. 255, 103 S. W. 1156 (1907); *Bateson v. State*, 46 Tex. Cr. App. 34, 80 S. W. 88 (1904).

From an administrative point of view, it may be error to admit evidence of so dramatic a fact when the hopelessness of declarant's condition is not seriously controverted. *Bateson v. State*, 46 Tex. Cr. App. 34, 80 S. W. 88 (1904).

6. *Roberts v. State*, 48 Tex. Cr. App. 378, 88 S. W. 221 (1905).

mother⁷ or children⁸ and the like,⁹ may assist to show a consciousness of impending death. In the same way, that the declarant, if a Roman Catholic, sent for a priest,¹⁰ and, before making his statement, received the last rites of the church,¹¹ may well be regarded as a significant circumstance. Making final arrangements in other particulars for leaving the world,¹² such as settling one's financial affairs, ordering a funeral and so forth,¹³

7. *State v. Nowells*, 135 Iowa 53, 109 N. W. 1016 (1907) ("tell, mother good bye").

8. *State v. Spencer*, 30 La. Ann. 362 (1878); *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908); *Rice v. State*, 49 Tex. Cr. App. 569, 94 S. W. 1024 (1906).

9. *Arkansas*.—*Jones v. State*, 88 Ark. 579, 115 S. W. 166 (1909) (bidding goodbye to his relatives).

California.—*People v. Shehadey*, 12 Cal. App. 648, 108 Pac. 146 (1910) (bidding everyone goodbye).

Iowa.—*State v. Brumo*, 153 Iowa 7, 132 N. W. 817 (1911) (writing mother); *State v. Nowells*, 109 N. W. 1016 (1906) ("tell mother good-bye").

Mississippi.—*House v. State*, 94 Miss. 107, 48 So. 3 (1909) (sending for parents).

Missouri.—*State v. Colvin*, 226 Mo. 446, 126 S. W. 448 (1910) (making will).

New York.—*People v. Stacy*, 192 N. Y. 577, 85 N. E. 1114 (1908) (made provision for child).

North Carolina.—*State v. Watkins*, 159 N. C. 480, 75 S. E. 22 (1912) (sending for one's people).

Texas.—*Rice v. State*, 51 Tex. Cr. App. 255, 103 S. W. 1156 (1907) (sent for his family); *Roberts v. State*, 48 Tex. Cr. App. 378, 88 S. W. 221 (1905) (releasing betrothed from her engagement); *Crockett v. State*, 45 Tex. Cr. App. 276, 77 S. W. 4 (1903) (gave directions as to his business).

Washington.—*State v. Bridgham*,

51 Wash. 18, 97 Pac. 1096 (1908) (daughter's ashes in trunk).

10. *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470 (1907).

11. *Connecticut*.—*State v. Swift*, 57 Conn. 496, 18 Atl. 664 (1889).

Illinois.—*People v. Buettner*, 233 Ill. 272, 84 N. E. 218 (1908).

Iowa.—*State v. O'Brien*, 81 Iowa 88, 46 N. W. 752 (1890).

New York.—*People v. Stacy*, 192 N. Y. 577, 85 N. E. 1114 (1908); *People v. Stacy*, 119 App. Div. 743, 104 N. Y. Suppl. 615 (1907).

Pennsylvania.—*Com. v. Williams*, 2 Ashm. 69 (1839).

United States.—*Carver v. United States*, 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. 228 (1897).

"The fact that the deceased had received extreme unction had some tendency to show that she must have known that she was in *articulo mortis*, and if the jury were of opinion that the fact that she received it lent an additional sanctity to her statement, it was no error to admit evidence of it." *Carver v. United States*, 164 U. S. 694, 695, 41 L. ed. 602, 17 Sup. Ct. 228 (1897), per Mr. Justice Brown.

12. *Smith v. State*, 145 Ala. 17, 40 So. 957 (1906) (asked friend to take care of his family); *State v. Uzzo*, 6 Pennw. (Del.) 212, 65 Atl. 775 (1907) ("take care of my children"); *Crockett v. State*, 45 Tex. Cr. App. 276, 77 S. W. 4, (1903) (made will).

13. *Reg. v. Goddard*, 15 Cox Cr. C. 7 (1882) (look after her children).

also have an obvious tendency in the same direction.¹⁴

Sending for a physician.—That the deceased sent for a physician is not conclusive against the admissibility of his alleged dying declaration.¹⁵ Such a request may merely have been made for the purpose of relieving the suffering man from pain,¹⁶ or to satisfy the importunities of friends.¹⁷

§ 2837. (*Expectation of Death; Modes of Proof*); (2) Declarations of Deceased.—While proof of the essential fact of a consciousness of impending death may be established by evidence not furnished by the declarant himself,¹ the most conclusive and

14. *Alabama.*—*Johnson v. State*, 47 Ala. 9 (1872).

Florida.—*Dixon v. State*, 13 Fla. 636 (1870).

Illinois.—*Westbrook v. People*, 126 Ill. 81, 18 N. E. 304 (1888).

Iowa.—*State v. Nash*, 7 Iowa 347 (1858); *State v. Gillick*, 7 Iowa 287 (1858).

Massachusetts.—*Com. v. Roberts*, 108 Mass. 296 (1871).

Michigan.—*People v. Simpson*, 48 Mich. 474, 12 N. W. 662 (1882).

Missouri.—*State v. Evans*, 124 Mo. 397, 28 S. W. 8 (1894).

Nevada.—*State v. Vaughan*, 22 Nev. 285, 39 Pac. 733 (1895).

New York.—*People v. Wood*, 2 Edm. Sel. Cas. 71 (1849).

Rhode Island.—*State v. Sullivan*, 20 R. I. 114, 37 Atl. 673 (1897).

England.—*Rex v. Spilsbury*, 7 C. & P. 187, 32 E. C. L. 565 (1835).

15. *Pitts v. State*, 140 Ala. 70, 37 So. 101 (1904); *McQueen v. State*, 103 Ala. 12, 15 So. 824 (1894); *Baker v. Com.*, 106 Ky. 212, 50 S. W. 54, 20 Ky. L. Rep. 1778 (1899); *State v. Evans*, 124 Mo. 397, 28 S. W. 8 (1894); *R. v. Howell*, 1 Dennison Cr. C. 1 (1844). See also *Matherly v. Com.*, (Ky. 1892) 19 S. W. 977.

On the other hand, the fact may furnish ground for believing that the declaration should be rejected, all hope not having been abandoned. *Fannie v. State*, (Miss. 1912) 58 So. 2.

16. *Justice v. State*, 99 Ala. 180, 13 So. 658 (1892); *Hawkins v. State*, 98 Md. 355, 57 Atl. 27 (1904); *State v. Evans*, 124 Mo. 397, 28 S. W. 8 (1894).

The sincerity of an injured person's statements expressing a sense of impending dissolution will not be affected by the fact of sending for a physician and asking him to grant relief from pain. Thus, where a woman who was suffering intense pain, asked that a doctor be called and upon his arrival said, "Oh, doctor, I am dying—I want you to relieve me," it was decided that by such act and request there was no indication of any hope of escape from death, but merely a desire to obtain respite from agony. *Hawkins v. State*, 98 Md. 355 (1904).

17. *State v. Howard*, 120 La. 311, 45 So. 260 (1908) (sanitarium).

§ 2837-1. *Alabama.*—*Ex parte Key*, 5 Ala. App. 274, 59 So. 331 (1912); *Sanders v. State*, 2 Ala. App. 13, 56 So. 69 (1911); *Parker v. State*, 165 Ala. 1, 51 So. 260 (1909).

Arkansas.—*Rhea v. State*, 147 S. W. 463 (1912).

Colorado.—*Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018 (1905).

Delaware.—*State v. Uzzo*, 6 Pennw. 212, 65 Atl. 775 (1907).

Florida.—*Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909).

Georgia.—*Josey v. State*, 137 Ga. 769, 74 S. E. 282 (1912); *Jefferson v.*

natural proof of the necessary psychological state, in this as in other connections,² is necessarily supplied by the statements of the declarant, made during or prior to his declaration.³ These,

State, 137 Ga. 382, 73 S. E. 499 (1912); *Barnett v. State*, 136 Ga. 65, 70 S. E. 868 (1911); *Washington v. State*, 137 Ga. 218, 73 S. E. 512 (1911).

Maryland.—*Hawkins v. State*, 98 Md. 355, 57 Atl. 27 (1904) (abortion).

Missouri.—*State v. Colvin*, 226 Mo. 446, 126 S. W. 448 (1910).

Nevada.—*State v. Roberts*, 28 Nev. 350, 82 Pac. 100 (1905).

New York.—*People v. Falletto*, 202 N. Y. 494, 96 N. E. 355 (1911).

Oregon.—*State v. Ju Nun*, 53 Oreg. 1, 97 Pac. 96, judgment affirmed on rehearing, 98 Pac. 513 (1908).

"The injured party need not, in express words, declare that he knows he is about to die, or make use of equivalent language." *Com. v. Matthews*, 89 Ky. 287, 292, 12 S. W. 333, 11 Ky. Law Rep. 505 (1889), per Holt, J.

2. §§ 2643 *et seq.*

3. *Alabama*.—*Heningburg v. State*, 153 Ala. 13, 45 So. 246 (1907); *Heningburg v. State*, 151 Ala. 26, 43 So. 959 (1907); *Brown v. State*, 150 Ala. 25, 43 So. 194 (1907); *Logan v. State*, 149 Ala. 11, 43 So. 10 (1907); *Smith v. State*, 145 Ala. 17, 40 So. 957 (1906); *Pitts v. State*, 140 Ala. 70, 37 So. 101 (1904).

Arkansas.—*Robinson v. State*, 99 Ark. 208, 137 S. W. 831 (1911).

California.—*People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829 (1911); *People v. Cord*, 157 Cal. 562, 108 Pac. 511 (1910).

Colorado.—*Weaver v. People*, 47 Colo. 617, 108 Pac. 331 (1910).

Delaware.—*State v. Fleetwood*, 6 Pennw. 153, 65 Atl. 772 (1906).

Florida.—*Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909); *Newton v. State*, 51 Fla. 82, 41 So. 19 (1906).

Georgia.—*Lyens v. State*, 133 Ga.

587, 66 S. E. 792 (1909); *Oliver v. State*, 129 Ga. 777, 59 S. E. 900 (1907); *Grant v. State*, 118 Ga. 804, 45 S. E. 603 (1903).

Illinois.—*People v. White*, 251 Ill. 67, 95 N. E. 1036 (1911); *People v. Buettner*, 233 Ill. 272, 84 N. E. 218 (1908).

Indiana.—*Williams v. State*, 168 Ind. 87, 79 N. E. 1079 (1907); *Gipe v. State*, 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419 (1905).

Iowa.—*State v. Nowells*, 109 N. W. 1016 (1906); *State v. Elliott*, 45 Iowa 486 (1877).

Kentucky.—*Kelly v. Com.*, 119 S. W. 809 (1909); *Com. v. Hargis*, 99 S. W. 510, 30 Ky. L. Rep. 510 (1907); *Kennedy v. Com.*, 100 S. W. 242, 30 Ky. L. Rep. 1063 (1907); *Asher v. Com.*, 91 S. W. 662, 28 Ky. L. Rep. 1342 (1906); *Rowsey v. Com.*, 76 S. W. 409, 25 Ky. L. Rep. 841 (1903).

Louisiana.—*State v. Brady*, 124 La. 951, 50 So. 806 (1909).

Maryland.—*Meno v. State*, 117 Md. 435, 83 Atl. 759 (1912); *Hawkins v. State*, 98 Md. 355, 57 Atl. 27 (1904).

Massachusetts.—*Com. v. Thompson*, 159 Mass. 56, 33 N. E. 111 (1893).

Mississippi.—*Wiltcher v. State*, 99 Miss. 374, 54 So. 726 (1911); *House v. State*, 94 Miss. 107, 48 So. 3, 21 L. R. A. (N. S.) 840 n. (1909); *Jackson v. State*, 94 Miss. 83, 47 So. 502 (1908).

Missouri.—*State v. Finley*, 245 Mo. 465, 150 S. W. 1051 (1912); *State v. Diple*, 242 Mo. 461, 147 S. W. 111 (1912); *State v. Colvin*, 226 Mo. 446, 126 S. W. 448 (1910); *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470 (1907); *State v. Brown*, 188 Mo. 451, 87 S. W. 519 (1905).

Montana.—*State v. Crean*, 43 Mont. 47, 114 Pac. 603 (1911).

therefore, may be shown to the court.⁴ His declarations are also equally admissible to negative the inference that he spoke under a sense of impending death.⁵ Declarations of the decedent as to his expectation of death may, within the limits of relevancy, precede or follow the alleged dying statement.⁶

Nebraska.—*Johnson v. State*, 88 Neb. 328, 129 N. W. 281 (1911) (abortion).

Nevada.—*State v. Hennessy*, 29 Nev. 320, 90 Pac. 221 (1907).

New Jersey.—*State v. Biango*, 75 N. J. L. 284, 68 Atl. 125 (1907); *State v. Barnes*, 75 N. J. L. 426, 68 Atl. 145 (1907).

New York.—*People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908).

North Carolina.—*State v. Laughter*, 159 N. C. 488, 74 S. E. 913 (1912); *State v. Quick*, 150 N. C. 820, 64 S. E. 168 (1909); *State v. Bohanon*, 142 N. C. 695, 55 S. E. 797 (1906); *State v. Boggan*, 133 N. C. 761, 46 S. E. 111 (1903).

Oklahoma.—*Offitt v. State*, 5 Okla. Cr. App. 48, 113 Pac. 554 (1911); *Smith v. State*, 5 Okla. Cr. App. 282, 114 Pac. 350 (1911); *Hawkins v. United States*, 3 Okla. Cr. 651, 108 Pac. 561 (1910).

Oregon.—*State v. Fuller*, 52 Ore. 42, 96 Pac. 456 (1908); *State v. Fitzhugh*, 2 Ore. 227 (1867).

Pennsylvania.—*Com. v. Rhoads*, 23 Pa. Super. Ct. 512 (1903).

South Carolina.—*State v. McCoomer*, 79 S. C. 63, 60 S. E. 237 (1907).

South Dakota.—*State v. Svenson*, 26 S. D. 589, 129 N. W. 119 (1910).

Texas.—*Douglas v. State*, 58 Tex. Cr. App. 122, 124 S. W. 933 (1910); *Hunter v. State*, 54 Tex. Cr. App. 224, 114 S. W. 124 (1908); *Jones v. State*, 52 Tex. Cr. App. 303, 106 S. W. 345 (1907); *Patterson v. State*, 49 Tex. Cr. App. 613, 95 S. W. 129 (1906); *Rice v. State*, 49 Tex. Cr. App. 569, 94 S. W. 1024 (1906); *Lewis v. State*, 48 Tex. Cr. App. 614, 89 S. W. 1073 (1905).

Washington.—*State v. Mayo*, 42 Wash. 540, 85 Pac. 251 (1906).

Canada.—*Queen v. Davidson*, 1 Can. Cr. Cas. 351, 30 N. S. R. 349 (1898); *R. v. Sparham*, 25 C. P. U. C. 143 (1875).

Such a declaration is not conclusive. *Bell v. State*, 72 Miss. 507, 17 So. 232 (1895).

Where the statement, recognizing the immediate approach of death, occurs at the end of the dying declaration, the whole has been rejected on the ground that perhaps the declarant did not realize his actual condition until he had already practically made his declaration. *R. v. Nicolas*, 6 Cox Cr. 120, 121 (1852).

Remoteness.—The declarations as to apprehension of death must be made sufficiently near the time of the dying declaration to be relevant. Where a considerable length of time intervenes the evidence may be rejected. *Phillips v. State*, 3 Ala. App. 218, 57 So. 1033 (1912) (several days).

"There is no form of phraseology in which a party making a dying declaration must indicate the fact that he is conscious of approaching death." *Keaton v. State*, 41 Tex. Cr. App. 621, 631, 57 S. W. 1125 (1900), per Brooks, J.

4. *State v. Umble*, 115 Mo. 452, 22 S. W. 378 (1893); *John's Case*, 1 East P. C. 357 (1790).

5. *Tibbs v. Commonwealth*, 138 Ky. 558, 128 S. W. 871, 28 L. R. A. (N. S.) 665n. (1910).

6. *State v. Vaughan*, 22 Nev. 285, 39 Pac. 733 (1895).

The assertion of an acquaintance or bystander, in the presence of one who subsequently makes a statement offered as a dying declaration, to the effect that he is sure to die of his injury or has no chance for recovery, cannot fail, if believed, to affect the mind of the injured person. The fact may, therefore, be shown to assist in proving that he was conscious that his end was at hand.

Probative force.—No conclusive effect attaches to the declarations of the deceased regarding his own mental condition. Thus, that he declares himself to be without hope is by no means final in the matter.⁷

§ 2838. (*Expectation of Death; Modes of Proof; (2) Declarations of Deceased*); Administrative Details.—What any given situation of fact amounts to, in terms of the appreciation of the presence of death, is within the administrative power of the court, to determine the first instance. In itself considered, i. e., in the absence of counterbalancing circumstances, the employment of a hypothetical form of statement, “If I die,”¹ has been regarded as fatal to admissibility.² Should it appear, however, upon all the evidence, that the certainty of death was recognized by the declarant this form of statement is not necessarily fatal to the reception of the declaration.³ Such vague phrases as “I will die of it,”

7. *Bell v. State*, 72 Miss. 507, 17 So. 232 (1895); *Reg. v. Mackay*, 11 Cox Cr. C. 148 (1868); *Reg. v. Megson*, 9 C. & P. 418, 38 E. C. L. 249 (1840); *Rex v. Fagent*, 7 C. & P. 238, 32 E. C. L. 590 (1835); *Rex v. Spilsbury*, 7 C. & P. 187, 32 E. C. L. 565 (1835).

§ 2838-1. “Any person who has been accustomed to attend on those who are injured, or are very ill, knows how common it is for them to say that they will never recover, or that they will die, when there is no good or sufficient reason for the apprehension, and they are not conscious themselves that they are in any real danger. Such expressions are often the result of impatience, restlessness, or great suffering. But at the same time let the attending physician inform them that there is

no hope, and that they must die, and they will be perfectly startled.” *State v. Simon*, 50 Mo. 370 (1872).

2. *State v. Medicott*, 9 Kan. 257, 282 (1872).

3. “We think the mere use of the words, ‘If I die,’ do not by themselves defeat and render nugatory all the emphatic declarations of abandonment of all hope. It is a form of expression very proper to be noticed and commented on in such a case. Had the declarant been otherwise silent as to her opinion of her state, or her danger, such an expression would have weighed heavily against the admission of her statements. Had the expression been, ‘If I die, as I firmly believe I shall, then A. B. will be my murderer,’ there could be little doubt as to the true meaning of the phrase, and the hypo-

"I'm dying,"⁴ "It is all over with me," "I will never recover," are generally regarded as insufficient to show the sense of impending death.⁵ The question, however, is ordinarily one of substance rather than one of form. The Supreme Judicial Court of Massachusetts express this clearly in saying:⁶ "The admissibility of such declarations does not depend upon any particular forms of expression, for these will vary indefinitely; but it depends upon the view which the deceased took of his own case when in imminent danger of death."⁷

Interpreter.—The fact that a dying declaration was in a foreign language, and introduced in evidence through an interpreter, affects merely the weight of the evidence.⁸

§ 2839. (*Expectation of Death; Modes of Proof*); (3) Inference from Physical condition.—The physical condition of the deceased at the time of making his statement may be shown¹ and

thetical form would be quite consistent with the existence of the firm belief in death as an inevitable event." *R. v. Sparham*, 25 U. C. C. P. 143, 154 (1875), per Hagarty, C. J.

4. The expression, "I'm dying," though constantly repeated has not, in some cases, been regarded as indicating a sense of impending death, being looked upon rather as expressive of the agony which the person is suffering. "When, as here, a person makes the statement 'I'm dying,' and in great pain ejaculates the expression several times, it seems to me unsafe, knowing the expressions of humanity in the agony of pain, to regard that expression as the expression of the real idea of impending death. The repetition of the statement makes it weaker. The frequency of the ejaculation points to me that the agony is so great that possibly the ejaculation may be referable to the agony of the pain, rather than to the fixed and settled belief in impending death. Upon the whole, therefore, I think it right that I should not admit the evidence." *R. v. Abbott* (1903), 67 J. P. 151, per Kennedy, J.

5. *R. v. Peltier*, 4 L. Can. Rep. 3 (1853).

6. *Com. v. Roberts*, 108 Mass. 296 (1871).

7. See, however, *State v. Center*, 35 Vt. 378 (1862).

8. *State v. Foot You*, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537 (1893) (Chinese). See *State v. Ju Nun*, 53 Oreg. 1, 97 Pac. 96, *affirmed on rehearing* 98 Pac. 513 (1908).

§ 2839-1. *Alabama.*—*White v. State*, 111 Ala. 92, 21 So. 330 (1895).

California.—*People v. Samaris*, 84 Cal. 484, 24 Pac. 283 (1890); *People v. Ybarra*, 17 Cal. 166 (1860).

Iowa.—*State v. Schmidt*, 73 Iowa 469, 35 N. W. 590 (1887).

Nebraska.—*Basye v. State*, 45 Nebr. 261, 63 N. W. 811 (1895).

New York.—*People v. Wood*, 2 Edm. Sel. Cas. 71 (1849).

Pennsylvania.—*Sullivan v. Com.*, 93 Pa. St. 284, *affirming* 13 Phila. 410 (1880).

Rhode Island.—*State v. Sullivan*, 20 R. I. 114, 37 Atl. 673 (1897).

Tennessee.—*Baxter v. State*, 15 Lea, 657 (1885).

England.—*Reg. v. Goddard*, 15 Cox Cr. C. 7 (1882); *Reg. v. Whitworth*, 1 F. & F. 382 (1858).

such inferences may be drawn therefrom as are logically legitimate. The court and jury are entitled to infer from his physical condition² and other similar facts,³ obvious to the declarant, that

2. Alabama.—Parker v. State, 165 Ala. 1, 51 So. 260 (1909); Heningburg v. State, 153 Ala. 13, 45 So. 246 (1907); Gregory v. State, 140 Ala. 16, 37 So. 259 (1904).

Arkansas.—Ward v. State, 85 Ark. 179, 107 S. W. 677 (1908); Evans v. State, 58 Ark. 47, 22 S. W. 1026 (1893).

Colorado.—Weaver v. People, 47 Colo. 617, 108 Pac. 331 (1910); Brennan v. People, 37 Colo. 256, 86 Pac. 79 (1906).

Florida.—Newton v. State, 51 Fla. 82, 41 So. 19 (1906).

Georgia.—Josey v. State, 137 Ga. 769, 74 S. E. 282 (1912); Jefferson v. State, 137 Ga. 382, 73 S. E. 499 (1912); Barnett v. State, 136 Ga. 65, 70 S. E. 868 (1911); Thompson v. State, 137 Ga. 164, 73 S. E. 363 (1911); Jones v. State, 130 Ga. 274, 60 S. E. 840 (1908); Robinson v. State, 130 Ga. 361, 60 S. E. 1005 (1908); Harper v. State, 129 Ga. 770, 59 S. E. 792 (1907).

Illinois.—People v. White, 251 Ill. 67, 95 N. E. 1036 (1911).

Indiana.—Williams v. State, 168 Ind. 87, 79 N. E. 1079 (1907); Gipe v. State, 165 Ind. 433, 75 N. E. 881, L. R. A. (N. S.) 419, 112 Am. St. Rep. 238 (1905).

Iowa.—State v. Dyer, 147 Iowa 217, 124 N. W. 629, 29 L. R. A. (N. S.) 459 (1910).

Kentucky.—Asher v. Com., 91 S. W. 662, 28 Ky. L. R. 1342 (1906); Fuqua v. Com., 118 Ky. 578, 81 S. W. 922, 26 Ky. L. Rep. 420 (1904); Rowsey v. Com., 76 S. W. 409, 25 Ky. L. Rep. 841 (1903); McHargue v. Com., 23 S. W. 349, 15 Ky. L. Rep. 323 (1893); Com. v. Matthews, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. R. 505 (1889).

Mississippi.—Wiltcher v. State, 99 Miss. 374, 54 So. 726 (1911); Pryor

v. State, 39 So. 1012 (1906) (lock-jaw).

Missouri.—State v. Diple, 147 S. W. 111 (1912); State v. Brown, 188 Mo. 451, 87 S. W. 519 (1905) (necessarily fatal).

Montana.—State v. Crean, 43 Mont. 47, 14 Pac. 603 (1911).

Nebraska.—Basye v. State, 45 Neb. 261, 63 N. W. 811 (1895).

Nevada.—State v. Roberts, 28 Nev. 350, 82 Pac. 100 (1905).

New Jersey.—State v. Barnes, 75 N. J. L. 426, 68 Atl. 145 (1907).

New Mexico.—Territory v. Eagle, 15 N. M. 609, 110 Pac. 862 (1910).

Oklahoma.—Morris v. State, 6 Okla. Cr. App. 29, 115 Pac. 1030 (1911); Blair v. State, 4 Okla. Cr. App. 359, 111 Pac. 1003 (1910); Hawkins v. United States, 3 Okla. Cr. 651, 108 Pac. 561 (1910).

Oregon.—State v. Ju Nun, 53 Ore. 1, 97 Pac. 96, *affirmed* on rehearing 98 Pac. 513 (1908); State v. Fuller, 52 Ore. 42, 96 Pac. 456 (1908); State v. Gray, 43 Ore. 446, 74 Pac. 927 (1904).

Pennsylvania.—Sullivan v. Com., 93 Pa. St. 284, 296 (1880).

South Dakota.—State v. Swenson, 26 S. D. 589, 129 N. W. 119 (1910).

Texas.—Douglas v. State, 58 Tex. Cr. App. 122, 124 S. W. 933, 137 Am. St. Rep. 930 (1910); Morgan v. State, 54 Tex. Cr. App. 542, 113 S. W. 934 (1908); Jones v. State, 52 Tex. Cr. App. 303, 106 S. W. 345, 124 Am. St. Rep. 1097 (1907); Connell v. State, 46 Tex. Cr. App. 259, 81 S. W. 746 (1904).

Washington.—State v. Mayo, 42 Wash. 540, 85 Pac. 251 (1906).

West Virginia.—State v. Clark, 64 W. Va. 625, 63 S. E. 403 (1908).

England.—John's Case, 1 East P. C. 357 (1790).

It will not, however, be presumed

he must have had a conscious sense of impending death.⁴ In thus

that a man who has been injured, though seriously, must necessarily feel that he is about to die so as to render his declaration admissible as a dying declaration. *Bilton v. Territory*, 1 Okla. Cr. App. 566, 99 Pac. 163 (1909).

Slight wounds.—Evidence has been admitted to show that the wound inflicted was not calculated to endanger or destroy decedent's life, and that he died solely from improper treatment. *Tibbs v. Com.*, 138 Ky. 558, 128 S. W. 871, 28 L. R. A. (N. S.) 665n.

3. "The absolute requirements preliminary to the admission of such evidence are that there must be clear proof of the certainty of speedy death, and that the declarant had no hope of recovery. Such facts, however, as we have recently held, need not be proved by statements made to or by him, but may be inferred from the surrounding circumstances, such as the nature of his wounds, his physical condition, preparation for death and the like." *People v. Falletto*, 202 N. Y. 494, 500, 96 N. E. 355 (1911), per Vann, J.

4. *Alabama.*—*McEwen v. State*, 152 Ala. 38, 44 So. 619 (1907).

Arizona.—*Wagoner v. Terr.*, 5 Ariz. 175, 51 Pac. 145 (1897).

Arkansas.—*Rhea v. State*, 147 S. W. 47 (1912); *Jones v. State*, 88 Ark. 579, 115 S. W. 166 (1909); *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54 (1841).

California.—*People v. Shehadey*, 12 Cal. App. 648, 108 Pac. 146 (1910); *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549 (1882).

Colorado.—*Weaver v. People*, 47 Colo. 617, 108 Pac. 331 (1910); *Brennan v. People*, 37 Colo. 256, 86 Pac. 79 (1906).

Connecticut.—*State v. Cronin*, 64 Conn. 293, 302, 29 Atl. 536 (1894).

Florida.—*Copeland v. State*, 58

Fla. 26, 50 So. 621 (1909).

Georgia.—*Josey v. State*, 137 Ga. 769, 74 S. E. 282 (1912); *Barnett v. State*, 136 Ga. 65, 70 S. E. 868 (1911); *Robinson v. State*, 130 Ga. 361, 60 S. E. 1005 (1908); *Jones v. State*, 130 Ga. 274, 60 S. E. 840 (1908); *Campbell v. State*, 11 Ga. 353 (1852).

Hawaii.—*Govt. v. Herring*, 9 Haw. 181, 188 (1893).

Illinois.—*People v. White*, 251 Ill. 67, 95 N. E. 1036 (1911).

Indiana.—*Williams v. State*, 168 Ind. 87, 79 N. E. 1079 (1907).

Iowa.—*State v. Elliott*, 45 Iowa 486 (1877).

Kentucky.—*Fuqua v. Com.*, 118 Ky. 578, 81 S. W. 923, 26 Ky. L. Rep. 420 (1904); *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505 (1889).

Louisiana.—*State v. Jones*, 38 La. Ann. 792, 18 So. 515 (1895); *State v. Scott*, 12 La. Ann. 274 (1857).

Maryland.—*Meno v. State*, 83 Atl. 759 (1912).

Massachusetts.—*Com. v. Roberts*, 108 Mass. 296 (1871).

Michigan.—*People v. Simpson*, 48 Mich. 477, 12 N. W. 622 (1882).

Mississippi.—*Pryor v. State*, 39 So. 1012 (1906).

Missouri.—*State v. Craig*, 190 Mo. 332, 88 S. W. 641 (1905).

Montana.—*State v. Russell*, 13 Mont. 164, 168, 32 Pac. 854 (1893).

Nebraska.—*Collins v. State*, 46 Nebr. 37, 64 N. W. 432 (1895).

Nevada.—*State v. Roberts*, 28 Nev. 350, 82 Pac. 100 (1905).

New Jersey.—*State v. Barnes*, 75 N. J. L. 426, 68 Atl. 145 (1907); *Donnelly v. State*, 26 N. J. L. 463, 618, *affirmed* 26 N. J. L. 601 (1857).

New Mexico.—*Territory v. Eagle*, 15 N. M. 609, 110 Pac. 862 (1910).

New York.—*People v. Falletto*, 202 N. Y. 494, 96 N. E. 355 (1911).

North Carolina.—*State v. Watkins*,

undertaking to act upon what it assumes, in the absence of self-expression, to be the state of a person's mind, judicial administration enters upon an uncertain task.⁵ Hope may still linger though all reason for it has long since gone and the slightest spark of hope is inconsistent with admissibility.⁶

§ 2840. (*Expectation of Death; Modes of Proof*); (4) Statements made to Deceased.—As seen in another connection,¹ one's mental state as to knowledge may be shown not only by his own statements but by those which are made to him. In the same

159 N. C. 480, 75 S. E. 22 (1912); *State v. Shelton*, 2 Jones L. 360, 64 Am. Dec. 587 (1855).

Oregon.—*State v. Fuller*, 52 *Oreg.* 42, 96 *Pac.* 456 (1908); *State v. Fletcher*, 24 *Oreg.* 295, 297, 33 *Pac.* 575 (1893).

Pennsylvania.—*Sullivan v. Com.*, 93 *Pa. St.* 284 (1880); *Kilpatrick v. Com.*, 31 *Pa.* 198, 3 *Phila.* 237 (1858).

South Dakota.—*State v. Swenson*, 26 *So. Dak.* 589, 129 *N. W.* 119 (1910).

Tennessee.—*Smith v. State*, 9 *Humph.* 9 (1848).

Texas.—*Douglas v. State*, 58 *Tex. Cr. App.* 122, 124 *S. W.* 933, 137 *Am. St. Rep.* 930 (1910); *Jones v. State*, 52 *Tex. Cr. App.* 303, 106 *S. W.* 345, 124 *Am. St. Rep.* 1097 (1907).

Virginia.—*Vass' Case*, 3 *Leigh.* 786, 24 *Am. Dec.* 695 (1831).

Washington.—*State v. Mayo*, 42 *Wash.* 540, 85 *Pac.* 251 (1906).

United States.—*Re Orpen*, 86 *Fed.* 760, 764 (1898); *Carver v. U. S.*, 164 *U. S.* 694, 17 *Sup. Ct.* 228, 41 *L. ed.* 602 (1897); *Mattox v. U. S.*, 146 *U. S.* 140, 151, 13 *Sup. Ct.* 50, 36 *L. ed.* 917 (1892).

England.—*John's Case*, 1 *East P. C.* 357 (1790).

Canada.—*R. v. Smith*, 23 *U. C. C. P.* 312 (1873).

"The court must look to all the circumstances under which they were made, and if they be sufficient to induce the belief that the deceased

made them under the sense of impending death, the declarations are admissible." *Oliver v. State*, 17 *Ala.* 587 (1850), per *Dargan, C. J.*

"Upon the whole of this difficulty, however, my judgment is, that inasmuch as she was mortally wounded, and was in a condition which rendered almost immediate death inevitable; as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation; her declarations, made under these circumstances, ought to be considered by a jury as being made under the impression of her approaching dissolution; for, resigned as she appeared to be, she must have felt the hand of death, and must have considered herself as a dying woman." *Woodcock's Case*, 1 *Leach Cr. L.* (4th ed.) 500, 503 (1789), per *Eyre, C. B.*

5. A query has been raised in England as to whether any case has gone so far as to infer the deceased's sense of impending death entirely "from the nature of the wound itself and from giving the deceased credit for ordinary intelligence as to its natural results." *R. v. Morgan*, 14 *Cox Cr.* 337 (1875), per *Denman, J.*, and *Cockburn, C. J.*

6. § 2833a.

§ 2840-1. §§ 2666 *et seq.*

way, the mental attitude of a dying declarant may be shown not alone by the statements which he makes but by those of others made to him or in his hearing. The assertion of a nurse, physician² or other attendant³ made to the declarant or in his presence or hearing in respect to his condition may be received for this purpose.

2. Alabama.—*Ex parte Key*, 5 Ala. App. 274, 59 So. 331 (1912); *Johnson v. State*, 169 Ala. 10, 53 So. 769 (1910).

Arkansas.—*Rhea v. State*, 147 S. W. 463 (1912); *Robinson v. State*, 99 Ark. 208, 137 S. W. 831 (1911).

Illinois.—*People v. White*, 251 Ill. 67, 95 N. E. 1036 (1911); *People v. Buettner*, 233 Ill. 272, 84 N. E. 218 (1908).

Iowa.—*State v. Luther*, 150 Iowa 158, 129 N. W. 801 (1911); *State v. Nowells*, 109 N. W. 1016 (1906).

Kentucky.—*Henson v. Com.*, 139 Ky. 173, 129 S. W. 566 (1910); *Fuqua v. Com.*, 118 Ky. 578, 26 Ky. L. Rep. 420, 81 S. W. 923 (1904).

Maryland.—*Meno v. State*, 117 Md. 435, 83 Atl. 759 (1912).

Mississippi.—*House v. State*, 94 Miss. 107, 48 So. 3, 21 L. R. A. (N. S.) 840n. (1909); *Boyd v. State*, 84 Miss. 414, 36 So. 525 (1904).

Missouri.—*State v. Craig*, 190 Mo. 332, 88 S. W. 641 (1905); *State v. Umble*, 115 Mo. 452, 22 S. W. 378 (1893) (entrails cut).

Montana.—*State v. Crean*, 43 Mont. 47, 114 Pac. 603 (1911).

Nebraska.—*Johnson v. State*, 88 Neb. 328, 129 N. W. 281 (1911) (abortion).

North Carolina.—*State v. Watkins*, 159 N. C. 480, 75 S. E. 22 (1912); *State v. Teachey*, 138 N. C. 587, 50 S. E. 232 (1905); *State v. Boggan*, 133 N. C. 761, 46 S. E. 111 (1903).

Oklahoma.—*Smith v. State*, 5 Okla. Cr. App. 282, 114 Pac. 350 (1911).

Oregon.—*State v. Ju Nun*, 53 Ore. 1, 97 Pac. 96, *affirmed* on rehearing, 98 Pac. 513 (1908); *State v. Fuller*,

52 Ore. 42, 96 Pac. 456 (1908); *State v. Thompson*, 49 Ore. 46, 88 Pac. 583, 124 Am. St. Rep. 1015n. (1907); *State v. Gray*, 43 Ore. 446, 74 Pac. 927 (1904).

Pennsylvania.—*Com. v. Rhoads*, 23 Pa. Super. Ct. 512 (1903).

Texas.—*Douglas v. State*, 58 Tex. Cr. App. 122, 124 S. W. 933, 137 Am. St. Rep. 930 (1910); *Morgan v. State*, 54 Tex. Cr. App. 542, 113 S. W. 934 (1908).

Washington.—*State v. Quinn*, 56 Wash. 295, 105 Pac. 818 (1909); *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096 (1908); *State v. Mayo*, 42 Wash. 540, 85 Pac. 251 (1906).

That the declarant made the statement under the belief of impending death was regarded as shown by proof that the deceased was informed by a physician that her wound was mortal and that she could not live; that she was rational and realized she could not live; that she said she did not think she could get well, and she expressed the wish that her son would look out for her three babies; that she said her daughter's ashes were in a jar in her trunk and she wanted them buried with her. *State v. Bridgham*, 51 Wash. 18, 20, 97 Pac. 1096 (1908).

Absence of statement.—The fact that an attending physician did not inform the declarant that death was impending will not exclude his statement if otherwise admissible. *People v. Cord*, 157 Cal. 562, 108 Pac. 511 (1910).

Even should the physician inform the declarant that his injury is not necessarily fatal, the statement will

§ 2841. Form of Declaration.—The form employed in making a dying declaration is immaterial.¹ It may be oral² or in writing³ or may even be partly oral and partly in writing.⁴ On the other hand, it may be neither oral nor written. Should the declarant desire or be compelled to do so, he may make his statement by use

be received if the injured person actually believed that he was going to die and entertained no hope of recovery. *Thompson v. State*, 137 Ga. 164, 73 S. E. 363 (1911); *People v. Stacy*, 192 N. Y. 577, 85 N. E. 1114 (1908); *People v. Grunzig*, 1 Parker Cr. Rep. (N. Y.) 299 (1851); *State v. Caldwell*, 115 N. C. 794, 20 S. E. 523 (1894); *Com. v. Latampa*, 226 Pa. 23, 74 Atl. 736 (1909). See, however, *People v. Hayes*, 9 Cal. App. 301, 99 Pac. 386 (1908).

Extraneous facts, as that the accused was suspected of the crime, should not be made part of the statement of the physician. *Boyd v. State*, 84 Miss. 414, 36 So. 525 (poisoning).

3. Alabama.—*Clark v. State*, 105 Ala. 91, 17 So. 37 (1894).

Delaware.—*State v. Fleetwood*, 6 Pennew. 153, 65 Atl. 772 (1906).

Illinois.—*Westbrook v. People*, 126 Ill. 81, 18 N. E. 304 (1888).

Iowa.—*State v. Young*, 104 Iowa 730, 74 N. W. 693 (1898); *State v. Murdy*, 81 Iowa 603, 47 N. W. 867 (1891); *State v. Schmidt*, 73 Iowa 469, 35 N. W. 590 (1887); *State v. Nash*, 7 Iowa 347 (1858).

Kentucky.—*Polly v. Com.*, 24 S. W. 7, 15 Ky. L. Rep. 502 (1893).

Louisiana.—*State v. Somnier*, 33 La. Ann. 237 (1881).

Michigan.—*People v. Weaver*, 108 Mich. 649, 66 N. W. 567 (1896); *People v. Simpson*, 48 Mich. 474, 12 N. H. 662 (1882).

Missouri.—*State v. Umble*, 115 Mo. 452, 22 S. W. 378 (1893).

New York.—*People v. Wood*, 3 Edm. Sel. Cas. 71 (1849); *People v. Green*, 1 Park. Cr. Rep. 11 (1845).

Rhode Island.—*State v. Sullivan*, 20 R. I. 114, 37 Atl. 673 (1897).

Tennessee.—*Lemons v. State*, 97 Tenn. 560, 37 S. W. 552 (1896); *Baxter v. State*, 15 Lea 657 (1885); *Anthony v. State*, Meigs 265, 33 Am. Dec. 143 (1838).

Texas.—*Sims v. State*, 36 Tex. Cr. App. 154, 36 S. W. 256 (1896); *Pier-son v. State*, 21 Tex. App. 14, 17 S. W. 468 (1886).

Virginia.—*Bull v. Com.*, 14 Gratt. 613 (1857).

Washington.—*State v. Baldwin*, 15 Wash. 15, 45 Pac. 650 (1896).

England.—*Reg. v. Brooks*, 1 Cox Cr. C. 6 (1843); *Reg. v. Perkins*, 9 C. & P. 395, 2 Moody C. C. 135, 38 E. C. L. 236 (1840); *Rex v. Hayward*, 6 C. & P. 157, 25 E. C. L. 371 (1833).

§ 2841-1. *Kirby v. State*, 151 Ala. 66, 44 So. 38 (1907); *State v. Colvin*, 226 Mo. 446, 126 S. W. 448 (1910).

A dying declaration need not be reduced to writing to render it admissible. *Kirby v. State*, 151 Ala. 66, 44 So. 38 (1907).

2. § 2842.

3. § 2844.

Complaint or declaration.—That a magistrate put what he meant to be a written dying declaration into the form of a criminal complaint is no ground for rejecting the document. *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018 (1905).

4. Alabama.—*Kirby v. State*, 151 Ala. 66, 44 So. 38 (1907); *Pate v. State*, 150 Ala. 10, 43 So. 343 (1907).

Colorado.—*Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018 (1905).

Oregon.—*State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 (1908).

of signs.⁵ He may merely adopt or negative the statements of others and this he may do in any manner by which intelligence may be conveyed. There must, however, be a distinct and definite assertion on the part of the declarant, however it may be effected. He will not be permitted to guess at or simply conjecture the speaker's meaning.⁶

A vague, incomplete or ambiguous phrase or sentence in a dying declaration may be explained into full meaning by other evidence. Thus where a deceased was asked why accused shot him his reply "You know why" may be shown by the witness to have reference to the infidelity of deceased's wife.⁷ Mere exclamations have been rejected,⁸ although the matter is one upon which it seems unsafe to generalize.

Expressing consciousness of condition.—A consciousness of impending death need not be expressed in order to render the declaration admissible⁹ and consequently the state need not affirmatively

Texas.—Hunter v. State, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910).

Utah.—State v. Vance, 38 Utah 1, 110 Pac. 434 (1910).

Dying declarations may be either in writing or oral, and where there are both, if otherwise competent, either or both may be given in evidence. State v. Vance, 38 Utah 1, 110 Pac. 434 (1910).

Where a dying declaration was made under oath to a justice of the peace which the justice reduced to writing as fully as he could, it was proper for him, in addition to reading his notes, to supply from his recollection the remainder of the declarant's statement. Mitchell v. State, 82 Ark. 324, 101 S. W. 763 (1907).

Where several statements have been made but only one reduced to writing the prosecution is not confined to the latter, but may introduce oral evidence of the other statements. Morris v. State, 6 Okla. Cr. 29, 115 Pac. 1030 (1911).

"In order, however, that undue prominence may not be given to the

contents of the written statement over the oral, the written declarations should not be taken to the jury box, and only such portions thereof as may be deemed material and competent should be read to the jury, thereby placing the written statements on an equality with the testimony relating to the oral statements of the declarant." State v. Doris, 51 Oreg. 136, 154, 94 Pac. 44, 16 L. R. A. (N. S.) 660 (1908), per King, C.

5. § 2843.

6. People v. Olmstead, 30 Mich. 431 (1874).

7. Wagoner v. Terr., 5 Ariz. 175, 51 Pac. 145 (1857).

8. People v. Olmstead, 30 Mich. 431 (1874).

9. *Alabama.*—Lewis v. State, 59 So. 577 (1912); Sanders v. State, 2 Ala. App. 13, 56 So. 69 (1911).

Arkansas.—Rea v. State, 147 S. W. 463 (1912).

California.—People v. Yokum, 118 Cal. 437, 50 Pac. 686 (1897).

Colorado.—Weaver v. People, 47 Colo. 617, 108 Pac. 331 (1910); Zip-

show that such an expression was made.¹⁰

§ 2842. (*Form of Declaration*); *Oral*.—A very large proportion of dying declarations, as will be seen *passim*, are in oral form. The statement need not have been made for the purpose primarily of affixing the responsibility to the accused. It may have been made for another purpose, as the message to the wife of the injured man.¹ Assuming that the declarant was under essentially necessary expectation of impending death,² much looseness in matters of detail will be permitted. No requirement is imposed, for example, that the declaration should all have been made at one time or without interruption or intervening of other matters.³ In other words, such administrative safeguards are not imposed as would require the statement to be a spontaneous one.⁴

perian v. People, 33 Colo. 134, 79 Pac. 1018 (1905).

Georgia.—*Josey v. State*, 137 Ga. 769, 74 S. E. 282 (1912); *Jefferson v. State*, 137 Ga. 382, 73 S. E. 499 (1912); *Barnett v. State*, 136 Ga. 65, 70 S. E. 868 (1911).

Kentucky.—*Austin v. Com.*, 40 S. W. 905, 19 Ky. L. Rep. 474 (1897).

Massachusetts.—*Com. v. Haney*, 127 Mass. 455 (1879).

Oregon.—*State v. Ju Nun*, 53 Oreg. 1, 97 Pac. 96, *affirmed on rehearing* 98 Pac. 513 (1908).

Texas.—*Morgan v. State*, 54 Tex. Cr. App. 542, 113 S. W. 934 (1908).

Washington.—*State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096 (1908).

England.—*R. v. Hunt*, 2 Cox Cr. C. 239 (1847).

"The declarations must be made under a sense of impending death, but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears in any manner that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of medical or other attendants stated to him, or from his conduct or other circumstances of the case—all of which are resorted to in order to ascertain the state of

the declarant's mind." *Miller v. State*, 27 Tex. Cr. App. 63, 81, 10 S. W. 447 (1889), per Hurt, J.

It is not essential to the admission of a statement as a dying declaration that the deceased before making it should have expressed a sense of impending death. Such an expression may immediately follow as well as precede the declaration where essential to admissibility. "Nor, as the decisions show, does the circumstance that the incriminating statement was made before the deceased had expressed any opinion or made any statement with regard to his condition evidencing his belief in impending death from the injury he had received, prevent its admission. His mental condition is a matter of inference from the attendant circumstances, including in this case, of course, his statements." *Rex v. Sunfield*, 10 O. W. R. 1010, 15 O. L. R. 252 (1907), per Moss, C. J.

10. *Washington v. State*, 137 Ga. 218, 73 S. E. 512 (1911).

§ 2842-1. *Daughdrill v. State*, 113 Ala. 7, 21 So. 378 (1896).

2. § 2831.

3. *State v. Ashworth*, 50 La. Ann. 94, 23 So. 270 (1898); *Brande v. State*, (Tex. Cr. App. 1898) 45 S. W. 17 (1898).

4. § 3016.

Use of questions.—It is not regarded as objectionable that the statement, oral or written, is made in response to questions,⁵ even those which are leading in their nature.⁶ That the declarant is

5. *Alabama.*—Greer v. State, 156 Ala. 15, 47 So. 300 (1908); Anderson v. State, 79 Ala. 5 (1885); Ingram v. State, 67 Ala. 67 (1880).

Florida.—Richard v. State, 42 Fla. 528, 29 So. 413 (1900).

Georgia.—Smith v. State, 9 Ga. App. 403, 71 S. E. 606 (1911) (by-stander); Cason v. State, 134 Ga. 786, 68 S. E. 554 (1910); Park v. State, 126 Ga. 575, 55 S. E. 489 (1906).

Illinois.—North v. People, 139 Ill. 81, 28 N. E. 966 (1891).

Indiana.—Boyle v. State, 97 Ind. 322 (1884).

Kansas.—State v. Morrison, 64 Kan. 669, 68 Pac. 48 (1902).

Louisiana.—State v. Ashworth, 50 La. Ann. 94, 23 So. 270 (1898); State v. Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293 (1880).

Massachusetts.—Com. v. Haney, 127 Mass. 455 (1879).

Oregon.—State v. Foot You, 24 Ore. 61, 32 Pac. 1031, 33 Pac. 537, affirmed 24 Ore. 61, 33 Pac. 537 (1893).

Texas.—Graham v. State, 57 Tex. Cr. App. 104, 123 S. W. 691 (1909); Phillips v. State, 50 Tex. Cr. App. 481, 98 S. W. 868 (1906); Grubb v. State, 43 Tex. Cr. App. 72, 63 S. W. 314 (1901); Taylor v. State, 38 Tex. Cr. App. 552, 43 S. W. 1019 (1898); White v. State, 30 Tex. App. 652, 18 S. W. 462 (1892); Hunnicutt v. State, 18 Tex. App. 498, 51 Am. Rep. 330 (1885).

Virginia.—Vass v. Com., 3 Leigh 786, 24 Am. Dec. 695 (1831).

England.—Rex v. Fagent, 7 C. & P. 238, 32 E. C. L. 590 (1835).

Canada.—Rex v. Louie, 23 Can. L. T. 274, 10 B. C. R. 1 (1903); R. v. Sparham, 25 U. C. C. P. 143 (1875).

The statement is admissible where in response to question by a by-

stander. Smith v. State, 9 Ga. App. 403, 71 S. E. 606 (1911).

6. *Alabama.*—McLean v. State, 16 Ala. 672, 675 (1849).

California.—People v. Sanchez, 24 Cal. 17 (1864).

Louisiana.—State v. Ashworth, 50 La. Ann. 94, 23 So. 270 (1898).

Maryland.—Worthington v. State, 92 Md. 222, 48 Atl. 355, 56 L. R. A. 353, 84 Am. St. Rep. 506 (1901).

Texas.—Rice v. State, 51 Tex. Cr. App. 255, 103 S. W. 1156 (1907).

Utah.—People v. Callaghan, 4 Utah 49, 6 Pac. 49 (1885).

Virginia.—Vass v. Com., 3 Leigh 786, 24 Am. Dec. 695 (1831).

United States.—Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. ed. 917 (1892).

England.—Reg. v. Smith, 10 Cox Cr. C. 82, 11 Jur. (N. S.) 695, L. & C. 607, 34 L. J. M. C. 153, 12 L. T. Rep. (N. S.) 608, 13 Wkly. Rep. 816 (1865); R. v. Fagent, 7 C. & P. 238 (1835).

Ireland.—R. v. Fitzpatrick, 46 I. L. T. 173 (1912).

Canada.—Reg. v. Smith, 23 U. C. C. P. 312 (1873).

See, however, Tex. C. Cr. P. § 788 (1895).

It is often difficult, under the circumstances, to call the attention of the speaker in any other way to the subject upon which his statement is desired. So much may be permitted, on general administrative principles. Should it appear that more than this has been done in any particular case, language and ideas being supplied to the speaker rather than suggested for his voluntary acceptance, the dying declaration or, if separable, the part affected, may be excluded. People v. Fuhrig, 127 Cal. 412, 59 Pac. 693 (1899); R. v. Mitchell, 17 Cox. Cr. C.

urged to make his statement, does not destroy its voluntary character or have the effect of excluding it. Such an insistence affects, like the use of questions, merely the probative force of what is said.⁷

§ 2843. (Form of Declaration); Signs.—A dying declaration may be made, in whole or in part, by nods,¹ gestures or signs.²

503, 507 (1892). On the other hand, certain judicial administrators have deemed it best to have such infirmative considerations weighed by the jury. The court in Michigan, for example, say: "Where they are taken under suspicious circumstances, or drawn out by doubtful means, they are not excluded, but go to the jury for what they are worth." *People v. Knapp*, 26 Mich. 112, 116 (1872), per Campbell, J. Others have rejected the dying statement where it has been made in response to a question obviously leading and suggestive. *Lockhart v. State*, 53 Tex. Cr. App. 589, 111 S. W. 1024 (1908).

Administrative fairness, both to the prosecution and to the accused, must be the prevailing consideration in all cases. Thus, where deceased, as a part of his dying declaration, stated that at the time he was shot he was facing accused, when a physician asked him if he was not mistaken, stating that that could not be true, because he was shot in the rear part of the leg, and not in front, whereupon deceased stated he did not know whether his back was turned to accused or not when the latter shot him, it was held, that it was error for the court to eliminate deceased's colloquy with the doctor and permit the balance of the declaration to go to the jury. *Arnwine v. State*, 50 Tex. Cr. App. 254, 96 S. W. 4 (1906).

7. *People v. Sanchez*, 24 Cal. 17 (1864); *Worthington v. State*, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 353 (1901).

§ 2843-1. *Godfrey v. State*, 31 Ala.

323, 70 Am. Dec. 494 (1858); *People v. Madas*, 201 N. Y. 349, 94 N. E. 857 (1911); *R. v. Louie*, 10 Br. C. 1, 3, 9 (1903).

See, also, *Luby v. Com.*, 12 Bush. (Ky.) 1 (1876).

Declarations may be by acts as well as by words.

Thus, it has been so decided, where a person killed could not speak on account of a tube which had been placed in his windpipe to enable him to breathe after the performance of an operation on him necessitated by the wound inflicted and he could only answer questions by a nod or by shaking his head he being conscious and intelligent, comprehending what was said to him and having no chance of recovery. *People v. Madas*, 201 N. Y. 349, 94 N. E. 857 (1911).

Under a case presenting peculiar facts where the deceased communicated by words his supposed approval of answers given by his friends in response to questions asked by his attorney, the statement was rejected, the court not being satisfied "that he either perfectly understood the language, or was able to have detected the erroneous inference as to his meaning, which his friends may have honestly drawn in making the answers set forth in the statement." *McHugh v. State*, 31 Ala. 317, 322 (1858), per Rice, C. J.

2. *Jones v. State*, 71 Ind. 66 (1880); *State v. Morrison*, 64 Kan. 669, 68 Pac. 48 (1902); *Com. v. Casey*, 11 Cush. (Mass.) 417, 59 Am. Dec. 150 (1853) (pointing); *Baxter v. State*, 15 Lea (Tenn.) 657 (1885).

As the Court of Appeals of Kentucky, speaking on this subject, say:³ "Dying declarations are not necessarily either written or spoken. Any method of communication between mind and mind may be adopted that will develop the thought, as the pressure of the hand, a nod of the head, or a glance of the eye." So hand pressure and other signals⁴ may be employed by the injured person in making his dying declaration. In the same way, the declaration may consist in part of a pointing with the finger.⁵ He may use these on his own initiative or he may so express his approval or disapproval of statements made in his presence by others. In view of the serious consequences involved, a presiding judge may feel justified in rejecting the declarations made in this way, where there is ground for believing that the assent to the statements made to him conveyed by a nod was due rather to impatience to be free from annoyance under trying circumstances⁶ or a defective consciousness as to what was going on⁷ than from any real desire to assent.

§ 2844. (*Form of Declaration*); Written.—The dying declaration may be in writing¹ and may properly be signed by the

3. *Mockabee v. Com.*, 78 Ky. 380 (1880), per Hines, J.

4. *People v. Madas*, 201 N. Y. 349, 94 N. E. 857 (1911) (pointing); *R. v. Steele*, 12 Cox Cr. C. 168 (1872) ("Tell him Patchett").

"It is equivalent to saying it himself." *R. v. Steele*, 12 Cox Cr. C. 168 (1872), per Lush, J.

5. *Com. v. Casey*, 11 Cush. (Mass.) 417, 59 Am. Dec. 150 (1853).

See, also, *Luby v. Com.*, 12 Bush. (Ky.) 1 (1876).

6. *McHugh v. State*, 31 Ala. 317 (1858). To the same effect, see *Godfrey v. State*, 31 Ala. 323, 70 Am. Dec. 494 (1858). "He was in just that condition, in which for the sake of peace, or to be rid of the importunity or annoyance of those around him, the probability is, he would assent to, or seem to say, whatever they might choose to suggest. Such an assent, obtained under such circumstances, by the friends on whom

he relied; not merely to a translation of language he himself had uttered to express his meaning, but to their inferences as to his meaning, couched in their own language, or in the language of the attorney who took down the statement; cannot safely or legally be held sufficient to give to the statement thus assented to the force and effect of dying declarations, in a cause involving the life or liberty of a human being." *McHugh v. State*, 31 Ala. 317, 322 (1858), per Rice, C. J.

7. "There was no evidence of sufficient consciousness to comprehend the questions asked." *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953 (1894).

§ 2844-1. *Alabama*.—*Scales v. State*, 96 Ala. 69, 11 So. 121 (1892).

Georgia.—*Freeman v. State*, 112 Ga. 48, 37 S. E. 172 (1900); *Perry v. State*, 102 Ga. 365, 30 S. E. 903 (1897).

declarant.² The fact, however, that he did not sign the statement and even was physically unable to do so is not conclusive against its admissibility.³ Neither, on the other hand, does the presence of a certain degree of formality, as where the declarant has not only signed the document,⁴ in presence of a subscribing witness,⁵ but sworn to ⁶ it, confer increased admissibility, in the

Idaho.—State v. Wilmbusse, 8 Ida. 608, 70 Pac. 849 (1902).

Indiana.—Jones v. State, 71 Ind. 66 (1880).

Kansas.—State v. Morrison, 64 Kan. 669, 68 Pac. 48 (1902).

Kentucky.—Hendrickson v. Com., 73 S. W. 764, 24 Ky. L. Rep. 2173 (1903); People v. Com., 87 Ky. 487, 9 S. W. 509, 810, 10 Ky. L. Rep. 517 (1888).

Louisiana.—State v. Parham, 48 La. Ann. 1309, 20 So. 727 (1896).

Massachusetts.—Com. v. Haney, 127 Mass. 455 (1879).

Minnesota.—State v. Cantieny, 34 Minn. 1, 24 N. W. 458 (1885).

North Carolina.—State v. Craine, 120 N. C. 601, 27 S. E. 72 (1897).

Ohio.—State v. Kindel, 47 Ohio St. 358, 24 N. E. 485 (1890).

Pennsylvania.—Com. v. Birriolo, 197 Pa. St. 371, 17 Atl. 355 (1900); Com. v. Stoops, Add. 381 (1799).

South Carolina.—State v. Ferguson, 2 Hill 619, 27 Am. Dec. 412 (1835).

Tennessee.—King v. State, 91 Tenn. 617, 20 S. W. 169 (1892).

Texas.—Bennett v. State, 47 Tex. Cr. App. 52, 81 S. W. 30 (1904); Adams v. State (App. 1892), 19 S. W. 907; Drake v. State, 25 Tex. App. 293, 7 S. W. 868 (1888).

Utah.—People v. Callaghan, 4 Utah 49, 6 Pac. 49 (1885).

Washington.—State v. Baldwin, 15 Wash. 15, 45 Pac. 650 (1896).

Wisconsin.—State v. Martin, 30 Wis. 216, 11 Am. St. Rep. 567 (1872).

England.—Reg. v. Hunt, 2 Cox. Cr. C. 239 (1847); Rex v. Gay, 7 C. & P. 230, 32 E. C. L. 586 (1835).

A statement drawn by the prosecuting attorney and read in the presence of and assented to by the deceased who signed it in the presence of witnesses is admissible. State v. Quinn, 56 Wash. 295, 105 Pac. 818 (1909).

2. Com. v. Haney, 127 Mass. 455 (1879) (mark); King v. State, 91 Tenn. 617, 20 S. W. 169 (1892).

Signature by mark.—Where the declarant is too ignorant or too weak to sign his name, his mark will be regarded as sufficient. Weaver v. People, 47 Colo. 617, 108 Pac. 331 (1910).

3. State v. Carrington, 15 Utah 480, 50 Pac. 526 (1897).

4. People v. White, 251 Ill. 67, 95 N. E. 1036 (1911).

5. People v. White, 251 Ill. 67, 95 N. E. 1036 (1911); State v. Byrd, 41 Mont. 585, 111 Pac. 407 (1910).

Nurses as subscribing witnesses.—A dying declaration in writing signed by two nurses as subscribing witnesses will not be rejected on the ground that the jury may be misled into supposing that the attendants were attesting the truth of the facts stated. People v. White, 251 Ill. 67, 95 N. E. 1036 (1911).

It is not required that the written declaration should have been made in the presence of a subscribing witness. McHugh v. State, 31 Ala. 317 (1858).

6. *California*.—People v. Brady, 72 Cal. 490, 14 Pac. 202 (1887).

Louisiana.—State v. Carter, 106 La. 407, 30 So. 895 (1901).

Massachusetts.—Com. v. Haney, 127 Mass. 455 (1879).

absence of some legal authority for administering the oath.⁷ Where the declarant does not ratify the truth of his statement by signing it, it is essential to its admissibility that he should have assented in some way to the truth of what purports to be his written statement,⁸ either upon reading it⁹ or upon having it read to him.¹⁰ It follows that a written statement of what the injured man said, taken down by a bystander, and not communicated to the declarant is not admissible as original evidence.¹¹ The expect-

Montana.—State v. Byrd, 41 Mont. 585, 111 Pac. 407 (1910).

North Carolina.—State v. Arnold, 35 N. C. 184 (1851).

South Carolina.—State v. Talbert, 41 S. C. 526, 19 S. E. 852 (1894).

Tennessee.—Turner v. State, 89 Tenn. 547, 15 S. W. 838 (1891); Bostick v. State, 3 Humphr. 344 (1842).

Affidavit.—It is immaterial that a dying declaration is in the form of an affidavit. State v. Bonar, 71 Kan. 800, 81 Pac. 484 (1905).

A deposition before a coroner, though incompetent as evidence, may be received as a dying declaration provided the proper foundation be laid for its reception. People v. Knapp, 1 Edm. Sel. Cas. (N. Y.) 177 (1845).

7. State v. Frazier, Houst. Cr. Cas. (Del.) 176 (1865). It is not deemed objectionable that the presence of an oath imports an "additional verity not provided for by law." Turner v. State, 89 Tenn. 547, 15 S. W. 838 (1891).

8. *Alabama*.—Darby v. State, 92 Ala. 9, 9 So. 429 (1890); Anderson v. State, 79 Ala. 5 (1885).

Arkansas.—Jackson v. State, 145 S. W. 559 (1912).

Delaware.—State v. Brooks, 84 Atl. 225 (1912).

Georgia.—Freeman v. State, 112 Ga. 48, 37 S. E. 172 (1900) (deceased need not sign).

Indiana.—Binns v. State, 46 Ind. 311 (1874).

Iowa.—State v. Sullivan, 51 Iowa

142, 50 N. W. 572 (1879); State v. Elliott, 45 Iowa 486 (1877); State v. Fraunburg, 40 Iowa 555 (1875).

Kansas.—State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257 (1880).

Kentucky.—Sailsberry v. Com., 107 S. W. 774, 32 Ky. L. Rep. 1085 (1908); Fuqua v. Com., 118 Ky. 578, 81 S. W. 923, 26 Ky. L. Rep. 420 (1904); Fuqua v. Com., 73 S. W. 782, 24 Ky. L. Rep. 2204 (1903).

Louisiana.—State v. Parham, 48 La. Ann. 1309, 20 So. 727 (1896); State v. Somnier, 33 La. Ann. 237 (1881).

Pennsylvania.—Allison v. Com., 99 Pa. St. 17 (1881).

Texas.—Hunter v. State, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910).

Utah.—People v. Callaghan, 4 Utah 49, 6 Pac. 49 (1885).

Washington.—State v. Baldwin, 15 Wash. 15, 45 Pac. 650 (1896).

Wyoming.—Foley v. State, 11 Wyo. 464, 72 Pac. 627 (1903).

England.—Rex v. Smith, 65 J. P. 426 (1901).

9. Perry v. State, 102 Ga. 365, 30 S. E. 903 (1898).

10. State v. Carrington, 15 Utah 480, 50 Pac. 526 (1897).

11. Jackson v. State, (Ark. 1912) 145 S. W. 559; State v. Fraunburg, 40 Iowa 555 (1875); Sailsberry v. Com., 32 Ky. L. Rep. 1085, 107 S. W. 774 (1908); Fuqua v. Com., 118 Ky. 578, 26 Ky. L. Rep. 420, 81 S. W. 923 (1904); Beets v. State, Meigs (Tenn.) 106 (1838). Compare State v. Byrd, 41 Mont. 585, 111 Pac. 407 (1910).

tation of death on the part of the declarant need not be distinctly stated in the written declaration,¹² although such fact may be properly inserted.¹³ Nor is it essential to admissibility that the written declaration should be in the exact words of the declarant¹⁴ especially where it has been read to and ratified by him.¹⁵

No administrative objection exists to receiving a written declaration in narrative form, although it was originally given by way of question and answer, provided that the speaker has assented to the statement in its present form.¹⁶

A *mere certificate* of the justice of the peace that the statement to which it is attached is a dying declaration will not secure its admissibility in the absence of proof that the deceased made the

Texas rule.—A good working rule would seem to be that adopted in Texas. Declarations reduced to writing for decedent by another are not admissible as written dying declarations unless it appears that decedent fully understood and consented to them, and as a rule they should be read to and approved by him after being reduced to writing. So a statement reduced to writing by another, from decedent's answers to questions, which was not read to nor approved by him, was not admissible as a written dying declaration. *Hunter v. State*, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910).

12. California.—*People v. Yokum*, 118 Cal. 437, 50 Pac. 686 (1897).

Kentucky.—*Austin v. Com.*, 40 S. W. 905, 19 Ky. L. Rep. 474 (1897).

Massachusetts.—*Com. v. Haney*, 127 Mass. 455 (1879).

Washington.—*State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096 (1908).

England.—*R. v. Hunt*, 2 Cox Cr. C. 239 (1847).

See also § 2841

"It was not necessary that the written statement should contain the express declaration that the declarant believed she was about to die, and it was not necessary to show by other testimony that she actually

used the words. It was sufficient to show, either by the statement itself or by other credible testimony, such statements or circumstances as would convince a reasonable mind that the declarant believed at the time that she was *in extremis*." *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096 (1908), per Hadley, C. J.

13. People v. Buettner, 233 Ill. 272, 84 N. E. 218 (1908); *State v. Biango*, 75 N. J. L. 284, 68 Atl. 125 (1907).

14. Weaver v. People, 47 Colo. 617, 108 Pac. 331 (1910).

15. State v. Clark, 64 W. Va. 625, 63 S. E. 402 (1908).

16. Richard v. State, 42 Fla. 528, 29 So. 413 (1900); *State v. Williams*, 28 Nev. 395, 82 Pac. 353 (1905); *Com. v. Birriolo*, 197 Pa. 371, 47 Atl. 355 (1900); *R. v. Louie*, 10 Br. C. 1, 8 (1903).

Where a magistrate took notes of a statement made by a dying woman who became too exhausted to complete it and he read certain portions of a prior statement of hers which he wrote down asking her if it was correct and then read the whole statement to her which she signed, it was admitted in evidence as a dying declaration. *R. v. Whitmarsh* (1898), 62 J. P. 680.

statement, understood its contents, and was under a sense of impending dissolution.¹⁷

Reiterated statements.—A statement made while there is hope of recovery becomes admissible as a dying declaration if affirmed after consciousness of impending death has supervened.¹⁸

§ 2845. (Form of Declaration; Written); Best Evidence Rule applies.—Though in no way connected with the reasoning upon which the “best evidence rule,” in its application to the proof of contents of a document, was founded and is maintained,¹ it is settled that this rule of procedure, originally administrative in its nature,² applies to proving the contents of a dying declaration

17. *Green v. State*, 43 Fla. 552, 30 So. 798 (1901).

18. *Alabama*.—*Sims v. State*, 139 Ala. 74, 36 So. 138, 101 Am. St. Rep. 17 (1904); *Johnson v. State*, 102 Ala. 1, 16 So. 99 (1894).

California.—*People v. Crews*, 102 Cal. 174, 36 Pac. 367 (1894).

Georgia.—*Park v. State*, 126 Ga. 575, 55 S. E. 489 (1906).

Kentucky.—*Smith v. Com.*, 67 S. W. 32 (1902); *Wilson v. Com.*, 60 S. W. 400, 22 Ky. L. Rep. 1251 (1901); *Mockabee v. Com.*, 78 Ky. 380 (1880).

Missouri.—*State v. Gorth*, 164 Mo. 553, 65 S. W. 275 (1901); *State v. Evans*, 124 Mo. 397, 409, 28 S. W. 8 (1894).

England.—*R. v. Steele*, 12 Cox Cr. C. 168, 170 (1872).

See, however, *Harper v. State*, 79 Miss. 575, 31 So. 195 (1901).

Previous statements may be admissible as dying declarations when they have been re-affirmed by the deceased under a sense of impending death. To render them admissible, however, they must have been referred to and identified with a great degree of certainty. The supreme court of Washington say, in this connection: “When it is sought to show that former statements of the deceased were re-affirmed under a sense of impending death, then such statements must be referred to and re-affirmed with

such a degree of certainty that there can be no doubt as to what previous statements are meant by the deceased to be re-affirmed.” *State v. Peacock*, 58 Wash. 41, 44, 107 Pac. 1022, 27 L. R. A. (N. S.) 702 (1910), per Parker, J.

A repetition of the statement during an interval of hope would not itself be admissible as a dying declaration. *State v. Sadler*, 61 La. Ann. 1397, 26 So. 390 (1899); *Carver v. U. S.*, 160 U. S. 553, 16 Sup. Ct. 388, 40 L. ed. 532 (1896).

§ 2845-1. Best on Ev. (Chamberlayne’s 3d Amer. ed.), p. 215.

2. “Best Evidence.”—It cannot be doubted that judicial administration, as applied to the law of evidence, suffered the loss of a very efficient means of exhibiting truth and doing justice when the permissive portion of the “best evidence” rule—what Burke in his sonorous diction refers to as the “one general rule of evidence,—the best that the nature of the case will admit. . . the master rule that governs all the subordinate rules,” (11 Burke’s Works (Little & Brown’s ed.) 77, quoted in Thayer, Prelim. Treat. 492,) fell under the blight of the procedural temper of the times. Applying the doctrine of *stare decisis*, (§§ 172, 1618 n. 2), to so elastic an administrative principle made it almost at once un-

when the latter is in writing.³ In other words, the contents of a written dying declaration, until a satisfactory reason be shown for failure to do so, must be proved by the production of the original declaration itself. The rule by no means requires that other evidence of the same fact should not be given. The requirement simply is that if this particular fact of the contents of a given written statement is to be shown it should be proved only in this way. Oral testimony may be given as to what the declarant said, by way of a dying declaration, although there is a written statement con-

workable. A judicial ruling upon a particular forensic situation *ipso facto* entered under this doctrine, into the domain of substantive law. Upon the presentation to a judge of any subsequent combination including similar facts, the prior decision obviously tended to fetter freedom of administrative action, regardless of the particular equities of the case. Such a process could not long continue. Almost as a matter of necessity for the preservation of the social value of truth which sound administration must always recognize, as well as in order to secure individual justice, some portion of this permissive "Best Evidence" administrative principle has been made operative in favor of litigants, through the enforcement of the paramount fundamental right of each party to a suit to prove his case by the best evidence practically in his power.

§§ 334 *et seq.*

The relevancy of any particular fact tendered in evidence must, of course, be shown. That which is not relevant is not evidence.

§ 1711.

The salutary, if not indispensable, nature of this administrative principle is generally recognized not only in the English Judicature Acts, but in the modern procedural codes of the United States. Prejudice against the entrusting of administrative power to the judicial servants of democracy is upon the wane. Undoubtedly the

protagonists of freedom, the early sufferers for popular rights, were much aggrieved by judicial action in matters of administration. Not unnaturally, a deep distrust of judges, not circumscribed in every situation by a fixed rule, took possession of immediately succeeding times and a somewhat panicky fear on the subject has written itself very broadly into the organic law. The fact is becoming recognized, however, that satisfactory justice is possible under general enactments only when these are enforced by competent administrators employing sound principles. As Pollock and Maitland observe: "It must not escape us that a law about 'actions in general' involves the exercise by our judges of wide discretionary powers. If the rules of procedure take nowadays a far more general shape than that which they took in the past centuries, this is because we have been persuaded that no rules of procedure can be special enough to do good justice in all particular cases. Instead of having one code for actions of trespass and another for actions of debt, we have a code for actions; but then at every turn some discretionary power over each particular case is committed to 'the court or a judge.'" 2 Pollock & M. Hist. of Eng. Law 560.

3. *Alabama*.—Boulden v. State, 102 Ala. 78, 15 So. 341 (1894).

Arkansas.—Collier v. State, 20 Ark. 36 (1859).

cerning the same affair⁴ and even though the document has been

California.—People v. Glenn, 10 Cal. 32 (1858).

Florida.—Gardner v. State, 55 Fla. 1025, 45 So. 1028 (1908) (copy rejected).

Iowa.—State v. Tweedy, 11 Iowa 350 (1860).

Tennessee.—Turner v. State, 89 Tenn. 547, 15 S. W. 838 (1890).

Texas.—Drake v. State, 25 Tex. App. 293, 7 S. W. 868 (1888); Krebs v. State, 8 Tex. App. 1 (1880).

Unratified statements not within the rule.

Where the dying declarations were taken down in writing by a witness but not read to, signed or assented to by the deceased, the supreme court of Iowa held that the absence of the original need not be accounted for. Speaking of the opposite contention the court says: "This would have been correct if the writing had been signed by deceased, or, probably, read to and pronounced by him correct. It was, however, a mere memorandum made by the witness." State v. Sullivan, 51 Iowa 142, 50 N. W. 572 (1879), per Beck, C. J.

4. *Alabama*.—Pate v. State, 150 Ala. 10, 43 So. 343 (1907); Sims v. State, 139 Ala. 74, 36 So. 138, 101 Am. St. Rep. 17 (1904); Jarvis v. State, 138 Ala. 17, 34 So. 1025 (1902); Anderson v. State, 79 Ala. 5, 8 (1885); Kelly v. State, 52 Ala. 361 (1875).

Arkansas.—Collier v. State, 20 Ark. 36, 44 (1859).

California.—People v. Vernon, 35 Cal. 49, 95 Am. Dec. 49 (1868); People v. Glenn, 10 Cal. 32, 37 (1858).

Colorado.—Zipperian v. People, 33 Colo. 134, 79 Pac. 1018 (1905).

Florida.—Morrison v. State, 42 Fla. 149, 28 So. 97 (1900).

Georgia.—Mixon v. State, 7 Ga. App. 805, 68 S. E. 315 (1910).

Illinois.—Dunn v. People, 172 Ill. 582, 50 N. E. 137 (1898).

Indiana.—Lane v. State, 151 Ind. 511, 51 N. E. 1056 (1898).

Iowa.—State v. Sullivan, 51 Iowa 142, 146, 50 N. W. 572 (1879); State v. Tweedy, 11 Iowa 350, 359 (1860).

Kentucky.—Allen v. Com., 134 Ky. 110, 119 S. W. 795 (1909).

Missouri.—State v. Holcomb, 86 Mo. 371, 377 (1885).

Oklahoma.—Morris v. State, 6 Okla. Cr. App. 29, 115 Pac. 1030 (1911).

Pennsylvania.—Allison v. Com., 99 Pa. 17, 33 (1881).

Tennessee.—Epperson v. State, 5 Lea 291, 297 (1880).

Texas.—Long v. State, 48 Tex. Cr. App. 175, 88 S. W. 203 (1905).

Though the proposed witness has put his oral statement into writing, he is not required to account for the loss of the document, if the latter has not been read to, signed or otherwise approved by the declarant. Darby v. State, 92 Ala. 9, 9 So. 429 (1891); State v. Sullivan, 51 Iowa 142, 50 N. W. 572 (1879); Allison v. Com., 99 Pa. St. 17 (1881).

It is no ground for rejecting the oral statement that it contradicts the written declaration. Hunter v. State, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910).

Partial reduction to writing.—A witness who has reduced a part of a dying declaration to writing may testify from his recollection as to the whole of the declaration, without producing the written statement. Jackson v. State, (Ark. 1912) 145 S. W. 559.

On the other hand, where a proper predicate has been laid for the admission of a dying declaration, it is no objection that such declaration is written instead of being orally testified to by persons who heard it. Bennett v. State, 47 Tex. Cr. App. 52, 81 S. W. 30 (1904).

signed⁵ or otherwise authenticated. Other judicial administrators have declined to receive a verbal statement where a declaration in writing has been signed by the deceased⁶ and even where no such verification has taken place, if the written statement is the only one made.⁷ In the same line of careful administration it has insisted that where there is a complete written statement authenticated by the declarant no testimony will be received to the same effect until the written declaration has been read or a satisfactory reason given for its non-production.⁸

Effect of oath.—Dying declarations do not derive their verity

5. *Iowa.*—State v. Walton, 92 Iowa 455, 61 N. W. 179 (1894).

Kentucky.—Hendrickson v. Com., 73 S. W. 764, 24 Ky. L. Rep. 2173 (1903).

Michigan.—People v. Simpson, 48 Mich. 474, 12 N. W. 662 (1882).

North Carolina.—State v. Whitson, 111 N. C. 695, 697, 16 S. E. 332 (1892).

Tennessee.—Beets v. State, Meigs 106 (1838).

Texas.—Ryan v. State (Cr. App. 1912), 142 S. W. 878; Herd v. State, 43 Tex. Cr. App. 575, 67 S. W. 495 (1902).

No interpolation or addition will be permitted to be made in a written dying declaration after it has been signed or assented to by the declarant. The better practice is to establish the new matter by oral testimony. State v. Doris, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 n. (1908).

6. *Alabama.*—Boulden v. State, 102 Ala. 78, 84, 15 So. 341 (1893).

California.—People v. Glenn, 10 Cal. 32, 37 (1858).

Iowa.—State v. Tweedy, 11 Iowa 350, 359 (1860).

Kentucky.—Saylor v. Com., 97 Ky. 184, 30 S. W. 390, 17 Ky. L. Rep. 100 (1895).

Tennessee.—King v. State, 91 Tenn. 617, 650, 20 S. W. 169 (1892).

Utah.—People v. Tracey, 1 Utah 343, 346 (1876).

England.—Rex v. Gay, 7 C. & P. 230, 32 E. C. L. 586 (1835).

7. *Epperson v. State*, 5 Lea (Tenn.) 291, 297 (1880).

Independent declarations.—Oral evidence may be received of an independent declaration made at the same or a different time. People v. Vernon, 35 Cal. 49, 95 Am. Dec. 49 (1868); Epperson v. State, 5 Lea (Tenn.) 291, 297 (1880). Still more often oral declarations made at other times may be received. People v. Glenn, 10 Cal. 32, 37 (1858); State v. Tweedy, 11 Iowa 350, 359 (1860); Hunter v. State, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910).

8. *Arkansas.*—Collier v. State, 20 Ark. 36 (1859).

California.—People v. Glenn, 10 Cal. 32 (1858).

Iowa.—State v. Tweedy, 11 Iowa 350 (1860).

Texas.—Drake v. State, 25 Tex. App. 293, 7 S. W. 868 (1888); Krebs v. State, 8 Tex. App. 1 (1880).

Wisconsin.—State v. Cameron, 2 Pinn. 490, 2 Chandl. 172 (1850).

A copy of a dying declaration taken down by a justice of the peace, should not be admitted in evidence, over the objection of the defendant, when the absence of the original has not been satisfactorily accounted for and explained, especially where the original would not be admissible. Gardner v. State, 55 Fla. 25, 45 So. 1028 (1908).

from an oath. Hence the administration of an oath to one making a dying declaration is immaterial.⁹ The fact that the written statement was taken down by a magistrate authorized to administer oaths does not render oral evidence on the same subject inadmissible.¹⁰

A fortiori, the fact that the dying declaration made on one occasion was reduced to writing furnishes no ground for excluding oral evidence of similar statements made on other occasions.¹¹

Waiver.—Should a sworn written statement containing a dying declaration be rejected on the trial at the instance of the accused, the latter will not be at liberty to object to the reception of oral testimony as to what the dying declaration was, provided that the other conditions of admissibility are satisfied.¹²

§ 2846. (Form of Declaration; Written); Memorandum to refresh Memory.—A written document prepared as a dying dec-

9. *Jackson v. State*, (Ark. 1912) 145 S. W. 559; *State v. Byrd*, 41 Mont. 585, 111 Pac. 407 (1910); *State v. Talbert*, 41 S. C. 526, 19 S. E. 852 (1894). See, also, *State v. Clark*, 64 W. Va. 625, 63 S. E. 402 (1908).

The fact that a declaration was made under the sanction of an oath cannot give it less validity than a simply written or even oral statement which would be admissible. *Rex v. Magyar*, 4 W. L. R. 396 (1906).

10. *Beets v. State*, Meigs 106 (1838).

A contrary view has, however, been held. *R. v. Reason and Tranter*, 16 How. St. Tr. 1, 33 (1722).

11. *Arkansas*.—*Collier v. State*, 20 Ark. 36 (1859).

California.—*People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49 (1868); *People v. Glenn*, 10 Cal. 37 (1858).

Illinois.—*Dunn v. People*, 172 Ill. 582, 50 N. E. 137 (1898).

Indiana.—*Skenkenberger v. State*, 154 Ind. 630, 57 N. E. 519 (1900); *Lane v. State*, 151 Ind. 511, 51 N. E. 1056 (1898).

Iowa.—*State v. Walton*, 92 Iowa 455, 61 N. W. 179 (1894); *State v. Schmidt*, 73 Iowa 469, 35 N. W. 590

(1887); *State v. Tweedy*, 11 Iowa 350 (1860).

Kentucky.—*Hendrickson v. Com.*, 73 S. W. 764, 24 Ky. L. Rep. 2173 (1903); *Hines v. Com.*, 90 Ky. 64, 13 S. W. 445, 1 Ky. L. Rep. 865 (1890).

Michigan.—*People v. Simpson*, 48 Mich. 474, 12 N. W. 662 (1882).

Tennessee.—*Epperson v. State*, 5 Lea 291 (1880).

Texas.—*Herd v. State*, 43 Tex. Cr. App. 575, 67 S. W. 495 (1902); *Krebs v. State*, 8 Tex. App. 1 (1880).

Utah.—*State v. Carrington*, 15 Utah 480, 50 Pac. 526 (1897).

England.—*Rex v. Reason*, 16 How. St. Tr. 1 (1722).

12. *Hines v. Com.*, 90 Ky. 64, 13 S. W. 445, 1 Ky. L. Rep. 865 (1890).

Where the accused, for any reason, procures the rejection of the writing, as he did in this case, it does not lie in his mouth to object to oral testimony detailing what the deceased then said, provided it be shown that the statement was made under the conditions necessary to render a statement admissible as a dying declaration." *Hines v. Com.*, 90 Ky. 64, 67, 13 S. W. 445, 1 Ky. L. Rep. 865 (1890), per Holt, J.

laration, though signed and sworn to, need not be used in evidence as speaking for itself. It may be employed merely as a memorandum by which to refresh the memory of a witness who heard the oral declarations and testifies to them.¹ Even in jurisdictions where the memoranda cannot be treated as original evidence, they are clearly admissible for the limited purpose mentioned.² Should a witness have made memoranda of a dying declaration in order to refresh his memory and subsequently lost them, the loss will not affect the admissibility of his testimony but merely its probative force.³

§ 2847. Number of dying Declarations.—Where statements are made by the deceased at different times, all may be proved as his dying declarations if all are made under a sense of impending death.¹ Should the original statement have been made while the declarant was not in the required mental condition, his subsequent affirmance of it, while under the sense of impending dissolution, admits the earlier declaration, provided that there is no uncertainty as to what statements are referred to.² Where certain of these dying statements are in writing, others being oral, there is no administrative requirement that the writings shall be

§ 2846-1. *Sailsberry v. Com.*, 32 Ky. L. Rep. 1085, 107 S. W. 774 (1908); *Com. v. Haney*, 127 Mass. 455 (1879); *State v. Whitson*, 111 N. C. 695, 697, 16 S. E. 332 (1892); *Turner v. State*, 89 Tenn. 547, 15 S. W. 838 (1891).

"The words used by the deceased were none the less primary evidence for having been taken down by a bystander in writing. They may be testified to by any witness who heard and remembers them. The written statement was a contemporary memorandum of what was said and witness had a right to refer to it for the purpose of refreshing his memory." *Com. v. Haney*, 127 Mass. 455, 458 (1879), per Ames, J.

2. *Alabama.*—*Anderson v. State*, 79 Ala. 5 (1885).

Massachusetts.—*Com. v. Haney*, 127 Mass. 455 (1879).

North Carolina.—*State v. Whitson*, 111 N. C. 695, 16 S. E. 332 (1892).

Tennessee.—*Beets v. State*, Meigs 106 (1838).

Wyoming.—*Foley v. State*, 11 Wyo. 464, 72 Pac. 627 (1903).

3. *Fuqua v. Com.*, 24 Ky. L. Rep. 2204, 73 S. W. 782 (1903); *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200 (1873).

§ 2847-1. *Florida.*—*Morrison v. State*, 42 Fla. 149, 28 So. 97 (1900).

Illinois.—*Dunn v. People*, 172 Ill. 582, 50 N. E. 137 (1898).

Indiana.—*Lane v. State*, 151 Ind. 511, 51 N. E. 1056 (1898).

Kentucky.—*Hines v. Com.*, 90 Ky. 64, 13 S. W. 445, 1 Ky. L. Rep. 865 (1890).

Michigan.—*People v. Simpson*, 48 Mich. 474, 12 N. W. 662 (1882).

Mississippi.—*Nelms v. State*, 13 Sm. & M. 500, 53 Am. Dec. 94 (1850).

2. *State v. Peacock*, 58 Wash. 41, 107 Pac. 1022, 27 L. R. A. (N. S.) 702 n. (1910).

first produced or their absence accounted for.³ So where one of several oral declarations has been reduced to writing it gains no administrative precedence over the remainder.⁴ And one among several written statements may be proved without producing the others.⁵ Naturally, there is no preference between oral statements made under similar conditions at different times.⁶

§ 2848. Privilege of Husband and Wife.—Under the well-known principle of the common law that husband and wife are permitted to testify as to acts of violence committed by one against the person of the other, it is not questioned in any quarter that the dying declarations of a wife may be admissible upon the trial of an indictment brought against her husband for killing her or *vice versa*.¹ In other words, the relation of husband and wife does not affect the admissibility of the statement. It will be received if otherwise admissible.² Still more clearly, no impediment would arise on this score where the accused was merely an *accomplice* with the husband of the declarant.³

On the other hand, where a husband and wife are killed in separate places, at about the same time, the dying declaration of the one is not admissible on the trial of an indictment for the killing of the other.⁴

§ 2849. Scope of Declaration.—In general, the dying declaration may properly cover whatever the declarant might legally have

3. *Collier v. State*, 20 Ark. 36, 44 (1859).

4. *Dunn v. People*, 172 Ill. 582, 50 N. E. 137 (1898).

5. *Morrison v. State*, 42 Fla. 149, 28 So. 97 (1900).

They are all equally competent. *State v. Carrington*, 15 Utah 480, 50 Pac. 526 (1897).

6. *People v. Simpson*, 48 Mich. 474, 478, 12 N. W. 662 (1882).

§ 2848-1. *Moore v. State*, 12 Ala. 764, 42 Am. Dec. 276 (1848); *People v. Green*, 1 Den. (N. Y.) 614 (1845); *State v. Belcher*, 13 S. C. 459 (1880); *Reg. v. Smith*, 23 U. C. C. P. 312 (1873).

2. *Alabama*.—*Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276 (1848).

Michigan.—*People v. Beverly*, 108 Mich. 509, 66 N. W. 379 (1896).

New York.—*People v. Green*, 1 Den. 614 (1845).

Pennsylvania.—*Com. v. Stoops*, Add. 381 (1799).

South Carolina.—*State v. Belcher*, 13 S. C. 459 (1880).

Texas.—*Rice v. State*, 54 Tex. Cr. App. 149, 112 S. W. 299 (1908).

England.—*Woodcock's Case*, 1 East P. C. 354, 2 Leach C. C. 563 (1789).

3. *State v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065, *affirmed* 56 Minn. 226, 57 N. W. 1065 (1894).

4. *Brown v. Com.*, 73 Pa. 321, 13 Am. Rep. 740 (1873); *Radford v. State*, 33 Tex. Cr. App. 520, 526, 27 S. W. 143 (1894).

stated as a witness,¹ and nothing further.² Primarily, it should cover the *res gestae* of the fatal encounter,³ using the very elastic

§ 2849-1. *Alabama*.—*Oliver v. State*, 17 Ala. 587 (1850).

Arkansas.—*Rhea v. State*, 147 S. W. 463 (1912); *Berry v. State*, 63 Ark. 382, 38 S. W. 1038 (1897).

Kentucky.—*Tibbs v. Com.*, 138 Ky. 558, 128 S. W. 871, 28 L. R. A. (N. S.) 665n. (1910); *Mathedy v. Com.*, 19 S. W. 977, 14 Ky. L. Rep. 182 (1892).

Michigan.—*People v. Olmstead*, 30 Mich. 431 (1874).

Mississippi.—*Guest v. State*, 96 Miss. 871, 52 So. 211 (1910).

Oregon.—*State v. Foot You*, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537 (1893); *affirmed* 24 Oreg. 61, 33 Pac. 537 (1893).

Texas.—*Hinton v. State* (Cr. App. 1907), 100 S. W. 772; *Connell v. State*, 46 Tex. Cr. App. 259, 81 S. W. 746 (1904); *Bateson v. State*, 46 Tex. Cr. App. 34, 80 S. W. 88 (1904).

Utah.—*State v. Carrington*, 15 Utah 480, 50 Pac. 526 (1897).

England.—*R. v. Sellers, Carrington*, Crim. Law 233 (1796).

"The cases all agree that dying declarations are admissible in a case where the evidence would be competent if the declarant were on the witness stand." *Boyle v. State*, 105 Ind. 469, 472 (1885), per Elliott, J.

"I want all you people to swear the truth about this," has been excluded. *Baker v. Com.*, 106 Ky. 212, 50 S. W. 54, 20 Ky. L. Rep. 1778 (1899).

2. *Alabama*.—*Reynolds v. State*, 68 Ala. 502 (1881); *Ben v. State*, 37 Ala. 103 (1861); *Mose v. State*, 35 Ala. 421 (1860).

California.—*People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833 (1897); *People v. Fong Ah Sing*, 64 Cal. 253, 28 Pac. 233 (1883); *People v. Taylor*, 59 Cal. 640, 648 (1881).

Florida.—*Gardner v. State*, 55 Fla. 25, 45 So. 1028 (1908).

Georgia.—*Bush v. State*, 109 Ga. 120, 34 S. E. 298 (1899); *Perry v. State*, 102 Ga. 365, 30 S. E. 903 (1898); *Wilkerson v. State*, 91 Ga. 729, 739, 17 S. E. 990, 44 Am. St. Rep. 63 (1893).

Indiana.—*Seifert v. State*, 160 Ind. 464, 67 N. E. 100, 98 Am. St. Rep. 340 (1903).

Iowa.—*State v. McKnight*, 119 Iowa 79, 93 N. W. 63 (1903).

Kansas.—*State v. O'Shea*, 60 Kan. 772, 57 Pac. 970 (1899).

Kentucky.—*Baker v. Com.*, 106 Ky. 212, 50 S. W. 54, 20 Ky. L. Rep. 1778 (1899); *Redmond v. Com.*, 21 Ky. L. Rep. 331, 51 S. W. 565 (1899); *People v. Com.*, 87 Ky. 500, 9 S. W. 500, 510 (1888); *Leiber v. Com.*, 9 Bush. 13 (1872).

Mississippi.—*Lipscomb v. State*, 75 Miss. 559, 23 So. 210 (1897).

Missouri.—*State v. Parker*, 172 Mo. 191, 72 S. W. 650 (1903).

New York.—*People v. Smith*, 172 N. Y. 210, 64 N. E. 814 (1902).

North Carolina.—*State v. Jefferson*, 125 N. C. 712, 34 S. E. 648 (1899).

Oklahoma.—*Mulkey v. State*, 5 Okla. Cr. 75, 113 Pac. 532 (1911).

Oregon.—*State v. Garrand*, 5 Oreg. 216, 219 (1874).

Texas.—*Lockhart v. State*, 53 Tex. Cr. App. 589, 111 S. W. 1024 (1908); *Connell v. State*, 46 Tex. Cr. App. 259, 81 S. W. 746 (1904).

Washington.—*State v. Moody*, 18 Wash. 165, 51 Pac. 356 (1897).

Wyoming.—*Foley v. State*, 11 Wyo. 464, 72 Pac. 627 (1903).

"I never made any threats against him in my life," "I had never had a quarrel with him," have not been regarded as statements within the proper scope of a dying declaration. *State v. Parker*, 172 Mo. 191, 72 S. W. 650 (1903).

3. *Alabama*.—*Clark v. State*, 105 Ala. 91, 17 So. 37 (1895); *Sullivan*

Latin term not in the extended American sense but in its English

v. State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22 (1893).

California.—People v. Cyty, 11 Cal. App. 702, 106 Pac. 257 (1909); People v. Cipolla, 155 Cal. 224, 100 Pac. 252 (1909).

Florida.—Coatney v. State, 61 Fla. 19, 55 So. 285 (1911).

Georgia.—Wilkerson v. State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63 (1893).

Illinois.—People v. Cassesse, 251 Ill. 422, 96 N. E. 274 (1911).

Indiana.—Archibald v. State, 122 Ind. 122, 23 N. E. 758 (1889).

Iowa.—State v. Wright, 112 Iowa 436, 445, 84 N. W. 541 (1900); State v. Jones, 89 Iowa 182, 56 N. W. 427 (1893).

Kentucky.—Allen v. Com., 134 Ky. 110, 119 S. W. 795 (1909); Wagner v. Com., 108 S. W. 318, 32 Ky. L. Rep. 1185 (1908); Leiber v. Com., 9 Bush. 11 (1872).

Michigan.—People v. Alexander, 161 Mich. 645, 126 N. W. 837 (1910).

Mississippi.—Guest v. State, 96 Miss. 871, 52 So. 211 (1910); Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1897).

Missouri.—State v. Colvin, 226 Mo. 446, 126 S. W. 448 (1910); State v. Kelleher, 224 Mo. 145, 123 S. W. 551 (1909); State v. Parker, 172 Mo. 191, 72 S. W. 650 (1903).

Montana.—State v. Crean, 43 Mont. 47, 114 Pac. 603 (1911).

New York.—Hackett v. People, 54 Barb. 370 (1866).

North Carolina.—State v. Laugh-ter, 159 N. C. 488, 74 S. E. 913 (1912); State v. Shelton, 2 Jones L. 360 (1855).

Oklahoma.—Mulkey v. State, 5 Okla. Cr. App. 75, 113 Pac. 532 (1911).

Oregon.—State v. Doris, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 (1908).

South Carolina.—State v. Gallman, 79 S. C. 229, 60 S. E. 682 (1908).

Tennessee.—Still v. State, 125 Tenn. 80, 140 S. W. 298 (1911).

Texas.—Hinton v. State (Cr. App. 1907), 100 S. W. 772.

Vermont.—State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200 (1873).

Virginia.—Patterson v. Com., 75 S. E. 737 (1912); Richards v. Com., 107 Va. 881, 59 S. E. 1104 (1908).

Washington.—State v. Baruth, 47 Wash. 283, 91 Pac. 977 (1907).

A dying declaration is restricted in respect of the admissibility of the statements contained therein to those referring to the act of the killing and to the other circumstances which attend such act and form a part of the *res gestae*. It was never intended that such a declaration should embrace recitals of past events or suspicions of the deceased nor his expectations of trouble with the accused. People v. Cyty, 11 Cal. App. 702, 708, 106 Pac. 257 (1909).

"The rule that dying declarations should be confined to facts concerning the cause and circumstances of the homicide is one that should not be relaxed. It must be remembered that this kind of testimony is classed as hearsay evidence and is admitted under an exception to the general rule from considerations of public necessity. It is not under the sanction of an oath, and there is no opportunity for cross-examination. It overrides the sacred constitutional right of an accused to be confronted with the witness against him. It is also subject to the special objection that such declarations are usually made when the declarant is in the last stage of physical exhaustion, with mental powers impaired to a greater or less extent. It leaves entirely out of consideration the fact that passions and prejudices, which

or restricted meaning.⁴ The extrajudicial statement should not be so extended as to include facts remotely⁵ or only incident-

in life pervert the perceptive faculties, do not always lose their power on the death bed. Such evidence is also liable to be incomplete. The victim may naturally be disposed to give only a partial account of the occurrence, although possibly not influenced by animosity or ill will. All these objections are overcome by the one consideration of public necessity that society may not be deprived of the testimony, such as it is, and whatever it may be worth." *Mulkey v. State*, 5 Okla. Cr. App. 75, 88, 113 Pac. 532 (1911), per Doyle, J.

"When it is remembered that the defendant is deprived of being brought face to face with the witness and of the benefits of cross-examination, and his statements are admitted without reference to the form of the questions to which they are responsive, which, in many instances, are leading as well as misleading to one in a weakened and dying condition, the protection of the liberties of the innocent, as well as in many cases the conviction of the guilty, demands that statements admitted under such circumstances be limited to the *res gestae*, and that the deceased be permitted to speak only of the transactions causing the death, with such accompanying statements and conduct as may throw light upon it." *State v. Doris*, 51 Oreg. 136, 152, 94 Pac. 44, 16 L. R. A. (N. S.) 660n. (1908), per King, C.

The requirement has been made that the fact stated in the dying declaration should be a material one. *State v. Harris*, 112 La. 937, 36 So. 810 (1904).

Cause.—Statements of deceased regarding the cause of death which he now recognizes as inevitable may be a proper subject for a dying declaration. *Coatney v. State*, 61 Fla.

19, 55 So. 285 (1911); *Darby v. State*, 79 Ga. 63, 3 S. E. 663 (1887); *State v. Bonar*, 71 Kan. 800, 81 Pac. 484 (1905) (affidavit); *Lockhart v. State*, 53 Tex. Cr. App. 589, 111 S. W. 1024 (1908).

The recitals in dying declarations, which are admissible in evidence, include recitals of fact which might have been given by declarant if living and appearing as a witness at the trial, and may include statements of facts occurring or existing coincident with the commission of the homicide, and tending to establish every essential element of the crime. *State v. Fuller*, 52 Oreg. 42, 96 Pac. 456 (1908).

4. § 2582.

5. *State v. Spivey*, 191 Mo. 81, 90 S. W. 81 (1905); *Wakefield v. State*, 50 Tex. Cr. App. 124, 94 S. W. 1046 (1906).

That the declarant prayed God to forgive the accused is not a legitimate part of a dying declaration. *Sullivan v. State*, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22 (1893).

A statement of previous threats contained in a declaration should not be considered by the jury. *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096 (1908); *State v. Moody*, 18 Wash. 165, 51 Pac. 365 (1897).

So the decedent will not be allowed to state that the defendant had threatened to shoot him through a window, even though the death-shot is actually delivered in that way. *Benns v. State*, 46 Ind. 311 (1874).

Narratives of post-*res-gestae* transactions constitute no proper part of dying declarations. *Pitts v. State*, 140 Ala. 70, 37 So. 101 (1904) (bowels hurt him). For example, where a wife claimed that her husband had poisoned her, the fact that he had just left the house forms no

ally⁶ connected with the main occurrence.⁷ Within the proper meaning of the phrase may be included any relevant facts, pre-

proper part of her dying statement. *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (1904).

6. *State v. Horn*, 204 Mo. 528, 103 S. W. 69 (1907); *State v. Eddon*, 8 Wash. 292, 36 Pac. 139 (1894) (deceased unarmed).

7. *Alabama*.—*Pitts v. State*, 140 Ala. 70, 37 So. 101 (1903); *Williams v. State*, 130 Ala. 107, 30 So. 484 (1900); *White v. State*, 111 Ala. 92, 21 So. 330 (1895); *Clark v. State*, 105 Ala. 91, 17 So. 37 (1894); *Sullivan v. State*, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22 (1893); *Johnson v. State*, 102 Ala. 1, 16 So. 99 (1893); *Walker v. State*, 52 Ala. 192 (1875); *Johnson v. State*, 47 Ala. 9 (1872); *Johnson v. State*, 17 Ala. 618 (1850); *Oliver v. State*, 17 Ala. 587 (1850); *McLean v. State*, 16 Ala. 672 (1849); *Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276 (1848).

California.—*People v. Cyty*, 11 Cal. App. 702, 106 Pac. 257 (1909) (expected to have trouble); *People v. Glover*, 141 Cal. 233, 74 Pac. 745 (1903); *People v. Yokum*, 118 Cal. 437, 50 Pac. 686 (1897); *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833 (1897); *People v. Farmer*, 77 Cal. 1, 18 Pac. 800 (1888); *People v. Fong Ah Sing*, 64 Cal. 253 (1883), 70 Cal. 8, 28 Pac. 233, 11 Pac. 323 (1886).

Delaware.—*State v. Thawley*, 4 Harr. 562 (1845).

Florida.—*Clemmons v. State*, 43 Fla. 200, 30 So. 699 (1901).

Georgia.—*Bush v. State*, 109 Ga. 120, 34 S. E. 298 (1899); *White v. State*, 100 Ga. 659, 28 S. E. 423 (1897); *Wilkerson v. State*, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63 (1893); *Bryant v. State*, 80 Ga. 272, 4 S. E. 853 (1887).

Illinois.—*Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (1904).

Indiana.—*Lane v. State*, 151 Ind.

511, 51 N. E. 1056 (1898); *Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218 (1885).

Iowa.—*State v. Jones*, 89 Iowa 182, 56 N. W. 427 (1893); *State v. Perigo*, 80 Iowa 37, 45 N. W. 399 (1890); *State v. Baldwin*, 79 Iowa 714, 45 N. W. 297 (1890).

Kansas.—*State v. O'Shea*, 60 Kan. 772, 57 Pac. 970 (1899); *State v. Furney*, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262 (1889); *State v. Medicott*, 9 Kan. 257 (1872).

Kentucky.—*Redmond v. Com.*, 51 S. W. 565, 21 Ky. L. Rep. 331 (1899); *Starr v. Com.*, 97 Ky. 193, 30 S. W. 397, 16 Ky. L. Rep. 843 (1895); *Luker v. Com.*, 5 S. W. 354, 9 Ky. L. Rep. 385 (1887); *Marcum v. Com.*, 1 S. W. 727, 8 Ky. L. Rep. (abstract) 418 (1886); *Terrell v. Com.*, 13 Bush 246 (1877); *Collins v. Com.*, 12 Bush. 271 (1876); *Leiber v. Com.*, 9 Bush 11 (1872).

Michigan.—*People v. Knapp*, 26 Mich. 112 (1872).

Mississippi.—*Boyd v. State*, 84 Miss. 414, 36 So. 525 (1904).

Missouri.—*State v. Kelleher*, 224 Mo. 145, 123 S. W. 551 (1909); *State v. Parker*, 172 Mo. 191, 72 S. W. 650 (1902); *State v. Garrison*, 147 Mo. 548, 49 S. W. 508 (1898); *State v. Reed*, 137 Mo. 125, 38 S. W. 574 (1897); *State v. Wilson*, 121 Mo. 434, 26 S. W. 357 (1894); *State v. Draper*, 65 Mo. 335, 27 Am. Rep. 287 (1877).

New York.—*People v. Sweeney*, 41 Hun 332, 4 N. Y. Cr. Rep. 275 (1886); *Hackett v. People*, 54 Barb. 370 (1866).

North Carolina.—*State v. Shelton*, 47 N. C. 360, 64 Am. Dec. 587 (1855).

Oregon.—*State v. Garrand*, 5 Oreg. 216 (1874).

South Carolina.—*State v. Petsch*, 43 S. C. 132, 20 S. E. 993 (1894);

liminary or subsequent, which have a causal relation to the happening of the *res gestae*.⁸

Explanation.—The dying declaration may properly cover such part of the actual *res gestae*, properly so-called, of the fatal transaction, as tends to explain or throw light upon the more significant happenings on that occasion.⁹ In much the same way the nature of the ground, which constitutes the *locus* of the alleged crime, and other physical facts surrounding the happenings in question may properly be covered by a dying declaration.

Effects of res gestae.—The declarant is not at liberty to detail his then present symptoms as being the effects produced on him by the actual *res gestae*, properly so-called. Thus one, alleged to have been injured by a severe beating administered to him by his step-father, will not be permitted to state, as a dying declaration, the day after the occurrence, that he had a bad pain in his head caused by the acts in question.¹⁰

Inference.—If the judge is able rationally to conclude that a fact stated in a dying declaration is, in reality, one of the *res gestae*, it will not be rejected because it takes the form of statement appropriate to the assertion of an act of reasoning. Perhaps this

State v. Belton, 24 S. C. 185, 58 Am. Rep. 245 (1885); State v. Quick, 15 Rich. L. 342 (1868); State v. Terrell, 12 Rich. L. 321 (1859).

Tennessee.—Nelson v. State, 7 Humphr. 542 (1847).

Texas.—Medina v. State, 43 Tex. Cr. App. 52, 63 S. W. 331 (1901); Blalock v. State, 40 Tex. Cr. App. 154, 49 S. W. 100 (1899); Sims v. State, 36 Tex. Cr. App. 154, 36 S. W. 256 (1896); Hunnicutt v. State, 18 Tex. App. 498, 51 Am. Rep. 330 (1885); *Ex parte* Barber, 16 Tex. App. 369 (1884); Lister v. State, 1 Tex. App. 739 (1877).

Vermont.—State v. Wood, 53 Vt. 560 (1881).

Washington.—State v. Eddon, 8 Wash. 292, 36 Pac. 139 (1894).

West Virginia.—Crookham v. State, 5 W. Va. 510 (1871).

8. People v. Cyty, 11 Cal. App. 702 106 Pac. 257 (1909).

"The *res gestae* embraces, not only the actual facts of the assault and

the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with the assault, as well as acts immediately following the assault and so closely connected with it as to form a part of the occurrence." People v. Cyty, 11 Cal. App. 702, 708, 106 Pac. 257 (1909), per Taggart, J. See, however, State v. Kelleher, 224 Mo. 145, 123 S. W. 551 (1909).

9. People v. Glover, 141 Cal. 233, 74 Pac. 745 (1903); State v. Betsch, 43 S. C. 132, 20 S. E. 993 (1895); Grubb v. State, 43 Tex. Cr. App. 72, 63 S. W. 314 (1901); State v. Bridgman, 51 Wash. 18, 97 Pac. 1096 (1908) (threats).

"Whether or not he had forbid the prisoner walking the road that morning, immediately preceding the time that prisoner shot him." McLean v. State, 16 Ala. 672, 676 (1849).

10. Johnson v. State, 63 Miss. 313 (1885).

situation is most commonly presented where the form of statement is negative.¹¹

Poisoning.—Where the alleged cause of death is the administration of poison, an unusually wide range is permitted.¹² The obvious administrative ground for this indulgence is found in the fact that, as in other cases of bodily sensation,¹³ knowledge on the subject is necessarily confined, in large measure, to the injured person himself. Unless the latter be allowed to testify as to his feelings, proof on the point will usually fail. To so grievous a result, judicial administration does not readily assent and the dying declarant is freely permitted to state what difference, if any, he noticed in the sensations immediately after taking the food, medicine, or whatever may be claimed to have been the vehicle for conveying the poison. Whether the declarant will be permitted to go further and state the collective fact that the accused "poisoned" him has excited some difference of opinion on the part of judges. On the one hand, it has been deemed best to reject the statement as an "opinion,"¹⁴ i. e., as an act of reasoning, rather than of perception. On the other, the declaration has been treated as being a very natural and obvious way of summarizing a number of individually inconclusive facts.¹⁵

§ 2850. (Scope of Declaration); Emotion Excluded.—The dying declaration must be one of fact. Emotionalism, the influ-

11. *Pennington v. Com.*, 68 S. W. 451, 24 Ky. L. Rep. 321 (1902); *Luker v. Com.*, 5 S. W. 354, 9 Ky. L. Rep. 385 (1887) (he and defendant had no difficulty).

12. *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (1904); *Boyd v. State*, 84 Miss. 414, 36 So. 525 (1904); *State v. Terrell*, 12 Rich. (S. C.) L. 321 (1859).

Where it was claimed by the prosecution that several persons had been poisoned by the prisoner, Terrell, at about the same time, by the use of strychnine disguised in liquor, evidence is admissible that one of the victims, in view of approaching death, said, "There was something strange about the way John Terrell had acted;" "he (Terrell) had never left

him in the store before, and told him to invite persons in to drink liquor," "he was poisoned for the first time in his life." *State v. Terrell*, 12 Rich. L. (S. C.) 321 (1859).

13. §§ 2625 *et seq.*

14. *Berry v. State*, 63 Ark. 382, 38 S. W. 1038 (1897) (whiskey was poisoned); *Mathedy v. Com.*, 19 S. W. 977, 14 Ky. L. Rep. 182 (1892); *Orner v. State*, (Tex. Cr. App. 1912) 143 S. W. 935).

15. *Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909); *Shankenberger v. State*, 154 Ind. 630, 57 N. E. 519 (1900) ("poisoned by my mother-in-law"); *State v. Kuhn*, 117 Iowa 216, 90 N. W. 733 (1902); *Lipscomb v. State*, 75 Miss. 559, 23 So. 210, 230 (1898).

ence of mere feeling, must, therefore, be rigidly excluded from it. Even emotional states of high ethical quality cannot be received. The decedent, for example, in a spirit of forgiveness for the injuries done him may employ expressions indicating that the accused is free from blame,¹ is guilty of no offence or the like. Such statements, however, have no proper place in a dying declaration. That the declarant forgives the defendant² or prays God to forgive him³ is, for like reasons, an irrelevant assertion.

§ 2851. (Scope of Declaration); Identification.—Positive and full identification of the accused, as being the person who did the killing, is one of the most valuable offices of a dying declaration. The fact is often highly relevant and the statement in respect thereto is therefore admissible,¹ where the deceased was in a posi-

§ 2850-1. *Williams v. State*, 130 Ala. 107, 30 So. 484 (1900); *Sweat v. State*, 107 Ga. 712, 33 S. E. 422 (1899); *Ratteree v. State*, 53 Ga. 570 (1875); *State v. Harris*, 112 La. 937, 36 So. 810 (1904); *State v. Nelson* 101 Mo. 464, 14 S. W. 712 (1890). Compare *State v. Ashworth*, 50 La. Ann. 94, 23 So. 270 (1898).

2. *State v. Evans*, 124 Mo. 397, 28 S. W. 8 (1894).

3. *Sullivan v. State*, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22 (1893).

§ 2851-1. *Alabama*.—*Greer v. State*, 156 Ala. 15, 47 So. 300 (1908); *Walker v. State*, 139 Ala. 56, 35 So. 1011 (1897); *Sullivan v. State*, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22 (1893); *Jordon v. State*, 82 Ala. 1, 2 So. 460, 81 Ala. 20, 1 So. 577 (1886); *McLean v. State*, 16 Ala. 672 (1849).

Arkansas.—*Walker v. State*, 39 Ark. 221 (1882).

Georgia.—*Owens v. State* (App. 1912), 75 S. E. 519; *Thompson v. State*, 137 Ga. 164, 73 S. E. 363 (1911); *Cason v. State*, 134 Ga. 786, 68 S. E. 554 (1910); *Darby v. State*, 79 Ga. 63, 3 S. E. 663 (1887).

Illinois.—*People v. Cassesse*, 251 Ill. 422, 96 N. E. 274 (1911).

Iowa.—*State v. Clemons*, 51 Iowa 274, 1 N. W. 546 (1879).

Kentucky.—*Henderson v. Com.*, 72 S. W. 781, 24 Ky. L. Rep. 1985 (1902).

Massachusetts.—*Com. v. McPike*, 3 Cush. 181, 50 Am. Dec. 727 (1849).

Mississippi.—*Lipscomb v. State*, 75 Miss. 559, 23 So. 210, 230 (1897).

Missouri.—*State v. Colvin*, 226 Mo. 446, 126 S. W. 448 (1910).

Nevada.—*State v. Roberts*, 28 Nev. 350, 82 Pac. 100 (1905).

New York.—*People v. Madas*, 201 N. Y. 349, 94 N. E. 857 (1911); *People v. Morse*, 196 N. Y. 306, 89 N. E. 816 (1909); *Brotherton v. People*, 75 N. Y. 159 (1878).

Oklahoma.—*Nelson v. State*, 3 Okla. Cr. App. 468, 106 Pac. 647 (1910).

Oregon.—*State v. Foot You*, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537 (1893).

Pennsylvania.—*Com. v. Roddy*, 184 Pa. St. 274, 39 Atl. 211 (1898).

South Carolina.—*State v. Smalls*, 87 S. C. 550, 70 S. E. 300 (1911); *State v. Freeman*, 1 Speers 57, 61 (1842).

Tennessee.—*Still v. State*, 125 Tenn. 80, 140 S. W. 298 (1911).

Texas.—*Graham v. State*, 57 Tex.

tion to know the truth. Indeed, even where a certain element or degree of inference is necessarily present,² e. g., where the assailant is masked,³ or in ambush⁴ the fact can often be proved in no other way. Where the circumstances are such that the deceased could not have known with any satisfactory degree of certainty who his assailant was, adequate knowledge, an indispensable element of subjective relevancy,⁵ is absent, and the evidence as contained in the dying declaration will be rejected.⁶ In the absence, however, of evidence on the point, intrinsic or extrinsic, the administrative assumption is that the declarant possessed adequate

Cr. App. 104, 123 S. W. 691 (1909); Jones v. State, 52 Tex. Cr. App. 303, 106 S. W. 345, 124 Am. St. Rep. 1097 (1907); McCorquodale v. State, 54 Tex. Cr. App. 344, 98 S. W. 879 (1906) (recognized by flash of pistol); McInturf v. State, 20 Tex. App. 335 (1886); Means v. State, 10 Tex. App. 16, 38 Am. Rep. 640 (1881).

Canada.—Rex v. Sunfield, 10 Ont. W. R. 1010, 15 O. L. R. 252 (1907).

Picking out one's assailant from a number of total strangers has been regarded as competent if done under a sense of impending death. State v. Roberts, 28 Nev. 350, 82 Pac. 100 (1905).

2. Henderson v. Com. 72 S. W. 781, 24 Ky. L. Rep. 1985 (1903) ("I know that one of the two shot me," naming two men as standing just back of a third who pushed the deceased); State v. Dixon, 131 N. C. 808, 42 S. E. 944 (1902) (assailant was a small white man and looked like the defendant).

3. Com. v. Roddy, 184 Pa. St. 274, 39 Atl. 211 (1898) ("I am satisfied that the Roddy boys (the prisoners) brought to my house by the officers, are the same men that robbed and tortured me").

4. Blair v. State, 4 Okla. Cr. App. 359, 111 Pac. 1003 (1910) ("Joe Blair, from ambush, two shots;" admitted).

5. § 2814.

6. Arkansas.—Jones v. State, 52 Ark. 345, 12 S. W. 704 (1889).

California.—People v. Wasson, 65 Cal. 538, 4 Pac. 555 (1884); People v. Taylor, 59 Cal. 640 (1881).

Indiana.—Jones v. State, 71 Ind. 66 (1880); Binns v. State, 46 Ind. 311 (1874).

Kentucky.—Green v. Com., 18 S. W. 515, 13 Ky. L. Rep. 897 (1892).

Mississippi.—Jones v. State, 79 Miss. 309, 30 So. 759 (1901).

New York.—People v. Shaw, 63 N. Y. 36 (1875).

North Carolina.—State v. Williams, 67 N. C. 12 (1872).

Pennsylvania.—Com. v. Roddy, 184 Pa. 274, 39 Atl. 211 (1898).

Texas.—Warren v. State, 9 Tex. App. 619, 35 Am. Rep. 745 (1880).

West Virginia.—State v. Burnett, 47 W. Va. 731, 35 S. E. 983 (1900).

Where it appears that the declarant could not have known of his own knowledge who his assailant was, his statement on that point cannot be received. Thus, a declaration, made while *in extremis*, by a deceased who was shot at night in a house from the outside through an aperture in the logs, "It was E. W. who shot me, though I did not see him," was accordingly rejected. State v. Williams, 67 N. C. 12 (1872).

knowledge on a subject which he states as a fact.⁷ It will not be assumed that he spoke merely by way of inference or suspicion.⁸

Complete identification is not required by judicial administration. Dying declarations are admissible, though the description does not identify the person who did the shooting as defendant. It is enough that they add a link in the chain of evidence.⁹ Nor is it necessary that the statement should directly charge the defendant with being the assailant.¹⁰

Impeachment.—Where a dying declaration was as to the identity of the accused, it was held that the declarant might be impeached by showing that the deceased was in the habit of mistaking her friends for persons whom they did not resemble.¹¹

§ 2852. (Scope of Declaration); Inference.—So far as practicable, administration confines the dying declarant to the range which his testimony might properly take were he a witness.¹ The position of the latter, as elsewhere indicated,² calls upon him to state the results of physical observation.³ Reasoning the use of

7. *Walker v. State*, 39 Ark. 221 (1882); *State v. Quick*, 15 Rich. L. (S. C.) 342 (1867).

8. *State v. Arnold*, 35 N. C. 184 (1851).

9. *State v. Mayo*, 42 Wash. 540, 85 Pac. 251 (1906).

10. *State v. Cronin*, 64 Conn. 293, 29 Atl. 536 (1894).

11. *Com. v. Cooper*, 5 Allen (Mass.) 495, 81 Am. Dec. 762 (1862).

A defendant against whom dying declarations are received has not the opportunity of cross-examining the declarant. Hence, it is justly held that he is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of a more full investigation by means of cross-examination." *Com. v. Cooper*, 5 Allen (Mass.) 495, 498, 81 Am. Dec. 762 (1862), per Metcalf, J.

§ 2852-1. § 2849.

2. § 1800.

3. *Arkansas*.—*Jones v. State*, 52 Ark. 345, 12 S. W. 704 (1889); *Walker v. State*, 39 Ark. 221 (1882).

Colorado.—*Jamison v. People*, 119

Pac. 474 (1911); *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953 (1894).

Indiana.—*Binns v. State*, 46 Ind. 311 (1874).

Mississippi.—*Jones v. State*, 79 Miss. 309, 30 So. 759 (1901).

Missouri.—*State v. Reed*, 137 Mo. 125, 38 S. W. 574 (1897); *State v. Parker*, 96 Mo. 382, 9 S. W. 728 (1888).

New York.—*People v. Falletto*, 202 N. Y. 495, 96 N. E. 355 (1911).

North Carolina.—*State v. Arnold*, 13 Ired. L. 184 (1851).

Pennsylvania.—*Com. v. Roddy*, 184 Pa. 274, 39 Atl. 211 (1898).

"A mere expression of opinion by the dying man is not admissible as a dying declaration, and it is immaterial whether the fact that the declaration is mere opinion appears from the statement itself, or from other undisputed evidence showing that it was impossible for the declarant to know the fact stated. If, upon any view of the evidence, it is possible for the declarant to know the truth of what he states, his declarations,

inference, conclusion or judgment, is to be excluded⁴ in the absence of a countervailing necessity for employing it. The exist-

being otherwise competent, should be received and considered by the jury in the light of all the evidence." *Jones v. State*, 52 Ark. 345, 347, 12 S. W. 704 (1889). "To us the true and proper test as to admissibility is whether the statement is the direct result of observation through the declarant's senses, or comes from a source of reasoning from collateral facts. If the former, it is admissible; if the latter, it is inadmissible." *House v. State*, 94 Miss. 107, 123, 48 So. 3, 21 L. R. A. (N. S.) 840 (1908), per Powell, J.

"It is well settled, however, that while such evidence should be received with great caution, dying declarations are competent in a criminal prosecution for homicide in so far as they state facts, but not opinions, relating to the circumstances of the crime and the perpetrator thereof, provided a sufficient foundation is first laid." *People v. Falletto*, 202 N. Y. 495, 500, 96 N. E. 355 (1911), per Vann, J.

4. *Alabama*.—*Sanford v. State*, 143 Ala. 78, 39 So. 370 (1905); *Smith v. State*, 133 Ala. 73, 31 So. 942 (1902).

Arkansas.—*Baker v. State*, 85 Ark. 300, 107 S. W. 983 (1908); *Berry v. State*, 63 Ark. 382, 38 S. W. 1038 (1897); *Jones v. State*, 52 Ark. 345, 12 S. W. 704 (1889).

California.—*People v. Lanagan*, 81 Cal. 142, 22 Pac. 482 (1889); *People v. Wasson*, 65 Cal. 538, 4 Pac. 555 (1884); *People v. Taylor*, 59 Cal. 640 (1881).

Colorado.—*Jamison v. People*, 119 Pac. 474 (1911) (murdered); *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953 (1894).

Georgia.—*Freeman v. State*, 112 Ga. 48, 50, 37 S. E. 172 (1900); *Kearney v. State*, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344 (1897) (accident); *Whitley v. State*, 38 Ga.

50 (1868); *McPherson v. State*, 22 Ga. 478 (1857).

Indiana.—*Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815 (1881); *Binns v. State*, 46 Ind. 311 (1874).

Iowa.—*State v. Sale*, 119 Iowa 1, 92 N. W. 680 (1902), modified on rehearing 119 Iowa 1, 95 N. W. 193 (1903); *State v. Wright*, 112 Iowa 436, 84 N. W. 541 (1900); *State v. Baldwin*, 79 Iowa 714, 45 N. W. 297 (1890); *State v. Donnelly*, 69 Iowa 705, 27 N. W. 369, 58 Am. Rep. 234 (1886); *State v. Nettlebush*, 20 Iowa 257 (1866).

Kansas.—*State v. O'Shea*, 60 Kan. 772, 57 Pac. 970 (1899) (best of friends).

Kentucky.—*Com. v. Griffith*, 149 S. W. 825 (1912); *Wilson v. Com.*, 140 Ky. 1, 130 S. W. 794 (1910); *Wagner v. Com.*, 32 Ky. L. Rep. 1185, 108 S. W. 318 (1908); *Johnson v. Com.*, 107 S. W. 768, 32 Ky. L. Rep. 1117 (1908); *Henderson v. Com.*, 72 S. W. 781, 24 Ky. L. Rep. 1985 (1903); *Mathedy v. Com.*, 19 S. W. 977, 14 Ky. L. Rep. 182 (1892); *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505 (1889).

Michigan.—*People v. Alexander*, 161 Mich. 645, 126 N. W. 837 (1910).

Mississippi.—*House v. State*, 94 Miss. 107, 48 So. 3, 21 L. R. A. (N. S.) 840 n. (1909); *Lipscomb v. State*, 76 Miss. 223, 25 So. 158 (1898); *Payne v. State*, 61 Miss. 161 (1883).

Missouri.—*State v. Brown*, 188 Mo. 451, 87 S. W. 519 (1905); *State v. Parker*, 96 Mo. 382, 9 S. W. 728 (1888); *State v. Chambers*, 87 Mo. 406 (1885); *State v. Vansant*, 80 Mo. 67 (1883); *State v. Draper*, 65 Mo. 335, 27 Am. Rep. 287 (1877).

New York.—*People v. Falletto*, 202 N. Y. 495, 96 N. E. 35 (1911); *Brotherton v. People*, 75 N. Y. 159 (1878); *People v. Shaw*, 63 N. Y. 40 (1875).

ence or non-existence of an objectionable amount of reasoning presents an administrative question to be determined by the trial

North Carolina.—State v. Mace, 118 N. C. 1244, 24 S. E. 798 (1896) (they have murdered me).

Ohio.—Wroe v. State, 20 Ohio St. 469 (1870).

Oklahoma.—Mulkey v. State, 5 Okla. Cr. App. 75, 113 Pac. 532 (1911).

Oregon.—State v. Foot You, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537, (1893).

Texas.—Manley v. State, 62 Tex. Cr. App. 392, 137 S. W. 1137 (1911); Lane v. State, 59 Tex. Cr. App. 595, 129 S. W. 353 (1910); Rice v. State, 54 Tex. Cr. App. 149, 112 S. W. 299 (1908); Bateson v. State, 46 Tex. Cr. App. 34, 80 S. W. 88 (1904); Williams v. State, 40 Tex. Cr. App. 497, 51 S. W. 220 (1899).

West Virginia.—State v. Burnett, 47 W. Va. 731, 35 S. E. 983 (1900).

Wyoming.—Hollywood v. State, 19 Wyo. 493, 120 Pac. 471, *rehearing denied* 122 Pac. 588 (1912).

United States.—U. S. v. Veitch, 28 Fed. Cas. No. 16,614, 1 Cranch C. C. 115 (1803).

"A dying declaration must relate to facts, and not to mere matters of opinion or conclusions of the declarant, and so much thereof as does not come within this rule is incompetent." Jamison v. People, (Colo. 1911) 119 Pac. 474, 475, per Musser, J.

"We apprehend there is a decisive test to which 'dying declarations' must be subjected, and by it their admissibility as testimony can be readily determined. That test is, *whatever* may be stated by a witness under oath, is admissible in evidence as dying declarations, made by one under the consciousness of approaching death. The statement, under such circumstances, is held to be as truthful as if under oath, and equivalent to a statement *sworn* to.

But the *opinions* of witnesses under oath, as a general rule, are inadmissible in evidence in *criminal cases*, and hence opinions in *dying declarations* are excluded." Whitley v. State, 38 Ga. 50, 70 (1868), per Harris, J.

A dying declaration which is the direct result of observation through declarant's senses is admissible; but a declaration which comes from a course of reasoning from collateral facts is inadmissible. House v. State, 94 Miss. 107, 48 So. 3, 21 L. R. A. (N. S.) 840n. (1909).

Dying declarations, to be admissible, must consist of facts, and not conclusions, mental impressions, or opinions. Hollywood v. State, 19 Wyo. 493, 120 Pac. 471, 122 Pac. 588 (1912).

"The courts are not in harmony as to what constitutes an opinion and what constitutes the statement of a fact within the rule stated, although all seem to agree that the statement by the declarant of a conclusion founded upon an inferred, as distinguished from an actual, fact within his knowledge is objectionable." Hollywood v. State, 19 Wyo. 493, 120 Pac. 471, 475, per Scott, J., *rehearing denied* 122 Pac. 588 (1912).

The entire declaration may be admitted even though it may contain expressions of opinion where they are unimportant and taken in connection with the remainder of the declaration are not in any respect prejudicial. Cleveland v. Com., 101 S. W. 931, 31 Ky. L. Rep. 115 (1907).

Where, however, a declaration consists, in part, of opinions of the deceased which are prejudicial to the accused, a motion to strike out the objectionable portions of the declaration should be granted. A refusal to grant such a motion has been re-

judge.⁵ The objectionable element of inference or opinion may appear from the declaration itself or be shown by the other evidence in the case, it being clear that the declarant could not have known the truth of that which he asserts as the result of his own observation. A still clearer administrative objection arises where the employment of a legal standard, as well as a moral or physical one, seems apparent. Thus, a declarant will not be permitted to state his opinion that the accused is not responsible for his death.⁶

On the other hand, it has not escaped the attention of judicial administration that, as the declarant cannot be made to change his form of statement, it will be practically necessary, in many cases, to accept inference, unless no attempt is to be made to punish crime. Very plain cases of inference are therefore received, e. g., a statement by the deceased that he knew the accused shot him for the reason that he had been told such was his intention.⁷

Admissions by conduct.—The presence of an element of inference or conclusion in a declaration made in the presence of the accused is not considered objectionable, where the circumstances are such as to call upon the accused for a reply.⁸

Mental state of a third person.—The mental state of a third person is not subject to direct observation.⁹ The statement of a dying declaration in regard thereto may therefore be rejected as an inference.¹⁰ The declarant's own mental state, being a subject upon which he might properly testify as a witness,¹¹ may, however, be established in this way.¹²

Poisoning.—Some consideration is given at another place in this chapter¹³ to the question as to how far inference will be

garded as an error which is not cured by the court's instruction to the jury directing them to consider only those parts of the declaration which state facts and to disregard any expression of opinion in such declaration. *Gardner v. State*, 55 Fla. 25, 45 So. 1028 (1908).

5. *Jones v. State*, 79 Miss. 309, 30 So. 759 (1901).

6. *Williams v. State*, 130 Ala. 107, 30 So. 484 (1900); *Sweat v. State*, 107 Ga. 712, 33 S. E. 422 (1899); *Ratteree v. State*, 53 Ga. 570 (1875); *State v. Harris*, 112 La. 937, 36 So.

810 (1904); *State v. Nelson*, 101 Mo. 464, 14 S. W. 712 (1890).

7. *Ex parte Key*, 5 Ala. App. 274, 59 So. 331 (1912).

8. *Rice v. State*, 49 Tex. Cr. App. 569, 94 S. W. 1024 (1906).

9. § 1891.

10. *State v. Carrington*, 15 Utah 480, 50 Pac. 526 (1897) (intention).

11. § 1741e.

12. *Doolin v. Com.*, 95 Ky. 29 (1893) ("believing myself to be now on my death-bed").

13. § 2849.

permitted in a dying declaration where the cause of death is an alleged poisoning.

§ 2853. (*Scope of Declaration; Inference*); Summarizing minute Phenomena.—A sufficient administrative necessity for accepting an inference or conclusion in a dying declaration is furnished where a large number of minute phenomena, often so intangible and interblending as to forbid effective individual statement, are given by the declarant in the form of a “collective fact,”¹ often the only way in which a speaker can well express himself. Thus, a declarant may properly state that a given shooting was an “accident”² or that he had been “butchered” by the malpractice of a doctor,³ and so forth.⁴ Even where a considerable element of voluntary or intentional reasoning is present, the declaration may simply amount to the statement of a fact in a vigorous and striking way, summarizing a number of facts in a single vivid expression, e. g., “he shot me down like a dog.”⁵

§ 2853-1. § 1841.

2. *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505 (1889).

See, however, *Kearney v. State*, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344 (1897).

The statement that deceased and accused “were playing, and that it was an accident,” is competent. “To be competent as a dying declaration, the statement must not only relate to the immediate circumstances of the transaction resulting in the injury, but it must detail facts, and not the opinion of the declarant. In our opinion, the statement in this instance conforms to this rule. It is unlike the case where the injured party declared that he had been killed for nothing. This was purely his opinion and inference. Here the injured man said that he and the accused were engaged in play, and that the shooting was an accident. This, in our opinion, was the statement of a fact, more than the giving of an opinion, and the court properly permitted it to be

proven.” *Com. v. Matthews*, 89 Ky. 287, 293, 12 S. W. 333, 11 Ky. L. Rep. 505 (1889), per Holt, J.

3. *State v. Gile*, 8 Wash. 12, 35 Pac. 417 (1894).

4. *State v. Fielding*, 135 Iowa 255, 112 N. W. 539 (1907) (deliberately shot); *State v. Brown*, 188 Mo. 451, 87 S. W. 519 (1905) (was reaching in his pocket for his revolver); *Lane v. State*, 59 Tex. Cr. App. 595, 129 S. W. 353 (1910).

The statement “he was trying to get out his gun at that time,” when read with the whole statement, was not objectionable as an opinion, being a shorthand statement of fact. *Gaines v. State*, 58 Tex. Cr. App. 631, 127 S. W. 181 (1910).

5. *State v. Saunders*, 14 Oreg. 300, 12 Pac. 441 (1886).

“Declarations of a party *in extremis*, in order to be admissible, must be as to facts and not conclusions. They are permitted as to those things to which the deceased would have been competent to testify, if sworn in the case. (1 Greenl. Ev., Sec. 159). But I do not think

Provocation.—As appears in the foregoing excerpt from the opinion of the court in Oregon, the absence of provocation may properly be stated, directly or by inference, in a dying declaration.⁶ On the other hand, it cannot be doubted by careful admin-

the expression of the deceased a conclusion. It was given as a part of his narrative relating to the affair, and I think it was merely intended to illustrate the lack of provocation and the wantonness in which the appellant did the act. It was descriptive of the manner in which the act was committed. It conveyed the idea that the appellant disregarded the claims of humanity, and, without giving him any warning, wantonly shot him. It was the statement of a fact made by way of illustration." *State v. Saunders*, 14 Oreg. 300, 305 (1886), per Thayer, J.

6. *Alabama.*—*Gerald v. State*, 128 Ala. 6, 29 So. 614 (1901) (he killed me for nothing); *Sullivan v. State*, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22 (1893).

California.—*People v. Abbott*, 66 Cal. 18, 4 Pac. 769 (1884).

Georgia.—*Washington v. State*, 137 Ga. 218, 73 S. E. 512 (1911) ("he shot me for nothing"); *Brown v. State*, 8 Ga. App. 382, 69 S. E. 45 (1910) ("I am shot for nothing; that man has shot me for nothing"); *McMillan v. State*, 128 Ga. 25, 57 S. E. 309 (1907) ("Oh, Lordy! Willie shot me for nothing, without any cause"); *White v. State*, 100 Ga. 659, 28 S. E. 423 (1897) (he shot me down like a dog); *Darby v. State*, 79 Ga. 63, 3 S. E. 663 (1887).

Indiana.—*Lane v. State*, 151 Ind. 511, 51 N. E. 1056 (1898); *Boyle v. State*, 105 Ind. 469, 472, 5 N. E. 203, 55 Am. Rep. 218 (1885) (no cause for killing); *Boyle v. State*, 97 Ind. 322, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218 (1884) (no reason).

Indian Territory.—*Burroughs v. United States*, 90 S. W. 8 (1905)

(did nothing to cause anybody "to do that to him").

Kentucky.—*Henson v. Com.*, 139 Ky. 173, 129 S. W. 566 (1910) (not doing anything).

Louisiana.—*State v. Black*, 42 La. Ann. 861, 8 So. 594 (1890).

Mississippi.—*House v. State*, 94 Miss. 107, 48 So. 3, 21 L. R. A. (N. S.) 840n. (1909) (without just cause); *Jackson v. State*, 94 Miss. 83, 47 So. 502 (1908) (for nothing); *Powers v. State*, 74 Miss. 777, 21 So. 657 (1897) ("killed me without cause"); *Payne v. State*, 61 Miss. 161 (1883).

Montana.—*State v. Crean*, 43 Mont. 47, 114 Pac. 603 (1911).

North Carolina.—*State v. Watkins*, 159 N. C. 480, 75 S. E. 22 (1912) (did nothing to be shot for); *State v. Mace*, 118 N. C. 1244, 24 S. E. 798 (1896).

Ohio.—*Wroe v. State*, 20 Ohio St. 460 (1870) (it was done without any provocation on his part).

South Carolina.—*State v. Lee*, 58 S. C. 335, 36 S. E. 706 (1900) ("he shot me for nothing").

Tennessee.—*Sherman v. State*, 125 Tenn. 19, 140 S. W. 209 (1911) (accused killed him without cause).

Texas.—*Craft v. State*, 57 Tex. Cr. App. 257, 122 S. W. 547 (1909) (that the accused shot him for nothing, and that he could not run out of it or beg out of it); *Lockhart v. State*, 53 Tex. Cr. App. 598, 111 S. W. 1024 (1908) (for nothing); *Pierson v. State*, 21 Tex. App. 14, 17 S. W. 468 (1886); *Roberts v. State*, 5 Tex. App. 141 (1878).

Utah.—*State v. Kessler*, 15 Utah 142, 49 Pac. 293, 62 Am. St. Rep. 911 (1897) ("he shot me down like a rabbit").

istrators that such statements as he "killed me for nothing,"⁷ and the like,⁸ imply the use of reasoning. Should it be necessary in the absence of testimony from direct observation to employ inference as a secondary grade of proof, it will be received.⁹ Should it happen, however, that it is in the power of the proponent to supply less objectionable evidence on the point no sound administrative reason exists for invading the province of the jury by the reasoning of the declarant and it is accordingly rejected.¹⁰

§ 2854. (Scope of Declaration; Inference); Psychological Facts.—Psychological facts may be as relevant, and, consequently, as admissible as any other. Should a suitable forensic necessity be shown for receiving the secondary proof as to it, furnished by a dying declaration, this may be done. Indeed, all that any declarant, judicial or extrajudicial, may bear witness to is his state of consciousness.¹ Should the psychological fact be relevant, either in a constituent or probative sense, as where a dying declarant states that he believes himself to be dying,² the evidence will be received. On the other hand, should the existence of a psychological fact be irrelevant, as where the prosecution offers to show a state of feeling previously existing between the parties to a fatal

Virginia.—Wright v. Com., 109 Va. 847, 65 S. E. 19 (1909).

Washington.—State v. Gile, 8 Wash. 12, 35 Pac. 417 (1894) ("butchered").

Compare, Bateson v. State, 46 Tex. Cr. App. 34, 80 S. W. 88 (1904) ("they murdered me without cause").

7. Jones v. Com., 46 S. W. 217, 20 Ky. L. Rep. 355 (1898); Collins v. Com., 12 Bush (Ky.) 271 (1876).

8. Starr v. Com., 97 Ky. 193, 30 S. W. 397, 16 Ky. L. Rep. 843 (1895) (did not know why defendant shot him); Smith v. Com., 17 S. W. 868, 13 Ky. L. Rep. 612 (1891) (accused of unsound mind); Henderson v. Com., 5 Ky. L. Rep. 244 (1883) (no trouble with defendant); State v. Elkins, 101 Mo. 344, 14 S. W. 116 (1890) ("picked a fuss with me");

Fitzgerald v. State, 1 Tenn. Cas. 505, 1 Leg. Rec. Rep. 53 (1875), (went with no evil intentions).

A dying declaration, that deceased did not know of any motive for shooting him, except that the accused was angry because he had refused to rent him land, was admissible. Wright v. Com., 109 Va. 847, 65 S. E. 19 (1909).

9. § 1799 n. 3.

10. Collins v. Com., 12 Bush (Ky.) 271 (1876).

§ 2854-1. As between inference and fact, the difference in this connection would seem to consist not so much in the mental process as the means by which the mental state has been created, whether observation or reasoning.

2. Doolin v. Com., 95 Ky. 29, 23 S. W. 663, 15 Ky. L. Rep. 408 (1893).

encounter,³ the evidence will be rejected, although a different reason may be assigned.⁴

§ 2855. (Scope of Declaration; Inference; Psychological Facts); A Fair Test.—A fair test, practically the only one, open to administration, in deciding whether a given statement contained in a dying declaration should be admitted or excluded, lies in determining whether the declarant would have been permitted to testify as a witness to the same effect.¹ "We apprehend," says

3. Alabama.—*Reynolds v. State*, 68 Ala. 502 (1881); *Ben v. State*, 37 Ala. 103 (1861); *Mose v. State*, 35 Ala. 421 (1860).

North Carolina.—*State v. Shelton*, 47 N. C. 360, 64 Am. Dec. 587 (1855).

Oregon.—*State v. Garrand*, 5 Oreg. 216 (1874).

Tennessee.—*Nelson v. State*, 7 Humphr. 542 (1847).

Wyoming.—*Foley v. State*, 11 Wyo. 464, 72 Pac. 627 (1903).

The government cannot show, as part of its original case, that the accused had threatened violence against the deceased.

Indiana.—*Jones v. State*, 71 Ind. 66 (1880).

Iowa.—*State v. Perigo*, 80 Iowa 37, 45 N. W. 399 (1890).

Mississippi.—*Merrill v. State*, 58 Miss. 65 (1880).

New York.—*Hackett v. People*, 54 Barb. 370 (1866).

Vermont.—*State v. Wood*, 53 Vt. 560 (1881).

Washington.—*State v. Moody*, 18 Wash. 165, 51 Pac. 356 (1897).

The general conduct of the defendant in respect to the deceased prior to the homicide may be equally immaterial. *North v. People*, 139 Ill. 81, 28 N. E. 966 (1891).

Malice.—The existence of malice at the time of the killing, cannot, it has been held, be proved by showing previous acts of conduct on other distinct occasions.

Kentucky.—*Chittendon v. Com.*, 9

S. W. 386, 10 Ky. L. Rep. 330 (1888); *Leiber v. Com.*, 9 Bush 11 (1872).

Missouri.—*State v. Parker*, 172 Mo. 191, 72 S. W. 650 (1902); *State v. Draper*, 65 Mo. 335, 27 Am. Rep. 287 (1877).

New York.—*People v. Smith*, 172 N. Y. 210, 64 N. E. 814 (1902).

North Carolina.—*State v. Jefferson*, 125 N. C. 712, 34 S. E. 648 (1899).

Texas.—*Winfrey v. State*, 41 Tex. Cr. App. 538, 56 S. W. 919 (1900).

4. § 2723.

§ 2855-1. Alabama.—*Gibson v. State*, 126 Ala. 59, 28 So. 673 (1899).

Arizona.—*Wagoner v. Territory*, 5 Ariz. 175, 51 Pac. 145 (1897).

Arkansas.—*Evans v. State*, 58 Ark. 47, 22 S. W. 1026 (1893).

California.—*People v. Glover*, 141 Cal. 233, 74 Pac. 745 (1903).

Georgia.—*Wheeler v. State*, 112 Ga. 43, 37 S. E. 126 (1900).

Idaho.—*State v. Yee Wee*, 7 Ida. 188, 61 Pac. 588 (1900).

Illinois.—*Barnett v. People*, 54 Ill. 325 (1870).

Indiana.—*Archibald v. State*, 122 Ind. 122, 23 N. E. 758 (1889).

Iowa.—*State v. Murdy*, 81 Iowa 603, 47 N. W. 867 (1891).

Kansas.—*State v. Morrison*, 64 Kan. 669, 68 Pac. 48 (1902).

Kentucky.—*Austin v. Com.*, 40 S. W. 905, 19 Ky. L. Rep. 474 (1897).

Louisiana.—*State v. Bordelon*, 113 La. 690, 37 So. 603 (1904).

the Supreme Court of Georgia,² "there is a decisive test to which 'dying declarations' must be subjected, and by it their admissibility as testimony can be readily determined. That test it, *whatever* may be stated by a witness under oath, is admissible in evidence as dying declarations, made by one under the consciousness of approaching death. The statement, under such circumstances, is held to be as truthful as if under oath, and equivalent to a statement *sworn* to. But the *opinions* of witnesses under oath, as a general rule, are inadmissible in evidence in *criminal cases*, and hence opinions in *dying declarations* are excluded."

§ 2856. (*Scope of Declaration*); Preliminary Facts.—The general requirement which limits the statements of a dying declarant to the *res gestae*, properly so-called, of the fatal encounter,¹ implies an exclusion of a narrative account of other facts. This may be enforced by careful administrators even to the exclusion of preliminary or antecedent circumstances deemed likely to prejudice a defendant by misleading the jury, even though some slight relevancy may be shown. Thus, a statement relating to a past occurrence between the deceased and the accused, showing a threat made by the accused, and tending to establish a motive for the crime, is not admissible as a dying declaration.² Preliminary facts, such as those tending to show what brought the parties to-

Michigan.—People v. Knapp, 26 Mich. 112 (1872).

Missouri.—State v. Hendricks, 172 Mo. 654, 73 S. W. 194 (1903).

Nevada.—State v. Vaughan, 22 Nev. 285, 39 Pac. 733 (1895).

New Jersey.—Donnelly v. State, 26 N. J. L. 463, *affirmed* 26 N. J. L. 601 (1857).

New York.—People v. Conklin, 175 N. Y. 333, 67 N. E. 624 (1903).

Oregon.—State v. Fletcher, 24 Ore. 295, 33 Pac. 575 (1893).

Pennsylvania.—Com. v. Birriolo, 197 Pa. St. 371, 47 Atl. 355 (1900).

South Carolina.—State v. Bradley, 34 S. C. 136, 13 S. E. 315 (1890).

Texas.—Benavides v. State, 31 Tex. 579 (1869).

Utah.—State v. Kessler, 15 Utah

142, 49 Pac. 293, 62 Am. St. Rep. 911 (1897).

Virginia.—Bull v. Com., 14 Gratt. 613 (1857).

West Virginia.—State v. Thompson, 21 W. Va. 741 (1882).

Wisconsin.—Hughes v. State, 109 Wis. 397, 85 N. W. 333 (1901).

United States.—U. S. v. McGurk, 26 Fed. Cas. No. 15,680, 1 Cranch C. C. 71 (1802).

England.—Reg. v. Howell, 1 C. & K. 689, 1 Cox Cr. C. 151, 1 Den. C. C. 1, 47 E. C. L. 689 (1845).

2. Whitley v. State, 38 Ga. 50, 70 (1868), per Harris, J.

§ 2856-1. § 2849.

2. People v. Alexander, 161 Mich. 645, 126 N. W. 837, 17 Detroit Leg. N. 408 (1910); Still v. State, 125 Tenn. 80, 140 S. W. 298 (1911).

gether,³ may properly be rejected.⁴ Previous threats of violence or any attempted dissuasion from inflicting injury stand in the same position.⁵

§ 2857. (Scope of Declaration); Administrative Details.—Should it happen that *res gestae* facts (using the phrase in its proper sense) are blended in a written¹ or oral dying declaration with those not properly part of the *res gestae*, an alternative course is open to judicial administration. Should the *res gestae* facts be fairly separable, they may be received in evidence, rejecting the balance. Should the tangle be an inextricable one, the natural impulse is to reject the entire statement. In this connection, however, as elsewhere, much will depend upon what it has seemed reasonable to call “the state of the case.”² Where no forensic necessity is shown by the government, requiring the admission of the objectionable evidence in exercising the right to prove its case,³ the ever-present duty of the judge to protect the substantive rights of the defendant to the benefit of the procedural rules of evidence⁴ and to prevent the jury from being misled,⁵ may properly suggest the exclusion of the evidence. Thus, where a statement embodying a large element of reasoning, e. g., “A. (the accused) shot and killed me for nothing,”⁶ is offered in evidence at a time when there is no forensic need of receiving it, there being unobjectionable evidence to the same effect, it will be rejected. Had the excluded statement been reasonably necessary to proof of the government’s case, its fate, when tendered in evidence, might have been entirely different. In any case, it readily occurs to sound judicial administration to accord but slight importance to defects in the form of the statement contained in a dying declaration. The declarant may well have been ignorant of or inattentive to the technical requirements of the witness stand while the prosecution is

3. *Wakefield v. State*, 50 Tex. Cr. App. 124, 94 S. W. 1046 (1906).

4. No prejudice, however, necessarily results from receiving evidence of such prior threats set out in the course of a dying declaration. *Com. v. Spahr*, 211 Pa. 542, 60 Atl. 1084 (1905).

5. *State v. Spivey*, 191 Mo. 81, 90 S. W. 81 (1905).

§ 2857-1. *Temple v. State*, 15 Tex. App. 304, 49 Am. Rep. 200 (1883).

2. § 1742.

3. §§ 334 *et seq.*

4. § 333.

5. §§ 386, 1745.

6. *Collins v. Com.*, 12 Bush (Ky.) 271 (1876).

debarred by the peculiar circumstances of the case from correcting any informalities in this direction.

§ 2858. **Weight for the Jury.**—The preliminary ruling of the judge admitting the dying declaration goes no farther than to decide that the jury may rationally consider it as evidence.¹ What probative force it shall have in deciding the issues raised in the case is absolutely for them to determine.² In deciding as to its

§ 2858-1. *Com. v. Roberts*, 108 Mass. 296 (1871).

"This preliminary adjudication of the court upon the question as to the admissibility of the testimony, in case the evidence be allowed, has decided nothing in regard to its credibility. That peculiar province still remains for the jury. It is every day's practice to admit evidence as competent, which the jury have no hesitation in disbelieving. The court may decide, upon examination of proofs, that a witness is not incompetent for want of reason or understanding; the jury may, notwithstanding, determine within their province, what is the weight of his testimony, and may graduate the credit they will repose in it, from the point of total disbelief to that of the most implicit confidence." *Vass's Case*, 3 Leigh (Va.) 786, 794, 24 Am. Dec. 695 (1831), per Lomax, J.

2. *Alabama.*—*Ex parte Key*, 5 Ala. App. 274, 59 So. 331 (1912); *White v. State*, 111 Ala. 92, 21 So. 330 (1895); *Justice v. State*, 99 Ala. 180, 13 So. 658 (1892).

Arkansas.—*Motley v. State*, 152 S. W. 140 (1912); *Rhea v. State*, 147 S. W. 463 (1912); *Jones v. State*, 88 Ark. 579, 115 S. W. 166 (1909); *Evans v. State*, 58 Ark. 47, 55, 22 S. W. 1026 (1893); *Campbell v. State*, 38 Ark. 498 (1882); *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54 (1839).

California.—*People v. Thomson*, 145 Cal. 717, 79 Pac. 435 (1905);

People v. Oliveria, 127 Cal. 376, 59 Pac. 772 (1899); *People v. Abbott*, 66 Cal. 18, 4 Pac. 769 (1884).

Delaware.—*State v. Adams*, 6 Pennw. 178, 65 Atl. 510 (1906).

Georgia.—*Smith v. State*, 9 Ga. App. 403, 71 S. E. 606 (1911).

Illinois.—*Hagenow v. People*, 188 Ill. 545, 59 N. E. 242 (1901); *Starkey v. People*, 17 Ill. 17 (1855).

Indiana.—*Doles v. State*, 97 Ind. 555 (1884).

Iowa.—*State v. Johns*, 152 Iowa 383, 132 N. W. 832 (1911); *State v. Phillips*, 118 Iowa 660, 92 N. W. 876 (1902); *State v. Elliott*, 45 Iowa 486 (1877); *State v. Nash*, 7 Iowa 347 (1858).

Kansas.—*State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322 (1894).

Kentucky.—*Brock v. Com.*, 92 Ky. 183, 17 S. W. 337, 13 Ky. L. Rep. 450 (1891); *Williams v. Com.*, 7 Ky. L. Rep. (abstract) 745 (1886); *Walston v. Com.*, 16 B. Mon. 15 (1855).

Maryland.—*Meno v. State*, 117 Md. 435, 83 Atl. 759 (1912) (sufficient intelligence).

Massachusetts.—*Com. v. Casey*, 11 Cush. 417, 59 Am. Dec. 150 (1853).

Minnesota.—*State v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065 (1894).

Mississippi.—*Jackson v. State*, 94 Miss. 83, 47 So. 502 (1908); *Jones v. State*, 70 Miss. 401, 12 So. 444 (1892); *Brown v. State*, 32 Miss. 433 (1856); *Nelms v. State*, 13 Sm. & M. 500, 53 Am. Dec. 94 (1850); *McDaniel v. State*, 8 Sm. & M. 401, 47 Am. Dec. 93 (1847).

credibility the jury should consider all the evidence in the case, including any which may have come to their attention during the

Missouri.—State v. Zorn, 202 Mo. 12, 100 S. W. 591 (1907); State v. Parker, 172 Mo. 191, 72 S. W. 650 (1903); State v. McCanon, 51 Mo. 160 (1872).

Montana.—State v. Gay, 18 Mont. 51, 44 Pac. 411 (1896).

Nebraska.—Johnson v. State, 88 Neb. 328, 129 N. W. 281 (1911).

New Jersey.—Donnelly v. State, 26 N. J. L. 463, *affirmed* 26 N. J. Law 601 (1857).

New York.—People v. Knapp, 1 Edm. Sel. Cas. 177 (1845).

North Carolina.—State v. Davis, 134 N. C. 633, 46 S. E. 722 (1904); State v. Whitson, 111 N. C. 695, 16 S. E. 332 (1892); State v. Thomason, 46 N. C. 274 (1854).

Oklahoma.—Bilton v. Territory, 1 Okla. Cr. App. 566, 99 Pac. 163 (1909).

Oregon.—State v. Fuller, 52 Ore. 42, 96 Pac. 456 (1908); State v. Doris, 51 Ore. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 n. (1908); State v. Foot You, 24 Ore. 61, 32 Pac. 1031, 33 Pac. 537 (1893); State v. Shaffer, 23 Ore. 555, 32 Pac. 545 (1893).

Pennsylvania.—Sullivan v. Com., 93 Pa. St. 284 (1880); Com. v. Lenox, 3 Brewst. 249 (1867).

South Carolina.—State v. Washington, 13 S. C. 453 (1880); State v. Quick, 15 Rich. L. 342 (1868).

Tennessee.—Baxter v. State, 15 Lea 657 (1885).

Texas.—Walker v. State, 37 Tex. 366 (1872).

Virginia.—Vass v. Com., 3 Leigh. 786, 24 Am. Dec. 695 (1831).

Wisconsin.—State v. Cameron, 2 Pinn. 490, 2 Chandl. 172 (1850).

On a prosecution for murder, dying declarations of decedent are to be considered by the jury, as any other testimony, in connection with all the

other evidence. State v. Adams, 6 Pennew. (Del.) 178, 65 Atl. 510 (1906).

It has been held "That the proper course to be pursued was this: that a *prima facie* case of the moral consciousness required, should be exhibited to the court in the first instance, as preliminary to the admission of the testimony. This done, the evidence should be received and left for the Jury to determine whether the deceased was really under the apprehension of death when the declarations were made, which they might infer either from circumstances or the expressions used." Campbell v. State, 11 Ga. 353, 376 (1852), per Lumpkin, J.

The jury are the judges of the weight and credibility of dying declarations, and, such declarations being in the nature of hearsay testimony, the jury must consider whether a declaration introduced in evidence is the exact words of the deceased, and whether it correctly expresses his meaning. State v. Byrd, 41 Mont. 585, 111 Pac. 407 (1910).

Existence of declaration.—Where there is a conflict of testimony as to whether any dying declaration at all, or what purported to be one, was actually made, the fact is to be determined by the jury. Com. v. Lawson, 80 S. W. 206, 25 Ky. Law Rep. 2187 (1904).

Numerical test.—Any judicial attempt to apply a numerical test, in number of witnesses, to the probative force of a dying declaration constitutes an invasion of the proper province of the jury. Thus, an instruction to the jury that they should give certain dying declarations such weight as they would be entitled to "if they had been

preliminary hearing on *voir dire*.³ The credit which the jury may be disposed to give may properly vary as they regard a dying declaration as being one of fact, on the one hand, or as stating opinion or inference, on the other.⁴ So, as to whether a dying declaration has been voluntarily made, or was extorted by duress⁵ is a question for them. As to the presence of a sense of impending death, the jury may find that it does or does not exist.⁶ To

stated to you by one witness," has been held erroneous. *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (1904).

3. *People v. White*, 251 Ill. 67, 95 N. E. 1036 (1911); *Gurley v. State*, (Miss. 1912) 57 So. 565; *State v. Gow*, 235 Mo. 307, 138 S. W. 648 (1911); *Jackson v. State*, 55 Tex. Cr. App. 79, 115 S. W. 262, 131 Am. St. Rep. 792 (1908).

"To enable the jury fairly and properly to determine its weight and credibility, testimony as to all circumstances bearing upon, and immediately connected with its execution, including all statements made at the time to and by the decedent as to his condition, and by him as to his sense thereof, as well as anything tending to throw light upon the motive prompting him to make a statement, should have been admitted and submitted to the jury for their consideration." *State v. Doris*, 51 Ore. 136, 149, 94 Pac. 44, 16 L. R. A. (N. S.) 660 (1908), per King, C.

"Each case must depend on its own circumstances. It is a very grave responsibility to have to decide, and one must look at all the surrounding circumstances." *R. v. Abbott* (1903), 67 J. P. 151, per Kennedy, J.

4. *State v. Washington*, 13 S. C. 453 (1880); *State v. Quick*, 15 Rich. L. (S. C.) 342 (1867).

5. *Jackson v. State*, 55 Tex. Cr. App. 79, 115 S. W. 262, 139 Am. St. Rep. 792 (1908) (abortion).

6. *California*.—*People v. Thomson*, 145 Cal. 717, 79 Pac. 435 (1905).

Georgia.—*Smith v. State*, 9 Ga. App. 403, 71 S. E. 606 (1911); *Robinson v. State*, 130 Ga. 361, 60 S. E. 1005 (1908); *Jones v. State*, 130 Ga. 274, 60 S. E. 840 (1908); *Findley v. State*, 125 Ga. 579, 54 S. E. 106 (1906); *Wallace v. State*, 90 Ga. 117, 15 S. E. 700 (1892).

Iowa.—*State v. Phillips*, 118 Iowa 660, 92 N. W. 876 (1902).

Missouri.—*State v. Sexton*, 147 Mo. 89, 48 S. W. 452 (1893).

New Jersey.—*State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 (1906).

Oregon.—*State v. Fuller*, 52 Ore. 42, 96 Pac. 456 (1908).

Texas.—*McCorquodale v. State* (Cr. App. 1906), 98 S. W. 879.

"If the court is satisfied *prima facie* that the deceased is *in extremis* and conscious of his condition, it will allow the dying declarations to go to the jury. The jury will look to the evidence to see if the person making them was *in extremis* at the time, and was conscious of his condition. If the jury believe the fact that the person was *in extremis*, and conscious of his condition, then they may consider the dying declarations as evidence." *Dumas v. State*, 62 Ga. 58, 62 (1878).

Existence of hope.—Whether at the time decedent made declarations, received in evidence as dying declarations, he cherished a hope of restoration to health is a question for the jury. *State v. Fuller*, 52 Ore. 42, 96 Pac. 456 (1908).

The subject is frequently one concerning which reasonable minds may reach different conclusions. *State v.*

assume, in instructions, therefore, that the statements admitted are, in fact, dying declarations, has been said to be error.⁷ Even should the jury be convinced that the utterances placed before them are properly entitled to the legal status of dying declarations, they are by no means constrained to credit them. They may believe that the declarant has spoken the truth and so credit his statement, although they fail to find that he spoke with a sense of impending death⁸ and they may, on the other hand, disbelieve his utterance, though made in expectation of immediate dissolution. The presiding judge may, however, require that the jury award credit to the statement only in case they find it to have been made while the declarant was in the mental state prescribed by law.⁹

Bias.—The jury may reasonably find that the probative force of the dying declaration is increased by the fact that the speaker is apparently not prepossessed in favor of his own side of the contention.¹⁰

Not conclusive.—The facts stated in a dying declaration are thus seen to be not conclusive upon the jury.¹¹

§ 2859. (*Weight for the Jury*); A discredited Rule.—The administrative treatment judicially accorded to the admission of this exception to the hearsay rule as secondary evidence of the facts

Doris, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 n. (1908).

Relations of court and jury.

Where the trial court determines that a dying declaration was made under a sense of impending death, defendant is not entitled to have the jury instructed that they may review such determination and disregard the declaration if they come to a different conclusion than that of the trial court. *State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 (1906).

7. *People v. Thomson*, 145 Cal. 717, 79 Pac. 435 (1905).

8. See *Donnelly v. State*, 26 N. J. L. 463, *affirmed* 26 N. J. L. 601 (1857).

9. *Bird v. State*, 128 Ga. 253, 57 S. E. 320 (1907); *Smith v. State*, 118 Ga. 61, 44 S. E. 817 (1903); *Ander-son v. State*, 117 Ga. 255, 43 S. E. 835 (1903); *Smith v. State*, 110 Ga.

255, 34 S. E. 204 (1899); *Dumas v. State*, 62 Ga. 58 (1878); *Jackson v. State*, 56 Ga. 235 (1876); *Com. v. Brewer*, 164 Mass. 577, 42 N. E. 92 (1895); *Hopkins v. State*, (Tex. Cr. App. 1899) 53 S. W. 619.

10. *Alabama.*—*Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276 (1848).

California.—*People v. Southern*, 120 Cal. 645, 53 Pac. 214 (1898).

Oregon.—*State v. Saunders*, 14 Oreg. 300, 12 Pac. 441 (1886).

United States.—*Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. ed. 917 (1892).

England.—*R. v. Scaife*, 1 Moo. & Rob. 552, 2 Lew. Cr. C. 150 (1836).

See, however, *People v. McLaughlin*, 44 Cal. 435 (1872).

11. *State v. Watkins*, 159 N. C. 480, 75 S. E. 22 (1912); *Wright v. Com.*, 109 Va. 847, 65 S. E. 19 (1909).

asserted is intelligible only upon the theory that the rule which admits it is a discredited one. It is both too strictly and too loosely construed. Since the ground for receiving the statement is that of necessity,¹ its reception, upon sound administrative principles, should end when the necessity no longer exists. Yet even where the government is able to prove a perfect case by direct evidence, the dying declaration continues to be received.² On the other hand, if the death of the declarant and the absence of other satisfactory proof furnishes a sufficient necessity for admitting the secondary evidence on indictments for homicide, no reason is perceived why the same necessity ought not to admit the same species of evidence in case of other criminal offences or even in civil actions. Much the same observation may properly be made with regard to the numerous limitations which are placed about the admissibility of this species of proof. If it is fit to be trusted at all, it should be trusted less grudgingly.³ The explanation of this anomalous situation apparently lies in the growth of a modern scepticism to which reference is elsewhere made,⁴ a doubt as to validity of the reasoning on which the credibility of the evidence is based.⁵ The result seems to be a rather illogical compromise. Dying declarations having been declared by competent authority to be a legitimate species of evidence under certain circumstances, judicial procedure receives it, even when unnecessary, should these

§ 2859-1. § 2812.

2. § 2812.

3. *Wooten v. Wilkins*, 39 Ga. 223, 99 Am. Dec. 456 (1869); *State v. Wagner*, 61 Me. 78 (1873); *Canjolle v. Ferrie*, 23 N. Y. 90 (1861); *McFarland v. Shaw*, 4 N. C. 200, 2 N. C. Law Reps. 102 (1815).

4. § 2819.

5. "The exception is in derogation of common right, for, independent of constitutions and laws, an accused person has the right to have the witness, who is to condemn him, in his presence, so that he may be subjected to the most rigid inquisition. To hang a man on the statements of one who is on his dying bed, racked with pain, incapable, in most cases, of giving a full and accurate account of the transaction, weakened in body

and in mind, and though *in articulo mortis*, harboring some vindictive feeling against him who has brought him to that condition, is, to say the least, and has always been, a dangerous innovation upon settled principles of evidence, and no court ought to be disposed to extend it to embrace cases to which it did not, in its inception, apply." *Marshall v. Chicago & G. E. Ry. Co.*, 48 Ill. 475, 477, 95 Am. Dec. 561 (1868), per Breese, C. J.

"For the reason that the admission of such statements is exceptional, they ought always to be excluded unless they come within the rule in every respect." *State v. Belcher*, 13 S. C. 459, 463 (1880), per McGowan, J.

circumstances be shown to exist. On the other hand, scepticism as to the trustworthiness of the dread of death for compelling the exhibition of the truth stops the extension of the rule to analogous situations, and has even, as is to be noticed *passim*, deprived the rule of much of the scope which it formerly possessed. Somewhat of this feeling is observable in the endorsement which has been given by good judicial administrators to limit the admissibility of dying declarations.

It has been held prejudicial error for a presiding judge to instruct the jury, without qualification, that such declarations are entitled to equal consideration by the jury as any other evidence in the case.⁶

§ 2860. (*Weight for the Jury; A discredited Rule*); Lack of Fairness.— Among considerations which cause judicial administration instinctively to deprecate the use of dying declarations, confining the rule strictly to its previously established limits, is an obvious lack of fairness to the accused. Two men, not greatly differing from each other socially, intellectually or morally, engage in an encounter. Of the two, the slain is enabled to tell his story in full, replete with passion, inaccuracy and possibly, even deliberate falsehood under what the jury are informed is a sanction equally solemn with that of the appeal to God contained in the judicial oath. The slayer, utterly unable to cross-examine this fatally damaging statement, can only contradict it, laboring meanwhile against the emotionalism of the jury¹ who recognize that he is working for his life. One thing, at least, administration will do to minimize the hardship cast upon the accused by the introduction of these extrajudicial statements, backed by a sanction

6. *State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 n. (1908).

"It would have been proper to have instructed the jury to the effect that, if they determine that the declarant was *in extremis* and the declaration was made under full belief of impending death, they may give the statements the same weight as they would if the declarant were living and made the statements attributed to him, or had given testimony of similar import, under oath,

from the witness stand, without cross-examination thereon, proper consideration being given and due allowance being made to all circumstances surrounding the declarant when the statement was made, together with his physical as well as mental condition, including any apparent influence, if any, under which he might have been laboring at the time." *State v. Doris*, 51 Oreg. 136, 155, 94 Pac. 44, 16 L. R. A. (N. S.) 660 n. (1908), per King, C.

§ 2860-1. § 186.

equivalent to an oath and untested by cross-examination. It will give him the widest latitude in making his defense. As Baron Alderson remarks in *Ashton's Case*,² "the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination."³ However justifiable such administrative attempts to hold the balance of indulgence even⁴ may be, and however clear the constitutionality of receiving this species of evidence may appear,⁵ undoubtedly its reception often involves placing the accused at a serious disadvantage.

§ 2861. (*Weight for the Jury; A discredited Rule*); *Distraction of Declarant's Mind*.—Second in importance, if second at all, to this lack of fairness as an infirmative consideration regarding the probative force of this class of evidence, are the administrative considerations which arise out of the distracted condition of the mind of the declarant. Assuming the utmost good faith on the part of the dying person, much is necessarily involved in the situation but little conducive to the reposefulness of thought and the calmness of judgment essential to the highest effectiveness in setting forth facts truthfully and in their due relations. The decedent, surrounded by family and friends deeply in sympathy with his distressing situation, desirous of exculpating himself and leaving a worthy memory, is apt to state his own side of an affair much more complicated than he discloses. Those about him do not, as a rule, seek to elicit qualifying facts favorable to the accused. Should the officers of the law wait upon him, they very often regard their duty to be that of learning facts helpful in securing the conviction of the assailant. Under these circumstances, the interests of truth may not be securely safe-guarded.

2. Lew. Cr. C. 147 (1789).

3. *Alabama*.—*Godfrey v. State*, 31 Ala. 323, 70 Am. Dec. 494 (1858).

California.—*People v. Sanchez*, 24 Cal. 17 (1864).

Georgia.—*Hill v. State*, 41 Ga. 484 (1871); *Whitley v. State*, 38 Ga. 50 (1868); *Campbell v. State*, 11 Ga. 353 (1852).

Illinois.—*Starkey v. People*, 17 Ill. 17 (1855).

Massachusetts.—*Com. v. Roberts*, 108 Mass. 296 (1871).

New York.—*Forrest v. Kissam*, 7 Hill 463 (1844).

North Carolina.—*State v. Williams*, 67 N. C. 12 (1872).

South Carolina.—*State v. Terrell*, 12 Rich. L. 321 (1859).

United States.—*Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. ed. 917 (1892).

4. § 541.

5. § 2868.

The probability is great that the distraction of pain, the stupefaction of drugs, to say nothing of the claim of many important matters pressing for attention in the final hours or minutes of a lifetime, may exclude many important facts which even the declarant would concede.¹

§ 2862. (*Weight for the Jury; A discredited Rule*); Wrong Emphasis.—The real reason why the rule admitting dying declarations is judicially discredited and for the consequent caution displayed by judges in enforcing it is a double one, lack of relevancy and the presence of administrative danger. In accordance, however, with their custom of giving the second reason first, to which attention has already been called,¹ presiding judges and appellate tribunals are more apt to emphasize the circumstance that these declarations constitute an exception to the hearsay rule, the defendant having had no opportunity for cross-examination.²

§ 2863. (*Weight for the Jury*); Corroboration.—Should it be thought that the accused, through the various methods open to him, has succeeded in impeaching the dying declaration or otherwise reducing it below the desired standard of probative efficiency, the prosecution may corroborate it,¹ *inter alia*, by showing prior consistent statements on the part of the declarant.² So far as this

§ 2861-1. "Statements made under the shadow of approaching death may come with the infirmity of inattention, when the mind is diverted to the thoughts of the future; the vigor of the mind may be impaired; facts may be but partially stated; inferences and opinions may be stated as facts; the passions of anger and revenge may linger, after all hope of life is fled, and affect the truth of the statement. It must come as the memory of those who heard it, subject to all the uncertainties of a correct understanding of the speech as made, and of a correct reproduction by the memory of what was truly said." *Lipcomb v. State*, 75 Miss. 559, 580, 23 So. 210 (1897), per Magruder, J.

§ 2862-1. § 2723.

2. *Gardner v. State*, 55 Fla. 25, 45 So. 1028 (1908); *State v. Knoll*, 69 Kan. 767, 77 Pac. 580 (1904); *State v. Davis*, 134 N. C. 633, 46 S. E. 722 (1904).

§ 2863-1. Florida.—*Lester v. State*, 37 Fla. 382, 20 So. 232 (1896).

Georgia.—*Redd v. State*, 99 Ga. 210, 25 S. E. 268 (1896).

Missouri.—*State v. Diple*, 242 Mo. 461, 147 S. W. 111 (1912); *State v. Parker*, 96 Mo. 382, 9 S. W. 728 (1888).

New York.—*People v. Knapp*, 1 Edm. Sel. Cas. 177 (1845).

North Carolina.—*State v. Blackburn*, 80 N. C. 474 (1879); *State v. Thomason*, 46 N. C. 274 (1854).

2. *State v. Craine*, 120 N. C. 601, 27 S. E. 72 (1897) (affidavit); *State v. Blackburn*, 80 N. C. 474 (1879).

is attempted to be done it has been required that the latter should be shown to have been made under circumstances which would make them competent as dying declarations,³ although other administrators have not recognized the propriety for this qualification.⁴ Corroboration has also been permitted prior to any attempt at impeachment.⁵

§ 2864. (*Weight for the Jury*); Impeachment.—The declarant in a dying declaration may be impeached in any manner which would be proper in case of a witness.¹

Direct disproof.—The impeachment which arises from disproving statements of a dying declaration is clearly within the rights of the accused. The effect, however, of the most conclusive demonstration of the falsity of the dying statement in some particular, as where the declarant enumerates among his assailants one who

3. *State v. Hendricks*, 172 Mo. 654, 73 S. W. 194 (1903).

4. *State v. Blackburn*, 80 N. C. 474 (1879).

5. *People v. Glenn*, 10 Cal. 32 (1858).

§ 2864-1. *Florida.*—*Lester v. State*, 37 Fla. 382, 20 So. 232 (1896).

Georgia.—*Robinson v. State*, 10 Ga. App. 462, 73 S. E. 622 (1912).

Kansas.—*State v. O'Shea*, 60 Kan. 772, 57 Pac. 970 (1899).

Massachusetts.—*Com. v. Cooper*, 5 Allen 495, 81 Am. Dec. 762 (1862).

Mississippi.—*Gambrell v. State*, 92 Miss. 728, 46 So. 138, 17 L. R. A. (N. S.) 291, 131 Am. St. Rep. 549 (1908).

Missouri.—*State v. Dipley*, 242 Mo. 461, 147 S. W. 111 (1912).

New York.—*People v. Wood*, 2 Edm. Sel. Cas. 71 (1849).

Oklahoma.—*Morris v. State*, 6 Okla. Cr. App. 29, 115 Pac. 1030 (1911).

Virginia.—*Wright v. Com.*, 109 Va. 847, 65 S. E. 19 (1909).

United States.—*Carver v. U. S.*, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. ed. 602 (1896).

A dying declaration stands on no higher plane than that occupied by the testimony of an ordinary wit-

ness. *People v. Thomson*, 145 Cal. 717, 79 Pac. 435 (1905); *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018 (1905).

"A statement made by the deceased, although admitted by the court as a dying declaration and so found and treated by the jury, has no greater force and effect than the testimony of a living witness. Indeed, when this anomalous character of evidence is properly considered, it is doubtful if it should have equal weight with that of an unimpeached witness." *Pyle v. State*, 4 Ga. App. 811, 814, 62 S. E. 540 (1908), per Hill, C. J.

A dying declaration, in law, is no more sacred than ordinary testimony, and is subject to discredit and impeachment by any competent testimony which impairs its value. *Gambrell v. State*, 92 Miss. 728, 46 So. 138, 17 L. R. A. (N. S.) 291, 131 Am. St. Rep. 549 (1908).

Lack of ability to distinguish between persons and things may be shown. *State v. Yee Gueng*, 57 Oreg. 509, 112 Pac. 424 (1910).

Incidents or statements which are such as tend to disclose doubts in the mind of the declarant, as to whether

could not have been present,² does not affect the admissibility of the declaration as a whole, but only its weight.

§ 2865. (*Weight for the Jury; Impeachment*); Inconsistent Statements.— The accused may seek to impair the probative force of a dying declaration by showing that the declarant has made inconsistent statements¹ at other times. Indeed, it is his right to

death is near at hand are admissible. *State v. Yee Gueng*, 57 Ore. 509, 112 Pac. 424 (1910).

2. *White v. State*, 30 Tex. App. 652, 18 S. W. 462 (1892).

§ 2865-1. *Alabama*.—*Parker v. State*, 165 Ala. 1, 51 So. 260 (1909); *Gregory v. State*, 140 Ala. 16, 37 So. 259 (1904).

Colorado.—*Salas v. People*, 51 Colo. 461, 118 Pac. 992, 37 L. R. A. (N. S.) 252 n. (1911).

Delaware.—*State v. Uzzo*, 6 Pennw. 212, 65 Atl. 775 (1907).

Georgia.—*Washington v. State*, 137 Ga. 218, 73 S. E. 512 (1911); *Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540 (1908).

Kentucky.—*Allen v. Com.*, 134 Ky. 110, 119 S. W. 795 (1909).

Louisiana.—*State v. Charles*, 111 La. 933, 36 So. 29 (1904).

Oklahoma.—*Morris v. State*, 6 Okla. Cr. App. 29, 115 Pac. 1030 (1911); *Bilton v. Territory*, 1 Okla. Cr. App. 566, 99 Pac. 163 (1909).

Oregon.—*State v. Fuller*, 52 Ore. 42, 96 Pac. 456 (1908).

Tennessee.—*Morelock v. State*, 90 Tenn. 528, 18 S. W. 258 (1891).

Texas.—*Lyles v. State* (Cr. App. 1912), 142 S. W. 592; *Hunter v. State*, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910); *McCorquodale v. State* (Cr. App. 1906), 98 S. W. 879.

Washington.—*State v. Mayo*, 42 Wash. 540, 85 Pac. 251 (1906).

United States.—*Carver v. United States*, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. ed. 602 (1897).

"It can not be easily seen, if the dying declarations of the deceased,

made *ex parte* in the presence of his own friends and relatives, and not in the presence of the accused or his friends, without a cross-examination, and testified to by his friends and relatives, are to be admitted against the accused from the necessity of the case, why the declarations of the deceased, after the mortal blow is given, to other persons and at other times, different from the dying declarations, should not be admitted in evidence to impeach the dying statement. If the one is admitted contrary to the general rule, why should not the other be likewise admitted? The former is admitted in favor of public justice, why not the latter in favor of life and liberty?" *Battle v. State*, 74 Ga. 101, 104 (1884), per Blandford, J.

"That public justice which treats every man alike, the living as well as the dead, and which has as much concern for the protection of the innocent as it has for the punishment of the guilty, demands that where proof of a dying declaration has been allowed against the accused, proof of a contradictory statement made by the declarant should be allowed in his favor. There can be no justice, therefore, in any rule which would deprive the accused, under such circumstances, of the right to impeach the credit of the deceased by proof of his having made contradictory statements as to the homicide and its cause." *Pyle v. State*, 4 Ga. App. 811, 817, 62 S. E. 540 (1908), per Hill, C. J.

establish that fact if it is within his power to do so.² The existence of such inconsistent statements,³ even that of a contradictory

"The only case holding otherwise is that of *Wroe v. State*, 20 Ohio St. 460 (1870). This case has never been followed, so far as we have been able to discover, and its reasoning is narrow and unsatisfactory." *Morelock v. State*, 90 Tenn. 528, 531, 18 S. W. 258 (1891), per Lurton, J.

"There is no reason why the same principle of law should not be applied to the contradictory statements of persons *in extremis* and those of a person on examination under oath. The court upon this point should have charged the jury, that if they believed that the contradiction in the dying declarations of the deceased, were produced by ignorance on her part as to who had committed the offence, and a mere surmise that it was the prisoner, they ought to be rejected and not permitted to have any weight in coming to a conclusion upon which their judgment was to be based; but that if they believed that the contradictions were produced by apprehension and fears of her husband, or an unwillingness to charge him with the offence, and not from ignorance as to his guilt, then the contradictions might be reconciled, and that portion of her declaration charging the prisoner with the offence ought to be taken into consideration by them, and such weight ought to be given to it as from all the circumstances in the case they might think it justly entitled." *McPherson v. State*, 9 Yerg. (Tenn.) 279, 280 (1836), per Turley, J.

Assigning wrong reasons.—Aside from questions of waiver or estoppel, the action of the trial court will, upon sound administrative principles, be judged in an appellate court rather by its actual nature than by the reasons which are assigned for it. A correct ruling, though made upon

untenable grounds, will not be disturbed. The judicial instinct, a certain appetency, as it were, for doing justice according to law is often more nearly accurate than the grounds upon which it is defended. The reverse is equally true.

Thus, where, in tendering contradictory statements in evidence, counsel announces that they are offered as dying declarations or part of the *res gestae*, thereby assigning a wrong reason why the statements are admissible, this does not render the evidence any the less admissible, nor its exclusion any the less reversible error. *State v. Charles*, 111 La. 933, 36 So. 29 (1904).

2. Pyle v. State, 4 Ga. App. 811, 62 S. E. 540 (1908); *Coyle v. Com.*, 29 Ky. L. Rep. 340, 93 S. W. 584 (1906).

See, also, §§ 334 *et seq.*

3. Alabama.—*Gregory v. State*, 140 Ala. 16, 37 So. 259 (1903); *Shell v. State*, 88 Ala. 14, 7 So. 40 (1889).

California.—*People v. Lawrence*, 21 Cal. 368 (1863).

Delaware.—*State v. Lodge*, 9 Houst. 542, 33 Atl. 312 (1892).

Georgia.—*Carter v. State*, 2 Ga. App. 254, 58 S. E. 532 (1907); *Battle v. State*, 74 Ga. 101 (1884).

Illinois.—*Dunn v. People*, 172 Ill. 582, 50 N. E. 137 (1898).

Indiana.—*Green v. State*, 154 Ind. 655, 57 N. E. 637 (1900).

Louisiana.—*State v. Charles*, 111 La. 933, 36 So. 29 (1904).

Mississippi.—*Nelms v. State*, 13 Sm. & M. 500, 53 Am. Dec. 94 (1850).

Oregon.—*State v. Shaffer*, 23 Oreg. 555, 32 Pac. 545 (1893).

Tennessee.—*Morelock v. State*, 90 Tenn. 528, 18 S. W. 258 (1891).

Texas.—*Snell v. State*, 29 Tex. App. 236, 15 S. W. 722, 25 Am. St. Rep. 723 (1890); *Felder v. State*, 23

dying declaration,⁴ does not warrant the rejection of an extrajudicial statement tendered in evidence or require that it be stricken out, if once admitted.⁵ It affects merely the probative efficiency of the latter.⁶ Indeed, there is some authority to the effect that a statement merely inconsistent with the dying declaration, though made subsequent to the injury, is not receivable for purposes of impeachment unless the contradictory statement is made under such conditions as would make it admissible as a dying declaration⁷ or as part of the *res gestae*.⁸ For obvious reasons, the administrative practice, often rigidly imposed by rule,⁹ of calling the attention of a witness to the existence of an alleged contradictory or inconsistent statement made by him affording an opportunity of explaining it, has no application to the present situation.¹⁰

Impeachment by prosecution.—Should it happen that the accused, as he well may,¹¹ relies upon a dying declaration of the deceased, it is open to the prosecution to impeach the latter in any way appropriate to a witness. For this purpose, it may show, if it can, that the declarant has made inconsistent or contradictory statements.¹² An administrative substitute for this expedient has

Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777 (1887).

United States.—Carver v. U. S., 164 U. S. 694, 17 Sup. Ct. 228, 41 L. ed. 602 (1896).

Witness.—The same administrative principle applies to the case of a witness. The judge, in passing on the admissibility of dying declarations, determines only whether a *prima facie* case is presented, conceding the testimony to be true, and, if a witness makes different statements material to the proof of dying declarations, the jury may discredit him, but the judge cannot for that reason withhold his testimony. Carter v. State, 2 Ga. App. 254, 58 S. E. 532 (1907).

4. Morrison v. State, 42 Fla. 149, 28 So. 97 (1900); Green v. State, 154 Ind. 655, 57 N. E. 637 (1900); McPherson v. State, 9 Yerg. (Tenn.) 279 (1835).

5. Hawkins v. State, 98 Md. 355, 57 Atl. 27 (1904).

6. Moore v. State, 12 Ala. 764, 46 Am. Dec. 276 (1848); Richards v. State, 82 Wis. 172, 51 N. W. 652 (1892).

7. State v. Mills, 79 S. C. 187, 60 S. E. 664 (1908).

8. Maine v. People, 9 Hun (N. Y.) 113 (1876); Wroe v. State, 20 Ohio St. 460 (1870); State v. Stuckey, 56 S. C. 576, 35 S. E. 263 (1899); State v. Taylor, 56 S. C. 360, 34 S. E. 939 (1899).

9. Best on Ev. (Chamberlayne's 3d Amer. ed.) 603.

10. People v. Lawrence, 21 Cal. 368 (1863); Allen v. Com., 144 Ky. 222, 119 S. W. 795 (1909); State v. Fuller, 52 Oreg. 42, 96 Pac. 456 (1908); Carver v. U. S., 164 U. S. 694, 17 Sup. Ct. 228, 41 L. ed. 602 (1896).

11. § 2811.

12. State v. Uzzo, 6 Pennw. 212, 65 Atl. 775 (1907).

been suggested. In impeaching a dying declaration by inconsistent statements, the attention of the witness may, it is said, be directed to the matter desired to be introduced in evidence, and he may then state in his own words what the deceased said about it.¹³

§ 2866. (*Weight for the Jury; Impeachment*); Moral Character.—The accused may at all times introduce evidence tending to show that the deceased was without a proper sense of moral accountability,¹ or that a sense of impending death would fail to clear his mind of bitterness or falsehood leaving a controlling desire to tell the truth.² That he was in the habit of using profane³ or indecent language or suffered from other moral obliquities⁴ e. g., the habit of drinking intoxicants to excess,⁵ may be shown. Conviction of crime may be a relevant fact in such a connection.⁶ Similarly, while evidence is not admissible to establish the general bad character of the deceased,⁷ the defendant may prove, as he might in case of a witness, that the declarant could not reasonably be believed⁸ and that his reputation for truth and veracity was bad in the community where he resided.⁹ That the actual state of

13. *State v. Mayo*, 42 Wash. 540, 85 Pac. 251 (1906).

§ 2866-1. *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (1904).

2. *State v. Trusty*, 1 Pennw. (Del.) 319, 40 Atl. 766 (1898); *Nesbit v. State*, 43 Ga. 238 (1871); *State v. Elliott*, 45 Iowa 486 (1877); *State v. Nash*, 7 Iowa 347 (1858); *Hill v. State*, 64 Miss. 431, 1 So. 494 (1886).

3. *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970 (1899) (just before death).

"The peculiar character of the deceased for wickedness and disregard of the law of God in his outpourings of blasphemy, would have invoked the consideration of the jury; for if a man, even without hope of life in this world, is, nevertheless, without belief in God or in the divine revelation, while his declarations would be admissible, their weight and consideration should be weighed by the jury." *Nesbit v. State*, 43 Ga. 238, 249 (1871), per Lochrane, C. J.

Use of such language at about the time of making his statement or even

during the course of it does not render the declaration inadmissible. *Kirby v. State*, 151 Ala. 66, 44 So. 38 (1907). It has even been held error to allow evidence that declarant while making his dying declaration cursed the accused and spat in his face. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829 (1911).

4. *State v. Dipley*, 242 Mo. 461, 147 S. W. 111 (1912) (prize fighter).

5. *State v. Thawley*, 4 Harr. (Del.) 562 (1847).

6. *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650 (1896).

7. *State v. Tomasi*, 75 N. J. L. 739, 69 Atl. 214 (1908).

8. *Lester v. State*, 37 Fla. 382, 20 So. 232 (1896); *Perry v. State*, 102 Ga. 365, 30 S. E. 903 (1898); *Redd v. State*, 99 Ga. 210, 25 S. E. 268 (1896); *Nesbit v. State*, 43 Ga. 238 (1871); *People v. Knapp*, 1 Edm. Sel. Cas. (N. Y.) 177 (1845); *Carver v. U. S.*, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. ed. 602 (1897).

9. *Lester v. State*, 37 Fla. 382, 20

mind of the declarant toward the accused at the time of making his statement was one of great animosity, recklessness and thirst for revenge¹⁰ is also a relevant fact.

Irreligion.—Although statutory changes in most jurisdictions have removed any disqualification on the part of witnesses resulting from atheism or lack of religious belief, with the not strictly necessary result that the dying declaration of an atheist or an infidel¹¹ is received on equal terms with that of the most sincere christian¹² the probative weight of the two statements may be by no means the same. Lack of belief in a future state of rewards and punishments naturally affects, as has been noticed, the sanction for truth telling in case of a dying declarant and the fact may be introduced in evidence for the purpose of affecting the credibility of his statement,¹³ although there is authority to a different

So. 232 (1896); *State v. Tomasi*, 75 N. J. L. 739, 69 Atl. 214 (1908); See *Robinson v. State*, 10 Ga. App. 462, 73 S. E. 622 (1912).

See, also, Best on Ev. (Chamberlayne's 3d Amer. ed.), 258c.

10. *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (1904); *Digby v. People*, 113 Ill. 123, 55 Am. Rep. 402 (1885); *Tracy v. People*, 97 Ill. 101 (1880); *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970 (1899); *People v. Knapp*, 1 Edm. Sel. Cas. (N. Y.) 177 (1845).

"It strikes at the very foundation of the reasons upon which dying declarations are admitted at all. There are certain guaranties of the truth of dying declarations growing out of the solemnity of the time and circumstances under which they are made. . . . It was, therefore, clearly the right of the accused to show . . . that the deceased, in making the statement, was in a reckless, irreverent state of mind, and entertained feelings of ill-will and hostility towards the accused." *Tracy v. People*, 97 Ill. 101, 106, 107 (1880), per Mulkey, J.

11. A Chinaman, though not a believer in the Christian religion, may properly give a dying declaration. *State v. Ah Lee*, 8 Oreg. 214 (1880).

12. *State v. Elliott*, 45 Iowa 486 (1877); *Gambrell v. State*, 92 Miss. 728, 46 So. 138, 17 L. R. A. (N. S.) 291, 131 Am. St. Rep. 549 (1908); *State v. Ah Lee*, 8 Oreg. 214 (1880); *State v. Hood*, 63 W. Va. 182, 59 S. E. 971, 15 L. R. A. (N. S.) 448 (1907).

"The common law rule in that respect has been abrogated, and that no person is to be held incompetent to be a witness on account of his opinions on matters of religious belief, is clear. It mattered not, therefore, upon the point of the mere competency of the evidence, even had it appeared that the deceased had no religious belief." *People v. Sanford*, 43 Cal. 29, 34 (1872), per Wallace, C. J.

13. *Nesbit v. State*, 43 Ga. 238 (1871); *State v. Elliott*, 45 Iowa 486 (1877); *Gambrell v. State*, 92 Miss. 728, 46 So. 138, 17 L. R. A. (N. S.) 291, 131 Am. St. Rep. 549 (1908); *Hill v. State*, 64 Miss. 431, 1 So. 494 (1886); *Goodall v. State*, 1 Oreg. 333, 80 Am. Dec. 396 (1861).

See, also,

Iowa.—*State v. Elliott*, 45 Iowa 486 (1877).

Mississippi.—*Hill v. State*, 64 Miss. 431 (1886).

effect.¹⁴ Disbelief of such a nature will not be assumed but must be affirmatively shown.¹⁵

§ 2867. (*Weight for the Jury*); Mental state of Declarant.—

To enable them properly to judge of the probative force of a dying declaration, the jury are entitled to be fully informed of the circumstances under which it was made.¹ Prominent among these is the mental condition of the declarant.² This they are entitled to view from all angles, reaching a conviction of their own as to an actual sense of impending death experienced by the declarant at the time of making his statement and its influence over him in inhibiting falsehood.³ Changes in the mental condition or state of the declarant which do not impair the conclusion of the jury

Missouri.—*State v. Zorn*, 202 Mo. 12, 100 S. W. 591 (1907).

Oregon.—*Goodall v. State*, 1 Oreg. 333, 80 Am. Dec. 396 (1861).

United States.—*Carver v. U. S.*, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. ed. 602 (1897).

Compare, *State v. Yee Gueng*, 57 Oreg. 509, 112 Pac. 424 (1910).

The judge will be especially careful to give the accused the benefit of this fact, even if but as a *tabula in naufragio*, should the dying declaration be likely to prove a damaging piece of evidence. *Gambrell v. State*, 92 Miss. 728, 46 So. 138, 17 L. R. A. (N. S.) 291, 131 Am. St. Rep. 549 (1908).

Evidence tending to show that the declarant had at various times asserted that there was no hell or hereafter and that all the punishment a man gets he gets in this world, should be received. *Hill v. State*, 64 Miss. 431, 1 So. 494 (1886).

The dying declaration has been rejected on this ground. *Donnelly v. State*, 26 N. J. L. 463, *affirmed* 26 N. J. L. 601 (1857).

14. *State v. Yee Gueng*, 57 Oreg. 509, 112 Pac. 424 (1910).

15. *Donnelly v. State*, 26 N. J. L. 463, *affirmed* 26 N. J. L. 601 (1857).

§ 2867-1. *Mitchell v. State*, 71 Ga. 128 (1883); *Campbell v. State*, 11

Ga. 353 (1852); *Martin v. State*, 9 Ohio Cir. Dec. 621, 17 Ohio Cir. Ct. Rep. 406 (1898); *State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 n. (1908); *State v. Crawford*, 31 Wash. 260, 71 Pac. 1030 (1903).

2. *Allen v. Com.*, 134 Ky. 10, 119 S. W. 795 (1909) (rational); *Hunter v. State*, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910).

3. Where the state offered testimony tending to show that an alleged dying declaration was made under a sense of impending death, and the declaration was thereupon admitted in evidence, the court should have admitted testimony as to all circumstances bearing upon, and immediately connected with, its execution, including all statements made at the time to and by decedent as to his condition, as well as anything tending to throw light upon the motive which prompted him to make the statement. *State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 n. (1908).

Circumstances and incidents in connection with or surrounding the last statements of a dying person which are of such a character as to indicate a spirit of revenge or otherwise may be shown. *State v. Yee Gueng*, 57 Oreg. 509, 112 Pac. 424 (1910).

that the statement was made under the sense of impending dissolution affects only the weight of the evidence, without impairing the admissibility. The fact, for example, that the declarant was delirious⁴ or unconscious⁵ during a portion of the time taken in making his dying declaration affects only the credit to be attached to the statement, provided that the latter is apparently rational. Much the same may be said as to the influence of drugs,⁶ e. g., where the declarant is under the effects of morphine.⁷ Otherwise, e. g., where the declarant appears to have been at all times but partially conscious, or unable to narrate events intelligently,⁸ the statement will be excluded.

Memory.—It must affirmatively be shown or reasonably assumed that the declarant possessed sufficient power of memory at the time of his statement as to make it rational for the jury to credit it.⁹

Sanity.—A dying declaration, to be admissible, must have been the utterance of a sane mind.¹⁰ That the declarant should appear to have been sufficiently intelligent to aid the jury¹¹ is a general requirement.

4. *Keith v. Com.*, 92 S. W. 599, 29 Ky. L. Rep. 158 (1906); *Roberts v. State*, 48 Tex. Cr. App. 378, 88 S. W. 221 (1905).

5. *McHugh v. State*, 31 Ala. 317 (1858); *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953 (1894); *Mitchell v. State*, 71 Ga. 128 (1883); *Taylor v. State*, 38 Tex. Cr. App. 552, 43 S. W. 1019 (1898).

6. *Hunter v. State*, 59 Tex. Cr. App. 439, 129 S. W. 125 (1910); *Roberts v. State*, 48 Tex. Cr. App. 378, 88 S. W. 221 (1905).

7. *Walker v. State*, 139 Ala. 56, 35 So. 1011 (1903); *Murphy v. People*, 37 Ill. 447 (1865); *Hays v. Com.*, 14 S. W. 833, 12 Ky. L. Rep. 611 (1890); *People v. Beverly*, 108 Mich. 509, 66 N. W. 379 (1896).

That decedent was given a hypodermic injection of morphia the morning when he made his dying declarations does not overcome testimony that his mind was clear when he made the declaration. *People v.*

White, 251 Ill. 67, 95 N. E. 1036 (1911).

8. *McHugh v. State*, 31 Ala. 317 (1858); *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953 (1894); *Mitchell v. State*, 71 Ga. 128 (1883).

9. *Mockabee v. Com.*, 78 Ky. 380 (1880); *Brown v. State*, 32 Miss. 433 (1856); *Vass' Case*, 3 Leigh (Va.) 786, 24 Am. Dec. 695 (1831).

"There are strong reasons for believing that the deceased did not fully understand the declarations as read to him, or that his faculties were so much impaired by the wounds under which he suffered, that he was incapable of remembering with distinctness or stating with accuracy the facts and circumstances of the rencontre which resulted in his death." *Brown v. State*, 32 Miss. 438, 448 (1856), per Smith, C. J.

10. *Guest v. State*, 96 Miss. 871, 52 So. 211 (1910).

11. *Hunter v. State*, 54 Tex. Cr. App. 224, 114 S. W. 124, 130 Am. St. Rep. 887 (1908) (ten years old).

§ 2868. (*Weight for the Jury*); Rule Constitutional.—That the admissibility of dying declarations is not in violation of the right of confrontation¹ frequently secured to all persons on trial by express constitutional provisions is well settled.² A familiar

§ 2868-1. §§ 458 *et seq.*

2. *Alabama*.—Green v. State, 66 Ala. 40, 41 Am. Rep. 744 (1880).

California.—People v. Glenn, 10 Cal. 32 (1858).

Delaware.—State v. Oliver, 2 Houst. 585 (1855).

Georgia.—Jones v. State, 130 Ga. 274, 60 S. E. 840 (1908); Campbell v. State, 11 Ga. 353 (1852).

Iowa.—State v. Nash, 7 Iowa 347 (1858).

Kentucky.—Walston v. Com., 16 B. Mon. 15 (1855).

Louisiana.—State v. Price, 6 La. Ann. 691 (1851).

Massachusetts.—Com. v. Carey, 12 Cush. 246 (1853).

Mississippi.—McDaniel v. State, 8 Sm. & M. 401, 47 Am. Dec. 93 (1847); Woodsides v. State, 2 How. 655 (1837).

Missouri.—State v. Colvin, 226 Mo. 446, 126 S. W. 448 (1910); State v. Vansant, 80 Mo. 67 (1883).

New York.—People v. Corey, 157 N. Y. 332, 51 N. E. 1024 (1898).

North Carolina.—State v. Tilghman, 33 N. C. 513 (1850).

Ohio.—State v. Kindle, 47 Ohio St. 358, 24 N. E. 485 (1890); Robbins v. State, 8 Ohio St. 131 (1858).

Oregon.—State v. Saunders, 14 Oreg. 300, 12 Pac. 441 (1886).

Pennsylvania.—Com. v. Winkelman, 12 Pa. Super. Ct. 497 (1900); Brown v. Com., 73 Pa. St. 321, 13 Am. Rep. 740 (1873).

Rhode Island.—State v. Jeswell, 22 R. I. 136, 46 Atl. 405 (1900); State v. Murphy, 16 R. I. 528, 17 Atl. 998 (1889).

Tennessee.—Anthony v. State, Meigs 265, 33 Am. Dec. 143 (1838).

Texas.—Payne v. State, 45 Tex. Cr. App. 564, 78 S. W. 934 (1904);

Taylor v. State, 38 Tex. Cr. App. 552, 43 S. W. 1019 (1898); Burrell v. State, 18 Tex. 713 (1857).

Virginia.—Hill v. Com., 2 Gratt. 594 (1845).

Washington.—State v. Baldwin, 15 Wash. 15, 45 Pac. 650 (1896).

Wisconsin.—State v. Dickinson, 41 Wis. 299 (1877); Miller v. State, 25 Wis. 384 (1870).

"The argument for the exclusion of the testimony, proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness. And it is as to *him* that the privileges of an oral and cross-examination are secured." Campbell v. State, 11 Ga. 353, 374 (1852), per Lumpkin, J.

"This objection is founded in a misconception of fact. The accused *is confronted* by the witness on his trial. The deceased person is not the witness, but the person who can relate, on the trial, the death-bed declarations, is the witness. The objection, if there be one, is to the competency of the evidence, and not to the want of personal presence of the witness. And it appears to be well settled that dying declarations, within the restricted rule prescribed, fall within the exceptions to the general rule that hearsay is not evidence." Robbins v. State, 8 Ohio St. 131, 163 (1857), per Bartley, C. J.

Bill of rights, § 20, providing that an accused shall be confronted with the witnesses against him, refers to living witnesses, and not to dying declarations. Mulkey v. State, 5 Okla. Cr. App. 75, 113 Pac. 532 (1911).

"The Constitution does not alter the rules of evidence, or determine

principle of constitutional construction is fully recognized that these fundamental instruments, securing rights in the most general terms, were not intended to have and do not have the effect of altering the then existing rules of evidence. They must be understood as applying to the law regulating the admissibility of testimony as it stood at the time of their adoption. It has been declared that the constitution is satisfied because its guaranty of confrontation applies only to the witness who reports the extrajudicial declaration of the deceased and that, as to him, such right has been fully secured to the defendant. The supreme court of Iowa in a case where the point was not fully considered, suggest that if the question were a new one they might feel constrained to decide contrary to the existing rule on this subject.³

§ 2869. Varying Estimates of Value.—The modern scepticism as to the present potency of the religious sanction in procuring the truth from witnesses and other declarants is elsewhere noticed.¹ It can scarcely be said, however, that this feeling dominates the entire situation regarding the judicial use to be made of this species of secondary evidence. On this point, the ruling, occa-

what shall be admissible testimony against the prisoner, but it only secures to him the right to confront the witnesses who may be introduced to prove such matters as, according to the settled principles of law, are evidence against him. This objection, if carried out fully, would result in the rejection of all declarations, even where they constitute part of the *res gestae*. The law determines the admissibility of testimony — the Constitution secures to the accused the right to meet the witness who deposes face to face. But what the witness, when thus confronted, shall be allowed to state as evidence, the Constitution does not undertake to prescribe, but leaves it to be regulated by the general principles of the law of evidence. When the declarations of the deceased are offered to the jury, they constitute facts in legal contemplation, which tend to establish the truth of the matter to

which they relate. The position, therefore, that their admission as evidence infringes upon the constitutional right of the prisoner to confront the witnesses against him, is wholly without foundation, and cannot be maintained." *Walston v. Com.*, 16 B. Mon. (Ky.) 15, 35 (1855), per Simpson, J.

"The rule, however, was well settled before the adoption of our constitution, that the declarations of a dying person were admissible in cases of homicide, 'where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations;' and we have no idea that it was the object of this provision in the bill of rights to abrogate this rule of evidence." *Miller v. State*, 25 Wis. 384, 387 (1870), per Cole, J.

3. *State v. Nash*, 7 Iowa 347 (1858).

§ 2869-1. § 2819.

sionally endorsed by an appellate court,² to the effect that a dying declaration is to be given the same credence which the testimony of the deceased would have had if given by him personally as a witness,³ is less specific than could be desired. So far as the element of the *oath* is concerned the statement is probably correct. The religious sanction of the oath, the future state of rewards and punishments, is precisely the same as that claimed for the dying declaration.⁴ The ruling seems to overlook any distinction between the probative force of a statement, tested by competent cross-examination, and that of one not so tested. Yet it is precisely the absence of cross-examination which makes the inherent weakness of the dying declaration or of any other hearsay statement.⁵ The proposition that, whatever may be true in individual

2. *Kennedy v. State*, 85 Ala. 326, 5 So. 300 (1888); *State v. Schmidt*, 73 Iowa 469, 35 N. W. 590 (1887); *State v. Nash*, 7 Iowa 347 (1858).

A request for an instruction that a dying declaration is not of the same weight as the testimony of the declarant would have been if given as a witness is properly refused. *DuBose v. State*, 120 Ala. 300, 25 So. 185 (1898); *State v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065 (1894), *affirmed* 56 Minn. 226, 57 N. W. 1065 (1894).

3. *Alabama*.—*Oliver v. State*, 17 Ala. 587 (1850); *McLean v. State*, 16 Ala. 672 (1849).

Florida.—*Dixon v. State*, 13 Fla. 636 (1869).

Iowa.—*State v. Schmidt*, 73 Iowa 469, 35 N. W. 590 (1887).

New Jersey.—*Donnelly v. State*, 26 N. J. L. 463, *affirmed* 26 N. J. L. 601 (1857).

South Carolina.—*State v. Ferguson*, 2 Hill 619, 27 Am. Dec. 412 (1835).

On the other hand, an instruction that a dying declaration of deceased was as much entitled to credit as the evidence of a witness under oath has been held to have been properly refused. *Campbell v. State*, 38 Ark. 498 (1882).

4. *Rex v. Ashton*, 2 Lew. C. C. 147 (1837).

5. §§ 2713 *et seq.*

The jury should have been told that, if they determine that the declaration was *in extremis*, and was made under full belief of impending death, they might give the statements the same weight as they would if the declarant were living and made the statement attributed to him, or had given testimony of similar import under oath, without cross-examination thereon; proper consideration being given to all circumstances surrounding the declaration when the statement was made, together with his physical and mental condition, including any apparent influence, if any, under which he might have been laboring at the time. *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018 (1905); *State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 n. (1908).

A charge in a prosecution for homicide that the dying declarations of the deceased should be carefully weighed and considered, for the reason that there was no cross-examination before the jury of the declarant, is proper. *State v. Davis*, 134 N. C. 633, 46 S. E. 722 (1904).

cases, a secondary grade of proof should receive the same credit as the corresponding primary grade, has not met with general acceptance.⁶ On the other hand, the circumstances often attending

6. *Georgia*.—*Mitchell v. State*, 71 Ga. 128 (1883).

Mississippi.—*Lambeth v. State*, 23 Miss. 322 (1852).

Missouri.—*State v. Mathes*, 90 Mo. 571, 2 S. W. 800 (1886); *State v. Vansant*, 80 Mo. 67 (1883); *State v. McCanon*, 51 Mo. 160 (1872).

New York.—*People v. Kraft*, 148 N. Y. 631, 634, 43 N. E. 80 (1896).

Oregon.—*State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 n. (1908).

Texas.—*Walker v. State*, 37 Tex. 366 (1872).

Washington.—*State v. Eddon*, 8 Wash. 292, 36 Pac. 139 (1894).

A dying declaration has not the same weight and value as the testimony of a witness given in open court.

"The law does not regard such evidence, when admitted, as of the same value and weight as the testimony of a witness given in open court under the sanction of an oath and under the tests and safeguards which are there provided." *People v. Falletto*, 202 N. Y. 494, 500 (1911), per Vann, J.

"It is, of course, true that such declarations are considered to be equal to an oath taken in a court of justice; but that is because of the circumstances surrounding them when made. It is assumed that, being made in extremity, when the party is at the point of death, and believes that all hope in this world is gone, they have some guaranty for their truth, in view of the solemnity of the occasion; or as much as an oath in court would have. But it is clear that their value as evidence rests upon an assumption and hence it is that, while the law recognizes the necessity of admitting such proof

on a par with an oath in a court of justice, it does not, and cannot, regard it as of the same value and weight as the evidence of a witness given in a court of justice, under all the tests and safeguards which are there afforded for discovering the truth—the object of judicial inquiry. For there the accused has the opportunity of more fully investigating the truth of the evidence by the means of cross-examination, and the jury have the opportunity of observing the demeanor of the person whose testimony is relied upon. The power of cross-examination is quite as essential, in the process of eliciting the truth, as the obligation of an oath; and where the life, or the liberty, of the defendant is at stake, the absence of the opportunity for cross-examination is a serious deprivation, which differentiates in nature and in degree the evidence of a dying declaration from that which is direct and given upon the witness stand. . . . Speaking in a strict sense, the sanction of an oath and the sanction of such declarations are deemed to be the same, when the state of mind of the person is considered; but, as it was said by Baron Alderson, in *Ashton's Case*, (2 Lew. Cr. C. 147) though the 'sanction is the same, the opportunity of investigating the truth is very different, and, therefore, the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination.'" *People v. Craft*, 148 N. Y. 631, 634, 635, 43 N. E. 80 (1896), per Gray, J.

Dying declarations being in their nature secondary evidence, an instruction to the effect that the dec-

a dying declaration, the physical and mental condition of the declarant, the defects of memory and the brevity or incoherence of statement due to severe pain or the power of the narcotics employed to offset it, to say nothing of the ignorance or the intentional or unintentional suppression of countervailing facts, make the situation one where careful administration of justice may well regret the absence of the sifting and testing supplied by cross-examination.⁷ Having these and similar facts in mind, eminent courts have not hesitated to declare that dying declarations should be received with caution⁸ and weighed with careful scrutiny.⁹ Re-

laration of a decedent, made under a sense of impending death, is entitled to the same weight by the jury as any other evidence in the case, is too broad, and, if given without qualification, is reversible error. *State v. Doris*, 51 Oreg. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660 n. (1908).

Of a ruling that dying "statements are worthy of more credence, under such circumstances, than if made under the sanctity of an oath, duly administered according to law," the Supreme Court of Texas say: "We think the charges here cited are clearly erroneous, because they raise hearsay evidence to the highest testimony known. This is in conflict with the clearly enunciated rule laid down by every writer on evidence to which we have had access, and contrary to the reason for the admission of proof to establish any fact. Dying declarations are admitted as evidence under an exception to the general rule, which is founded upon public necessity, and not because they are more worthy of credence than other testimony. They are admitted under restrictions, and when so admitted, they are raised to the character of other evidence, which may, or may not, have great weight, according to the circumstances under which they were made; and it is for the jury, and not the court, to judge of those circumstances, and the credence to be given to those declara-

tions." *Walker v. State*, 37 Tex. 366, 385, 386 (1872), per Ogden, J.

7. That cross-examination is not essential to the admissibility of a dying declaration requires no support from authority. *Lane v. State*, 59 Tex. Cr. App. 595, 129 S. W. 353 (1910).

8. *Gardner v. State*, 55 Fla. 25, 45 So. 1028 (1908); *Smith v. State*, 9 Ga. App. 403, 71 S. E. 606 (1911); *State v. Mayo*, 42 Wash. 540, 85 Pac. 251 (1906).

9. *Alabama*.—*Shell v. State*, 88 Ala. 14, 7 So. 40 (1889); *Kennedy v. State*, 85 Ala. 326, 5 So. 300 (1888).

Georgia.—*Mitchell v. State*, 71 Ga. 128 (1883).

Indiana.—*Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218 (1885); *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815 (1881).

Mississippi.—*Brown v. State*, 32 Miss. 433 (1856); *Lambeth v. State*, 23 Miss. 322 (1852); *Nelms v. State*, 13 Sm. & M. 500, 53 Am. Dec. 94 (1850).

New York.—*People v. Smith*, 104 N. Y. 491, 10 N. E. 873, 58 Am. Rep. 537 (1887).

North Carolina.—*State v. Davis*, 134 N. C. 633, 46 S. E. 722 (1904).

Tennessee.—*Poteete v. State*, 9 Baxt. 261, 40 Am. Rep. 90 (1878).

Vermont.—*State v. Center*, 35 Vt. 378 (1862).

quests for instructions that "it is the experience of mankind that the premonitions of immediate death, from which there is no hope of recovery, is always sufficient to influence persons so situated to speak the truth"¹⁰ or to some similar effect have accordingly been refused. On the other hand, it has been held that the court is not justified in charging the jury that the evidence is of a species which is to be viewed by them with suspicion¹¹ and credited if at all, with caution.¹²

England.—*Rex v. Spilsbury*, 7 C. & P. 187, 32 E. C. L. 565 (1835).

"We all concur that it is clear that as to dying declarations it would not be objectionable if the jury be charged that while they are the sole judges of the weight and effect to be given to a dying declaration, and that it is to be determined like any other evidence, in the light of all the evidence of the case, and to caution them, in determining its effect, that they should weigh it with great deliberation and care, and take into consideration the circumstances of its being hearsay; that it is the statement of one not subject to cross-examination, or such other relevant circumstances in that regard as

may exist in any given case; and that it is the duty of the court to lay before the jury by precautionary instructions, when asked, the inherent elements of weakness which the law recognizes in certain classes of evidence, but in such form as not to invade the province of the jury."

Lipscomb v. State, 75 Miss. 559, 581, 23 So. 210 (1897), per Magruder, J.

10. *People v. Corey*, 157 N. Y. 332, 51 N. E. 1024 (1898).

11. *Brown v. State*, 150 Ala. 25, 43 So. 194 (1907). See, also, *State v. Fleetwood*, 6 Pennw. (Del.) 153, 65 Atl. 772 (1906).

12. *Brown v. State*, 150 Ala. 25, 43 So. 194 (1907).

CHAPTER XLII.

HEARSAY AS SECONDARY EVIDENCE; ENTRIES IN COURSE OF BUSINESS.

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§ 2870. **Declarations in Course of Business.**— Another exception to the hearsay rule which substantive law has placed at the service of judicial administration in its effort to elicit truth is that which admits, as proof of the facts asserted, oral declarations or written entries made by deceased persons in the usual course of professional or official business, or in discharge of some duty.¹ In view of the conspicuous modern extension of this doc-

§ 2870-1. "When a witness is shown to be dead, or beyond the jurisdiction of the court, written entries and memorials of a transaction, entered in the usual course of business, and which are shown to be in the handwriting of the absent or deceased witness, and purport or are shown to have been made at or about the time of such alleged transaction, are admissible evidence, in any issue involving the transaction to which they relate." *Elliott v. Dycke*, 78 Ala. 150, 157 (1884), per Stone, C. J.

"We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done." *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 337, 5 L. ed. 326 (1823), per Mr. Justice Story.

For example, the record of a station agent as to the movement of freight cars at his station, made in the course of his duties as agent of the company, is admissible as evidence of the facts stated. *R. R. Co. v. Henderson*, 57 Ark. 402 (1893).

On an action against a railroad company for a collision at a crossing, by which the plaintiff's wagon was injured, it became important for the plaintiff to show the character and extent of the injury to one of the hind wheels. One Woodward, a wheelwright, who repaired the woodwork of the wheel, died before the trial. The plaintiff called his administrator, who testified that he had Woodward's account-book, kept by Woodward in his lifetime, on which appeared a charge "June 8th, 1887. To sixteen spokes, twenty cents apiece, \$3.20." It was held that the reception of this evidence was correct. "There is a dis-

trine into the proof of commercial transactions, it may fairly be said that the element of *oral* utterances may almost be regarded as of little importance. The proper title of the rule would thereupon become Entries in the Course of Business as given in the heading of the present chapter. This rule is at once seen to present the familiar indicia or ear-marks of a species of secondary evidence, the primary consisting of the testimony, no longer procurable, of the declarant as a witness. For the reception of the evidence, it is accordingly required that the proponent should show that it is necessary² to the proof of his case that he should

tion between entries made in the usual and regular course of business, and a private memorandum. The latter is mere hearsay, and inadmissible in evidence after the death of the person who made it. Entries made in the regular and usual course of business stand differently. When shop-books are kept and the entries are made contemporaneously with the delivery of goods or the performance of labor by the person whose duty it was to make them, they are admissible, unless the nature of the subject is such as to render better evidence attainable. Mr. Greenleaf says the remark that this evidence is admitted contrary to the rules of the common law is incorrect; that 'in general its admission will be found in perfect harmony with those rules, the entry being admitted only when it was evidently contemporaneous with the fact and part of the *res gestae*.'" *Lassone v. Railroad*, 66 N. H. 345, 358 (1890), per Smith, J.

Official duty.—The duty under which the declaration or entry has been made may well be official, public or private.

Entries in the private book of a deceased town treasurer made in the usual course of his official duty, are competent. *Rindge v. Walker*, 61 N. H. 58 (1881).

The protest of a note found among the papers of a deceased notary public is good evidence, under the present

rule, that demand was made and notice properly given. "Notaries are usually employed for that purpose by holders of notes, and are trustworthy persons conversant with such business, and therefore suitable and proper agents to be so employed; and their written memoranda, after their decease, though not competent evidence in chief, yet from necessity are good secondary evidence, because it is in the usual course of their duty and business to keep such memoranda." *Porter v. Judson*, 1 Gray (Mass.) 175 (1854), per Shaw, C. J.

An entry of the demand for payment of a certain note made in a book kept, as required by the by-laws of the bank, by a deceased messenger, is competent evidence of the making of such a demand. *Welsh v. Barrett*, 15 Mass. 380 (1819).

On an action by an indorsee of a promissory note against an indorser, demand and notice may be proved by an entry of a notary's clerk since deceased. "It has been recently settled, that the memorandums made at the time by a person in the ordinary course of his business, of acts and matters which his duty in such business required him to do for others, are admissible evidence of the acts and matters so done after his death." *Farmers' Bank v. Whitehill*, 16 Serg. & R. (Pa.) 89, 90 (1827), per Duncan, J.

2. § 2878.

be permitted to establish the fact in this way and also that the particular statement submitted is relevant,³ objectively⁴ and subjectively⁵ considered.

Relevancy of regularity.—At the present day the chief importance of the exception to the hearsay rule under consideration is a historical one. Together with the rule relating to shop books,⁶ it constitutes one of the confluent currents of authority which have blended under the influence of modern conditions into the broad general principle of the *Relevancy of Regularity*. This may broadly be defined as a judicial recognition of the probative force as primary evidence of hearsay statements contemporaneously made in the regular course of private or official duty or business by one having no motive to misrepresent. This principle is perhaps most firmly established in legislative enactments passed in most jurisdictions of the English-speaking world. So far from uniform have these statutes been, to such different lengths have the modifications created by them gone, that it will be necessary to examine in some detail both the shop-book rule and that which forms the subject of the present chapter. Even in jurisdictions where the general law is statutory and fairly adapted to its general purpose, some contingency in the requirements of proof may call for the application of a rule which under modern conditions can hardly be regarded as other than archaic.

Except so far as a different course may be deemed advisable for purposes of illustration, it will be found convenient, so far as practicable in case of rules so frequently blended to consider, in connection with the shop-book rule,⁷ the specific use made at various epochs of a party's *books of account*. Under the exception to the hearsay rule relating to entries in course of business, which forms the subject of the present chapter, it will thus remain to consider only the broad, general principles under which extrajudicial statements made by deceased persons, not necessarily those connected with the suit, in the regular course of their private or official business or duty, are admitted, under the prescribed conditions of Necessity and Relevancy, as secondary evidence of the facts asserted.

3. § 2883.

4. § 2883.

5. § 2884.

6. §§ 3051 *et seq.*

7. §§ 3051 *et seq.*

§ 2871. **English Rule.**— In connection with the present exception, the rule early established in England presents points of difference to that later formulated in the United States. Even while parties were being confined to the narrow limits of the shop-book rule,¹ for the proof of their accounts, it had become firmly established, in the procedure of courts, that where it had been the duty of a *servant*, or clerk, to make entries in the due and regular course of business upon the account book of his master, or employer, and the clerk or servant had deceased at the time of trial, that his entry, verified by proof of his handwriting might, upon the fulfillment of certain conditions, go to the jury as evidence of the facts contained in the entry. As early as 1750 Lord Hardwicke said: — “Where that servant, agent, or bookkeeper has been dead, if there is proof that he was the servant or agent usually employed in such business, was intrusted to make such entries by his master, that it was the course of trade, on proof that he was dead, and that it was his handwriting, such entry has been read (which was *Sir Biby Lake’s Case*), and that was going a great way; for there it might be objected, that such entry was the same as if made by the master himself; yet by reason of the difficulty of making proof in cases of this kind, the court has gone so far.”² Even this indulgence, however, to the deceased clerks of a party, which Lord Hardwicke thought to be going far, was lost, as it were, in a general admission, under the same conditions of necessity³ and relevancy,⁴ in case of any entries made in the regular course of mercantile business in books regularly and contemporaneously kept, by persons since deceased, or otherwise unavailable as witnesses.⁵ The present “exception,” as it is called, to the hearsay rule, as established in England has been spoken of as covering all entries “made by a person since deceased, in the ordinary course of his business,”⁶ “in the usual course or routine of business,”⁷ “in the

§ 2871-1. §§ 3051 *et seq.*

2. *Lefebure v. Worden*, 2 Ves. Sr. 53, 54 (1750); *Glynn v. Bank of England*, 2 Ves. 37, 38 (1750). See, also, *Price v. Lord Torrington*, 2 Ld. Raym. 873 (1703); *Pitman v. Maddox*, 1 Ld. Raym. 732 (1698).

3. § 2878.

4. § 2883.

5. *Sutton v. Gregory*, *Peake’s Add.*

Cas. 150 (1797); *Woodnoth v. Lord Cobham*, *Bunbury* 180 (1724); *Smart v. Williams*, *Comb.* 247 (1694).

6. *Doe v. Turford*, 3 B. & Ad. 890 (1832). To the same effect, see *Rawlins v. Rickards*, 28 Beav. 370, 373 (1860).

7. *Poole v. Dicas*, 1 Bing. N. C. 649 (1835), per *Tindal*, C. J.

exercise of his business and duty ”⁸ and in other similar expressions.⁹ In this connection, it is not material whether the entrant is a party, the clerk of a party, or a stranger to the proceedings in which the evidence is offered.

§ 2872. (*English Rule*); Duty to Make Record.—The distinctive feature of the English rule, relating to entries in the course of business, as compared with that prevailing in America, is that it is not sufficient in England, as it would be in the United States, for the proponent to show that the entry was actually made by the deceased person in the course of his regular business, calling or employment.¹ He is further required to establish that it was the duty of the person making the entry not only to do the precise act which he recorded but also to record the precise act which he did.² In other words, the rule as administered in England is not satisfied where it simply appears that the declarant made his statement in the *course* of official or professional business. It is further necessary that it should have been the duty of the declarant to make the entry itself at the time when it was made.³ In the clear, terse language of Blackburn, J.: “The duty must be to do the very thing to which the entry relates, and then to make a report or record of it.”⁴ The same requirement is made in Canada.⁵

§ 2873. (*English Rule; Duty to Make Record*); Duty Must Not be Self-imposed.—Under the requirement of the English

8. *Rawlins v. Rickards*, 28 Beav. 370, 373 (1860), per Romilly, M. R.

9. *Mercer v. Denne*, (Eng. 1905) 74 Law J. Ch. 723 [1905] 2 Ch. 538, 93 Law T. 412, 3 Local Gov. R. 1293, 21 Times Law R. 760.

§ 2872-1. *Lyell v. Kennedy*, 35 Wkly. Rep. 725 (1887); *R. v. Worth*, 4 Q. B. 132 (1843); *Chambers v. Bernasconi*, 1 Crompt. & J. 451 (1831).

2. *Lyell v. Kennedy*, 35 Wkly. Rep. 725 (1887); *Polini v. Gray*, L. R. 12 Ch. D. 411, 431 (1879).

3. *Chambers v. Bernasconi*, 1 Crompt. & J. 451 (1831). See also *Lyell v. Kennedy*, 35 Wkly. Rep. 725 (1887).

4. *Smith v. Blakey*, L. R. 2 Q. B. 326, 333 (1867), per Blackburn, J.

This stringency clearly constitutes, in many cases, an added safeguard of no small value. How far, in point of principle, such an additional precaution is needed, provided the evidence is relevant, may, however, well be questioned. In other cases it seems well calculated to exclude necessary and probative testimony. If so, its enforcement would seem bad administration.

5. *Canada C. R. Co. v. McLaren*, 8 Ont. App. 564 (1883); *O'Connor v. Dunn*, 2 Ont. App. 247 (1877).

rule, just mentioned, the duty upon the person making the entry must be something more than one which he has voluntarily assumed. The command of some superior who has power to enforce obedience must have been laid on him directing the doing of the act and the making of the entry, as and when it was actually made. Where the element of restraint extrinsic to the doer is absent, the entry is inadmissible. Accordingly, the books of a farmer setting down, regularly and in course of his business, the time of his farm laborers, is not to be received; — the farmer not having kept the book “in discharge of some duty for which he is responsible” to a superior.¹ In like manner, a surveyor’s minutes voluntarily made pursuant to his regular business would not be competent under the English rule, for a like reason.² In other words, the duty to make the entry, endorsement, report or the like, must be other than one self-imposed. The record must have been made under the command of some other person,³ or, at least, in accordance with some existing duty toward him.

§ 2874. (*English Rule; Duty to Make Record*); Collateral Facts.—A further peculiarity of the English rule, relating to this subject, is that it cannot be invoked for the proof of collateral facts mentioned in the entry. The extrajudicial declaration is admissible only in so far as it affirms the doing of the precise act which it is the duty of the declarant to do.¹ “The statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances.”² Such a rule connotes a remarkable, if not lamentable, degree of administrative strictness. Thus in the leading case of *Chambers v. Bernasconi*,³ the return of a deputy sheriff as to *where* he had made an arrest, which it was his duty to make, was rejected because while it was the officer’s obligation to record the *fact* itself

§ 2873-1. *R. v. Worth*, 4 Q. B. 132 (1843).

2. *O’Connor v. Dunn*, 2 Ont. App. 247 (1877). See also *Canada C. R. Co. v. McLaren*, 8 Ont. App. 564 (1883).

3. *R. v. Worth*, 4 Q. B. 132 (1843).

§ 2874-1. *Lyell v. Kennedy*, 35 Wkly. Rep. 725 (1887); *Massey v. Allen*, L. R. 13 Ch. D. 558 (1879);

Trotter v. Maclean, L. R. 13 Ch. D. 574, 579 (1879); *Polini v. Gray*, L. R. 12 Ch. Div. 411, 420, 426, 431 (1879); *Smith v. Blakey*, L. R. 2 Q. B. 326, 332 (1867).

2. *Chambers v. Bernasconi* 1 Crompt. M. & R. 347, 368, 1 Crompt. & J. 451 (1831), per Denman, C. J.

3. 1 Crompt. & J. 451 (1831).

he was not required by law to enter or record the *place* where it occurred.

§ 2875. (*English Rule; Duty to Make Record*); Time Essential.—The entrant must, in order that his statement should constitute secondary evidence of the facts asserted, have been under an obligation not only to enter the precise act which it was his bounden duty to do but also to enter or record it at the exact *time* when it was actually recorded.¹

§ 2876. American Rule.—Certain earlier American cases contain leanings toward the stricter rule administered in England.¹ A more liberal one, that of England, minus the distinctive features just noticed, seems, however, well established in the United States. The requirement that the declarant should not only be acting in the course of his duty or business in doing the very act stated but it should also be a duty imposed upon him by some superior authority to make an entry of it at the exact time when it was made, does not obtain in the United States. It is, on the contrary, sufficient if the making of an entry on the doing of the act was a natural and usual accompaniment of the doing of the act itself in case either of a private individual,² or of a public official.³ It is not, however, essential to admissibility that such should be the case. For example, the baptismal record kept by a Roman Catholic priest,⁴ or clergyman of another denomination

§ 2875-1. *Polini v. Gray*, L. R. 12 Ch. D. 411 (1879); *Smith v. Blakey*, L. R. 2 Q. B. 326 (1867).

§ 2876-1. *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 5 L. ed. 628 (1823).

2. "The entry by an attorney in his register of the making of an order or decree in a proceeding conducted by him, is admissible within this rule. The order or decree is the act of the court, but it is procured upon the application of the attorney, and the fact of obtaining it is a part of the history of the proceeding, which properly and usually is inserted in the register." *Fisher v. Mayor*, 67 N. Y. 73, 77 (1876), per Andrews, J.

3. "Official records, or books kept by persons in public office, in which they are required to write down the proceedings of some public body or corporation, are generally admissible in evidence, although their authenticity be not confirmed by an oath, or the power of cross-examining the persons on whose authority their truth and correctness depend." *Little v. Downing*, 37 N. H. 355, 364 (1858), per Fowler, J.

4. "In the case before us, the book was kept by the deceased priest in the usual course of his office, and was produced from the custody of his successor; the entry is in his own handwriting, and appears to have been

is admissible although no law requires the making of the entry, or indeed the keeping of the record itself.⁵ Under the American view, it will thus be seen, that while the existence of a specific duty to do and record the precise thing actually done may add to the probative force of the entry, it is by no means required that such an obligation should exist. As the New York Court of Appeals say: ⁶ "There is no absolute duty resting upon an attorney to make such an entry, but this is not essential, it is sufficient if the entry was the natural commitant of the transaction to which it relates, and usually accompanies it." To say that the entries on the official registers or other records kept by public officers for official transactions, in the discharge of the duties of their respective offices, are admissible, though no statute requires the books to be kept, is merely to amplify this rule.⁷ There must, however, be a duty of some kind, something of a morally binding character, operative in the conduct or recording of business, professional or official transactions. As under the English rule,⁸ a purely voluntary and self-imposed obligation, which the person in question may neglect or suspend at his own option, is not sufficient under the present rule.⁹ The book containing the entries must, moreover, have some established connection with the business of the person making such entries.¹⁰

made contemporaneously with the performance of the rite, long before any controversy had arisen, with no inducement to misstate, and no interest except to perform his official duty. The addition of a memorandum that he had been paid a fee for the ceremony could not have added anything to the competency, the credibility, or the weight, of the record as evidence of the fact. An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger or notary, an attorney or solicitor, or a physician, in the course of his secular occupation." *Kennedy v. Doyle*, 10 Allen (Mass.) 161, 168 (1865), per Gray, J.

5. *Weaver v. Leiman*, 52 Md. 708 (1879); *Kennedy v. Doyle*, 10 Allen (Mass.) 161 (1865).

6. *Fisher v. Mayor*, 67 N. Y. 73, 77 (1876), per Andrews, J.

7. *Bell & Lockett v. Kendrick*, 25 Fla. 778 (1889).

8. § 2873.

9. *Diaries*.—Payments of money recited in a diary kept for the purpose of making daily entries cannot be proved, after the decease of the entrant, by production of the book. *Costelo v. Crowell*, 139 Mass. 588, 2 N. E. 698 (1885). A lawyer cannot fix a date by proof of an entry in his diary, though such entry might be used to refresh his recollection. *Whitaker v. White*, 69 Hun 258, 23 N. Y. St. 487, 53 N. Y. St. Rep. 243 (1893).

10. *Avery's Adm'r. v. Avery*, 49 Ala. 193 (1873).

§ 2877. (*American Rule*); Collateral Facts.—Under the American rule, though not pursuant to the English,¹ a contemporaneous entry regularly made in the course of private or official business will be received not only as evidence of the facts directly asserted, for the sake of stating which the declaration may fairly be regarded as having been made, but also of those collaterally or, as it were, incidentally, mentioned. Indeed, any fact which the declarant is proved to have known or which can fairly be assumed to have been within his knowledge² may, if stated by him under the conditions prescribed by the rule be evidence, after his decease or when he is unavailable as a witness, in proof of the facts asserted. Thus entries on the books of a deceased jeweler, showing the charges for repairs made on a certain watch, have been considered competent evidence of its number, maker, style, etc., in any suit where such facts are material.³

So broad a latitude of proof has not, however, seemed wise to other courts. In these courts the proving capacity of an entry in the course of business is limited to such facts as the declarant or entrant is under a duty to declare or record.⁴ Thus, the record of a Lutheran minister, for example, showing the burial of certain persons has been held to be inadmissible as evidence as to the dates of their birth or as to the names of their parents, it being no part of the pastor's duty to record any facts other than those of death or burial. And the fact that the form used by the minister "was the usual way of keeping the record" is not regarded as material.⁵ It may be observed, moreover, that little relevancy,

§ 2877-1. § 2874.

2. A man may be reasonably taken to know that which it is his duty to know. *Massee-Felton Lumber Company v. Sirmans*, 122 Ga. 297, 50 S. E. 92 (1905). See also § 1219.

3. *State v. Phair*, 48 Vt. 366 (1875).

4. "In full."—A book entry cannot be used as evidence not only of the making of a certain payment, but also that it was "in full." "It is well settled that such an entry cannot prove anything more than the charge of such an amount, if it proves that. Any further entry can have no weight to prove such a settlement as is relied on here. Book entries, when

receivable, are not allowed beyond the purpose for which the exception in their favor is made in the usual course of business." *Estate of Ward*, 73 Mich. 220, 225, 41 N. W. 431 (1889), per Campbell, J.

5. *Sitler v. Gehr*, 105 Pa. St. 577, 600, 51 Am. Rep. 207 (1884).

"This burial list was competent to show the death and burial of these ladies, but what the pastor put down in the book as to their parentage, and the time and place of their birth, was incompetent, for the plain reason that it was no part of his duty to make such entries. Such registers are not, in general, evidence of any fact not

if any, can usually be predicated of an extrajudicial statement of a collateral fact as to which the declarant could have had no personal knowledge but must have taken as true upon the assertion of others, and which, even were it possible to do so, he has little motive to verify, it being no part of his duty to declare correctly. This view has been taken of the entries in the records of a church or parish by the priest or clergyman of a baptism by him, where such entry also states the date of the birth of the one baptized, it being generally decided that the entry is evidence of the fact of baptism⁶ but not of the birth of the child or person it refers to⁷ except so far as it is evidence of the fact of birth prior to the

required to be recorded in them, and which did not occur in the presence of the registering officer." *Sitler v. Gehr*, 105 Pa. St. 577, 600, 51 Am. Rep. 207 (1884), per Paxson, J.

6. *Connecticut*.—*Huntly v. Compstock*, 2 Root 99 (1794).

Maryland.—*Weaver v. Leiman*, 52 Md. 708 (1879).

Massachusetts.—*Kennedy v. Doyle*, 10 Allen 161 (1865).

Michigan.—*Hunt v. Supreme Council of C. F.*, 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855 (1887); *Durfee v. Abbott*, 61 Mich. 471, 28 N. W. 521 (1886).

New York.—*Kabok v. Phoenix Mut. L. I. Co.*, 4 N. Y. Suppl. 718, 51 Hun 639, 21 N. Y. St. Rep. 203 (1889). See *Clark v. Society St. James' Church*, 21 Hun 95 (1880).

Texas.—*Overall v. Armstrong* (Civ. App. 1894) 25 S. W. 440.

England.—*O'Connor v. Malone*, 6 Cl. & F. 572, Macl. & R. 468, 7 Eng. Reprint 814 (1839).

Ireland.—*Malone v. L'Estrange*, 2 Ir. Eq. 16 (1839).

Canada.—*Connolly v. Consumers' Cordage Co.*, 6 Queb. Practice R. 150 (1904); *Sutherland v. Young*, 1 Manitoba 38 (1884).

7. *Maryland*.—*Weaver v. Leiman*, 52 Md. 708 (1879).

Massachusetts.—*Whitcher v. McLaughlin*, 115 Mass. 167 (1874).

Michigan.—*Hant v. Supreme Coun-*

cil of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855 (1887); *Durfee v. Abbott*, 61 Mich. 471, 28 N. W. 521 (1886).

Minnesota.—*Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541 (1892).

New Mexico.—*Berry v. Hull*, 6 N. M. 643, 30 Pac. 936 (1892).

New York.—*Jacobi v. Germania Order*, 73 Hun 602, 26 N. Y. Suppl. 318, 56 N. Y. St. Rep. 142 (1893); *Kabok v. Phoenix Mut. L. Ins. Co.*, 51 Hun 639, 4 N. Y. Suppl. 718, 21 N. Y. St. Rep. 203 (1889).

Texas.—*Baldwin v. Salgado*, (Civ. App. 1911) 135 S. W. 608.

Wisconsin.—*Herman v. Mason*, 37 Wis. 273 (1875).

England.—*Wiien v. Law*, 3 Starkie 63 (1821).

Compare Fletcher v. Cavalier, 4 La. 267 (1832).

Independently of statute requiring it, the baptismal register of a church, in which entries of baptism are made in the ordinary course of the clergyman's business, is admissible to prove the fact and date of baptism, but not to prove other facts, e.g., that the child was baptized as the lawful child of the parents, and hence to infer a marriage between them. *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175, 18 L. ed. 186 (1865).

"The record of a baptism, when admissible in evidence, is evidence of the date of baptism, but not of a birth,

baptism.⁸

In point of administrative principle, the test of the admissibility of the statement of collateral facts as evidence depends upon the determination of the question as to how far the statement is probative as to the existence of the incidental fact taking into account the personal knowledge of the declarant or the accuracy of the information from others which he is shown or may be assumed to have received upon the point.⁹ A further administrative consideration of no small importance concerns the probable effect to one of the parties of any mistake in admitting the evidence of a collateral fact. It may well add to the inertia of the court in admitting the extrajudicial statement as evidence of an incidental fact, should it appear probable that the consequences of its admission will be important.¹⁰ The ground commonly assigned for declining to receive the entry as proof of the collateral facts asserted in it is that it is no part of the entrant's duty to record the fact in question. This conception seems appropriate rather to the English than to the American rule on this subject. The bearing in America of the question as to whether the declarant was required by law to state a particular fact which is mentioned, seems to lie in its relation to the possession of adequate knowledge on the part of the entrant. The record of a fact which it is the duty of the declarant to know as a preliminary to recording it, may well be supposed to have been made upon the personal knowledge of the entrant. On the other hand, where the fact stated is one which it is no part of the legal duty of the declarant to record, the inference of personal knowledge is greatly weakened. It may even fail to arise at all in cases where as in regard to date of birth, legitimacy and the like, it is difficult to see how the entrant could have based his statement on any thing

although stated therein." *Durfee v. Abbott*, 61 Mich. 471, 476, 28 N. Y. 521 (1886), per Champlin, J.

8. *Jacobi v. Germania Order*, 73 Hun (N. Y.) 602, 26 N. Y. Suppl. 318, 56 N. Y. St. Rep. 142 (1893).

9. *Age of applicant*.—Under such a rule, the secretary of a lodge might not be a competent declarant as to the age of an applicant. *Connecticut Mut. Life Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294 (1876).

10. Thus on an indictment for cohabiting with a female under the age of 18, the age of the girl is too material a fact to be proved by the annual report of the clerk of the school district in which she went to school; the clerk not being "required to include in his report the names of the children or the actual age of any child." *State v. Woods*, 49 Kan. 237, 244 (1892).

beyond the extrajudicial declarations, possibly self-serving, of others.¹¹

§ 2878. Administrative Requirements; Necessity.—The conditions of admissibility for this species of evidence, originally administrative in their nature,¹ but at present largely procedural in character, are those customary in case of any species of secondary evidence, Necessity and Relevancy.² In so far as relates to the requirement of necessity, it is to be observed that the proponent of the evidence, in discharge of his paramount right to prove his case,³ being unable on account of the absence,⁴ death,⁵ physical or mental condition of the declarant⁶ or other sufficient reason⁷ to produce the primary evidence of the speaker as a witness, is under the necessity of introducing the extrajudicial statements of the latter as proof of the facts asserted.⁸ The proponent is called upon

11. A further administrative consideration is to be borne constantly in mind. So closely do the rules relating to entries by persons since deceased in regular course of business, admissible as secondary evidence constituting an exception to the hearsay rule, merge into and blend with those relating to extrajudicial statements in their assertive capacity as primary evidence when made by one in the regular course of private or official duty that the distinctive requirements of one rule are frequently found employed in connection with the other. It thus may happen, as in this connection, that an unsound reason be assigned for a ruling of unimpeachable correctness. In connection with the relevancy of regularity, hereafter to be considered (§§ 3051 *et seq.*), it is an important element, in case of official statements, i. e., records by public officers, that the declarant should be acting in performance of his official duty. Such a requirement, however, in connection with the use of declarations by deceased persons in the regular course of business as secondary evidence of the facts asserted is, as has been said, English, not American.

§ 2878-1. § 2812.

2. § 2883.

3. §§ 334 *et seq.*

4. § 2879.

5. § 2880.

6. § 2882.

7. § 2881.

8. *Welsh v. Barrett*, 15 Mass. 380 (1819); *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 5 L. ed. 628 (1823); *Lefebure v. Worden*, 2 Ves. Sr. 53, 54 (1750).

It is the province of the presiding judge, as a matter of course, to determine whether the conditions for admissibility have been fulfilled. *Dow v. Sawyer*, 29 Me. 117 (1848).

"The question presented in this case . . . was thought to fall within the general rule which requires the best evidence the nature of the case admits of" *Welsh v. Barrett*, 15 Mass. 380, 383 (1819), per Parker, C. J.

"The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however,

to show further that the statement which he submits is both objectively and subjectively relevant to some issue raised in the case.⁹ Objectively, because, if believed, it logically tends to establish the existence of some relevant fact; subjectively, because the adequate knowledge of the declarant¹⁰ and the absence, on his part, of any controlling motive to misrepresent,¹¹ make the statement worthy of belief.

It follows from what has been already said relating to the administrative requirement of necessity that unless the absence of the original declarant is accounted for by the proponent in some way satisfactory to the presiding judge, his declarations in the course of business will be rejected,¹² as not being necessary to proof of the case of the proponent.¹³

sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited by the necessity upon which it is founded." *Chaffee & Co. v. U. S.*, 18 Wall. (U. S.) 516, 541, 21 L. ed. 908 (1873), per Mr. Justice Field.

"It is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination on oath; and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts, where ordinary prudence cannot guard us against the effects of human mortality?" *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 333, 5 L. ed. 628 (1823), per Mr. Justice Story.

9. The inveterate judicial habit of regarding relevancy as an attribute of an extrajudicial statement admissible as an exception to the hearsay rule rather than as being a necessary condition of all evidence and so not within the exclusionary rule relating to hearsay, has already been so frequently mentioned as to call for no comment in this connection.

10. § 2884.

11. § 2888.

12. *Alabama*.—*Tennessee & C. R. Co. v. Danforth*, 112 Ala. 80, 20 So. 502 (1896); *Terry v. Birmingham N. Bank*, 93 Ala. 599, 608, 9 So. 299, 30 Am. St. Rep. 87 (1891).

Connecticut.—*Bartholomew v. Farwell*, 41 Conn. 107, 109 (1874).

Illinois.—*Barnes v. Simmons*, 27 Ill. 512 (1862).

New York.—*State Bank of Pike v. Brown*, 165 N. Y. 216, 59 N. E. 1, 53 L. R. A. 513 (1901).

United States.—*Baird v. Reilly*, 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884 (1899).

Thus, the report of an expert to his employer will not be admitted as proof of the facts asserted, even where the same has been communicated to the opposite party. *Manning v. School Dist. No. 6 of Ft. Atkinson*, 124 Wis. 84, 102 N. W. 356 (1905).

13. *Alabama*.—*Tennessee & C. R. Co. v. Danforth*, 112 Ala. 80, 20 So. 502 (1895); *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87 (1890).

Connecticut.—*Bartholomew v. Farwell*, 41 Conn. 107 (1874).

Illinois.—*Barnes v. Simmons*, 27 Ill. 512, 81 Am. Dec. 248 (1862).

New York.—*State Bank of Pike v. Brown*, 165 N. Y. 216, 59 N. E. 1, 53 L. R. A. 513 (1901).

The *relevancy* of these book entries, the remaining condition of their admissibility, it has seemed proper to term the Relevancy of Regularity.¹⁴

§ 2879. (*Administrative Requirements; Necessity*); Absence.—With somewhat less uniformity of decision than where the necessity for using this species of secondary evidence has been caused by the death of the declarant,¹ it has been held that proof of the unavailability of the witness due to other causes will suffice to admit the evidence. Among reasons other than death for receiving proof of extrajudicial statements of this nature, is absence from the jurisdiction,² and residence beyond its process,³ especially

United States.—*Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78, 63 U. S. App. 157 (1899). See also *Watrons v. Cunningham*, 65 Cal. 410, 4 Pac. 408 (1884).

The modern extension of the present rule, which admits in evidence the books of account *in specie* as primary evidence of the facts asserted, is based, in part, upon the same forensic necessity of the proponent.

"The reason for its introduction has never been placed, by any court, on higher ground than that of necessity. For, in view of the number and frequency of transactions of which entries are daily required to be made, the difficulty and inconvenience of making formal common law proof of each item would be very great. To insist upon it, therefore, would either render a credit system impossible or leave the creditor remediless. But where a course of dealing between parties is shown to have existed, a degree of credit, more or less, will naturally attach to the registration by the proper person, in the proper book kept for such purpose, in the usual course of business, of such transactions as occur between them. The admission of books of account in evidence, therefore, under proper restrictions and limitations, is not calculated to produce injurious conse-

quences." 1 Smith's L. C., (9th Am. Ed.) 570.

14. §§ 3051 *et seq.*

§ 2879-1. § 2880.

2. *Alabama*.—*McDonald v. Carnes*, 90 Ala. 147, 7 So. 919 (1890); *Elliott v. Dycke*, 78 Ala. 150 (1884).

Arkansas.—*St. L., etc., R. R. Co. v. Henderson*, 57 Ark. 402, 21 S. W. 878 (1893).

Colorado.—*Farrington v. Tucker, et al.*, 6 Colo. 557 (1883).

Connecticut.—*Bartholomew v. Farwell*, 41 Conn. 107, 109 (1874).

Illinois.—*Cooke v. People*, 231 Ill. 9, 82 N. E. 863 (1907).

Indiana.—*State v. Central States Bridge Co.*, (App. 1912) 97 N. E. 803; *Culver v. Marks*, 122 Ind. 554, 562, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377 (1889).

Iowa.—*Karr v. Stivers*, 34 Iowa 123 (1871).

Kentucky.—*Poor v. Robinson*, 13 Bush. 290, 294 (1877).

Maryland.—*Heiskell v. Rollins*, 82 Md. 14, 33 Atl. 263, 51 Am. St. Rep. 455 (1895); *Reynolds v. Manning*, 15 Md. 510 (1859).

Massachusetts.—*North Bank v. Abbott*, 13 Pick. 465, 25 Am. Dec. 334 (1833).

Michigan.—*Cameron Lumber Co. v. Somerville*, 129 Mich. 552, 89 N. W. 346 (1902).

where the absentee is of parts unknown,⁴ or the absence is shown to be permanent in its nature.⁵ Thus, where the declarant or entrant has *absconded* and can no longer be traced, his extrajudicial declaration made in the course of business or official duty will be received in evidence.⁶ Affirmative proof must be made by the proponent to the effect that he has used all reasonable diligence for discovering the whereabouts of the declarant and procuring his attendance as a witness. Unless this is done, his extrajudicial statements or entries made in the course of business are properly rejected.⁷ The obvious reasons for such an administrative course are thus stated by a very distinguished chief justice of the supreme judicial court of Massachusetts:⁸ "It was satisfactorily proved,

Pennsylvania.—Crouse v. Miller, 10 Serg. & R. 155 (1823); Sterrett v. Binn. 234, 237 (1808).

Rhode Island.—State v. Mace, 6 R. I. 85 (1859).

South Carolina.—Rigby v. Logan, 45 S. C. 651, 24 S. E. 56 (1896); Elms v. Chevis, 2 McC. L. 349 (1823).
West Virginia.—Vinal v. Gilman, 21 W. Va. 301, 45 Am. Rep. 562 (1883).

United States.—Chaffee Co. v. U. S., 18 Wall. 516, 540, 21 L. ed. 908 (1873); Fennerstein's Champagne, 3 Wall. 145, 149, 18 L. ed. 121 (1865); James v. Wharton, 13 Fed. Cas. No. 7187, 3 McLean 492 (1844).

3. Chaffee v. U. S., 18 Wall. (U. S.) 516, 541, 21 L. ed. 908 (1873).

4. Poor v. Robinson, 13 Bush (Ky.) 290, 294 (1877); North Bank v. Abbott, 13 Pick. 465, 25 Am. Dec. 334 (1833).

5. Moore v. Andrews & Bros., 5 Port. (Ala.) 107 (1837); Vinal v. Gilman, 21 W. Va. 301, 313, 45 Am. Rep. 562 (1883).

Where the entrant is "indefinitely absent from the State," such absence may properly be regarded by judicial administration as permanent. McDonald v. Carnes, 90 Ala. 147, 7 So. 919 (1890); Vinal v. Gilman, 21 W. Va. 301, 313, 45 Am. Rep. 562 (1883).

6. New Haven Co. v. Goodwin, 42

Conn. 230 (1875); Poor v. Robinson, 13 Bush. (Ky.) 290, 294 (1877); North Bank v. Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334 (1833).

"Under these circumstances we think it is clear that, by the law of this State, the books should have been received in evidence without the testimony of Buck in regard to them. He had gone to parts unknown, and could not be produced as a witness. The same necessity therefore existed for receiving the books in evidence that would have existed if Buck had been dead at the time of trial. If such had been the case they would undoubtedly have been evidence." New Haven & N. Co. v. Goodwin, 42 Conn. 230, 231 (1875), per Park, C. J.

7. St. Louis, I. M. & S. R. Co. v. Henderson, 57 Ark. 402, 21 S. W. 878 (1893).

Certain of the more recent statutes leave the question of admissibility open as an administrative one, merely requiring that "sufficient evidence be given" of the unavailability of the witness. Volker v. First Nat. Bank, 26 Nebr. 602, 605, 42 N. W. 732 (1889). The step seems to be in the right direction, as the question of when a secondary grade of evidence is receivable is, in the nature of things, a purely administrative one.

8. North Bank v. Abbot, 13 Pick.

not merely that the witness was out of the jurisdiction of the court, but that it had become impossible to procure his testimony. We cannot distinguish this, in principle, from the case of death or alienation of mind. The ground is, the impossibility of obtaining the testimony; and the cause of such impossibility seems immaterial." Absence from the jurisdiction has not been regarded in all cases as constituting a sufficient necessity for receiving the evidence,⁹ the situation apparently suggesting the propriety of postponing the trial or granting a continuance.

§ 2880. (*Administrative Requirements; Necessity*); Death.

— The proponent of an unsworn statement made in the regular course of business or duty, may establish the administrative necessity for resorting to the secondary evidence of a hearsay declaration by establishing the fact that the original declarant is deceased at the time of trial. This is the universally conceded and entirely sufficient excuse for failing to produce the primary evidence of the declarant's testimony. Customarily, therefore, the declaration or entry in the course of private or official business or duty is regarded as admissible whenever the maker thereof is shown to have died.¹ That the declarant should be proved to be dead has not,

(Mass.) 465, 471, 25 Am. Dec. 334 (1833), per Shaw, C. J.

9. *Browning v. Flanagan*, 22 N. J. L. 567, 572 (1849); *Wilber v. Selden*, 6 Cow. (N. Y.) 161 (1826); *Little Rock Granite Co. v. Dallas Co.*, 66 Fed. 522, 13 C. C. A. 620 (1894); *Cooper v. Marsden*, 1 Esp. 1 (1793).

Rhode Island not only fails to regard absence from the jurisdiction as a ground for admitting the secondary evidence, but requires for admissibility that the entry should have been when made against the interest of the entrant. *McKeen v. Bank*, 24 R. I. 542, 54 Atl. 49 (1902). For this anomalous ruling the court, not unnaturally, relies on 1 Glf. Ev., 15 Ed. § 120.

§ 2880-1. *Alabama*.—*Davie v. Roland*, 3 Ala. App. 567, 57 So. 1034 (1912); *Sands v. Hammel*, 108 Ala. 624, 18 So. 489 (1895); *Terry v. Birmingham National Bank*, 93 Ala.

599, 9 So. 299, 30 Am. St. Rep. 87 (1890).

Connecticut.—*Bartholomew v. Farwell*, 41 Conn. 107, 109 (1874); *Ashmead v. Colby*, 26 Conn. 287, 310 (1857); *Livingston v. Tyler*, 14 Conn. 493, 498 (1842).

Indiana.—*Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377, 562 (1889).

Maryland.—*Lewis v. Kramer*, 3 Md. 265 (1852); *Clarke v. Magruder*, 2 Har. & J. 77 (1807).

Massachusetts.—*Washington Bank v. Prescott*, 20 Pick. 339, 342 (1838); *Welsh v. Barrett*, 15 Mass. 380 (1819).

New Mexico.—*Price v. Garland*, 3 N. M. 505, 6 Pac. 472 (1885).

New York.—*Fisher v. Mayor*, 67 N. Y. 73, 77 (1876); *Leland v. Cameron*, 31 N. Y. 114a, 121 (1865); *Sheldon v. Benham*, 4 Hill 129, 40 Am. Dec. 271 (1843).

however, been absolutely insisted on by judicial administration in the United States. The regular written declaration contemporaneously made in course of business has been received, although the declarant is alive² and available as a witness. On the contrary, where it appeared that certain entries of sales upon the books of a stock-exchange offered in evidence in a suit between third parties, were written by a secretary who was alive and in the city of trial, the evidence was held to have been properly rejected.³

§ 2881. (*Administrative Requirements; Necessity*); Practical Conditions of Business.—For the admissibility of the evidence, the important consideration is that the witness is unavailable. This precise cause of his being so may properly be regarded from the standpoint of sound administration as being really immaterial.¹ Modern conditions of doing business have introduced a new element of unavailability, that of practical inconvenience. Temporarily withdrawing, for example, all the persons connected with the sale, charge and delivery of even a single item in an account of sales might cause, in many instances, a dislocation in the smooth running of a large establishment, a result which would be quite disproportionate in producing annoyance and expense, to the value which the administration of justice could fairly be expected

Pennsylvania.—*Smith v. Lane*, 12 Serg. & R. 80 (1824); *Patton's Adm'r's v. Ash*, 7 Serg. & R. 116 (1821); *Sterrett v. Buell*, 1 Binn. 234, 237 (1808).

Vermont.—*State v. Hopkins*, 56 Vt. 250 (1883).

United States.—*Chaffee & Co. v. U. S.*, 18 Wall. 516, 540, 21 L. ed. 908 (1873); *Nicholls v. Webb*, 8 Wheat. 326, 5 L. ed. 628 (1823).

England.—*Lefebure v. Worden*, 2 Ves. Sr. 54 (1750).

“By reason of the difficulty of making of proof in cases of this kind, the court has gone so far.” *Lefebure v. Worden*, 2 Ves. Sr. 54 (1750), per Hardwicke, L. C.

2. *Shove v. Wiley*, 18 Pick. (Mass.) 558 (1836); *Chaffee v. U. S.*, 18 Wall. (U. S.) 516, 541, 21 L. ed. 908 (1873); *Fennerstein's Champagne*, 3 Wall. (U. S.) 145, 18 L. ed. 121 (1865),

3. *Terry v. Birmingham National Bank*, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87 (1890).

§ 2881-1. *Sims v. American Ice Co.*, 109 Md. 68, 71 Atl. 522 (1908); *North Bank v. Abbot*, 13 Pick. (Mass.) 465, 25 Am. Dec. 334 (1833); *Volker v. First Nat. Bank*, 26 Nebr. 602, 42 N. W. 732 (1889).

“It was satisfactorily proved, not merely that the witness was out of the jurisdiction of the court, but that it had become impossible to procure his testimony. We cannot distinguish this, in principle, from the case of death, or alienation of mind. The ground is the impossibility of obtaining the testimony; and the cause of such impossibility seems immaterial.” *North Bank v. Abbot*, 13 Pick. (Mass.) 465, 471, 25 Am. Dec. 334, (1833), per Shaw, C. J.

to gain from their fragmentary testimony. Under these circumstances, bearing in mind the many and unavoidable changes among the clerks possessing original knowledge, caused by death, promotion, removal or the like, judicial administration may well be justified, where the final step, the completed entry of charge, has properly been taken and exhibited to the court, in dispensing with strict proof of the regular intervention of preliminary witnesses, assuming, for the purposes of the case, that all necessary acts have been properly done and by persons of adequate knowledge. With the great increase in the volume of business handled by many modern mercantile houses, and the very large and highly specialized departments into which the business is customarily divided, each in a sense ignorant of the actual doings of the others, an administrative necessity arises for recognizing other forms of unavailability than those regarded as valid by earlier judges. Nor will it invariably be found that the individual knowledge of the officers or clerks of the creditor is obtainable, whatever may have been the annoyance or expense involved in seeking to obtain it. The personal memory of a witness regarding one among a large number of similar transactions, would necessarily, in a typical case, be so vague and fragmentary as merely to amount to an assertion of the accuracy of the books. A situation is thus apparently furnished calling for administrative relief in many cases by a ruling that the books, properly identified are *prima facie* sufficient; and that the exigencies of business are an adequate ground for failing to produce the actual witnesses required under the original common law rule. The inconvenience of and meagre results gained from compelling the attendance of the original witnesses under such circumstances could scarcely fail to impress many excellent legal administrators.² For these and similar rea-

2. *Schaefer v. Georgia R. R. Co.*, 66 Ga. 39, 43 (1880); *Fielder Bros. & Co. v. Collier*, 13 Ga. 495, 499 (1853); *Chisholm v. Beaman Machine Co.*, 160 Ill. 101, 43 N. E. 796 (1896); *Dohmen Co. v. N. F. Ins. Co.*, 96 Wis. 38, 71 N. W. 69 (1897).

"Shall the plaintiffs be compelled to go behind the books thus verified by the clerks who kept them, and resort to each of the subagents who partici-

pated in the transaction and sale of this produce? Are not the entries thus made in the usual course of the business of this extensive trading establishment, and as a part of the proper employment of the witnesses who prove them, not only the best, but the only reliable evidence which it is practicable to procure? We have no hesitation in holding that propriety, justice and convenience, re-

sons, many courts have hesitated to require large mercantile enterprises such as railroads,³ banks⁴ and the like⁵ to produce the persons who originally possessed information regarding the truth of matters entered in the books of account, even though the absence of these witnesses is not excused by death, absence from the jurisdiction or other common law disability. The entries based upon the oral reports of employees made in the ordinary course of business have been received upon a verification of the accuracy of the books and proof of the inconvenience of producing the original witnesses.

§ 2882. (*Administrative Requirements; Necessity*); Sickness.—Sickness, physical or mental,¹ may constitute a rationally sufficient reason for the proponent's failure to produce the original declarant or entrant as a witness.² Such persons are regarded as being beyond the reach of the process of the court or as is said in some cases may be treated as dead.³

quire it to be admitted. The weighers, wharfingers, and numerous subordinates who handled this cotton, keep no books. They report to the clerks who keep the books of the concern, and their functions are performed. It is not reasonable to suppose that they can remember the multitude of transactions thus occurring every day. . . . The actual salesmen in none of the great wholesale stores keep the books. They report to the clerks who stand at the different desks, and they make the entries. And yet, these books are always received to prove the sale and delivery of goods. . . . To impose a different rule upon these establishments, whether at home or abroad, and to require them at all times within the statutory period of limitations, to be prepared with original *aliunde* evidence, to prove the terms of sale of all the property consigned to them, each item of expense, etc., would trammel commerce and amount to a denial of justice." *Fielder Bros. & Co. v. Collier*, 13 Ga. 495, 499, 500 (1853), per Lumpkin, J.

3. *Donovan v. B. & M. R. Co.*, 158 Mass. 450, 452, 33 N. E. 583 (1893); *Northern Pac. R. Co. v. Keyes*, C. C. 91 Fed. 47 (1898).

4. *Continental Nat. Bank v. First Nat. Bank*, 108 Tenn. 374, 68 S. W. 497 (1902).

5. *U. S. v. Venable C. Co.*, C. C., 124 Fed. 267 (1903).

§ 2882-1. *Beattie v. McMullen*, 82 Conn. 484, 74 Atl. 767 (1909); *Bridgewater v. Roxbury*, 54 Conn. 217, 3 Atl. 415 (1886); *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181 (1825); *Chaffee v. U. S.*, 18 Wall. (U. S.) 516, 541, 21 L. ed. 908 (1873).

"It is the same as if he were dead." *Bridgewater v. Roxbury*, 54 Conn. 213, 217, 6 Atl. 415 (1886), per Loomis, J.

2. Some authority exists to the contrary. *Taylor v. Chic., M. & St. P. Ry. Co.*, 80 Iowa 431, 46 N. W. 64 (1890).

3. *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562 (1883); *Chaffee v. U. S.*, 18 Wall. (U. S.) 516, 541, 21 L. ed. 908 (1873); *James v. Wharton*, 13 Fed. Cas. No. 7,187, 3 McLean (U. S.) 492 (1844).

§ 2883. (*Administrative Requirements*); Relevancy.— That unsworn statements made in the regular course of business or official duty should be admissible as secondary evidence of the facts stated, it is essential not only that a suitable administrative necessity should be shown for substituting secondary proof for primary, but also that the extrajudicial statement should be relevant, both in an objective and subjective sense. In other words, the existence of the entry or other statement should logically tend to show that the fact is as stated; first, because, if true, such would be its logical effect; second, because it is to be believed for the reason that the declarant knew the facts and had no controlling motive to misrepresent them. The first of these requirements or conditions of relevancy — that the declaration should be objectively probative — is an implied element in all evidence.

Objective relevancy is, however, not sufficient. The statement of the declarant must not only be such that, if true, it would assist to establish the fact in the *res gestae* but also the credit of the declarant must be such as to lead to a belief in the truth of his assertion because he has made it. That this result should occur, subjective relevancy must also be made to appear. The speaker must be shown to have been possessed of adequate knowledge and under no controlling motive to misrepresent. In other words, admissibility, therefore is, as a rule, conditioned, in case of any statement, by its subjective relevancy.

§ 2884. (*Administrative Requirements*); Subjective Relevancy; Adequate Knowledge.— For the subjective relevancy of the extrajudicial statement made in the course of business and its consequent admissibility, it is essential that the declarant be shown or reasonably assumed to have been possessed of such adequate knowledge on the subject as to make his declaration helpful to the jury.¹ With the exception of cases where the joint knowl-

§ 2884-1. *Alabama*.— Zimmerman Mfg. Co. v. Dunn, 151 Ala. 435, 44 So. 533 (1907).

Illinois.— Schnellbacker v. McLaughlin Plumbing Co., 108 Ill. App. 486 (1902).

Indiana.— Dodge v. Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153 (1895).

Minnesota.— Carlton v. Carey, 83 Minn. 232, 86 N. W. 85 (1901).

Missouri.— Ridenour v. Wilcox Mines Co., 164 Mo. App. 573, 147 S. W. 852 (1912).

New Jersey.— New Jersey Zinc & Iron Co. v. Lehigh Zinc & Iron Co., 59 N. J. L. 189, 35 Atl. 915 (1896).

New York.— Leask v. Hoagland,

edge of several persons is necessary to complete proof,² extrajudicial statements not based upon personal knowledge will be rejected.³ Information, however trustworthy, derived from others,

205 N. Y. 171, 98 N. E. 395 (1912); *Dykman v. Northbridge*, 80 Hun 258, 30 N. Y. Supp. 164, 61 N. Y. St. Rep. 863 (1894); *Burke v. Wolfe*, 38 N. Y. Super. Ct. 263 (1874).

Pennsylvania.—*Com. v. Berney*, 28 Pa. Super. Ct. 61 (1905).

Texas.—*Cathey v. Missouri, K. & T. Ry. Co. of Texas*, (Tex. Civ. App. 1910) 124 S. W. 217; *Bouldin v. Atlantic Ricemills Co.*, (Civ. App. 1905), 86 S. W. 795.

United States.—*Rosenthal v. Pinehill Consol. Min. Co.*, 157 Fed. 83, 84 C. C. A. 587 (1907); *Connecticut Mut. L. I. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294 (1876); *Chaffee v. U. S.*, 18 Wall. 516, 543, 21 L. ed. 908 (1873).

Canada.—*Camsusa v. Coigdarripe*, 11 Brit. Col. 177, 191 (1904).

On an action against distillers for selling untaxed whiskey, shipped over the Miami Canal, the government is not allowed to put in evidence entries in the certificate books of collectors of tolls on the canal, made in the handwriting of deceased clerks, showing the arrival of freight at their respective ports, where these entries were compiled from the verbal statements of captains reporting to the collectors or from freight bills presented by these captains. "If now we apply the rule which we have mentioned to the certificate-books of the canal collectors their inadmissibility is evident. They were not competent evidence as declarations of the collectors, for the collectors had no personal knowledge of the matters stated; they derived all their information either from the bills of lading or verbal statements of the captains. Nor were the books competent evidence as declarations of the captains, because it does not appear that the

bills of lading were prepared by them, or that they had personal knowledge of their correctness, or that their verbal statements, when the bills of lading were not produced, were founded upon personal knowledge; and besides, many of the certificates were admitted without calling the captains who signed them, and without proof of their death or inaccessibility." *Chaffee v. U. S.*, 18 Wall. (U. S.) 516, 543, 21 L. ed. 908 (1873), per Mr. Justice Field.

The general feeling of the courts in respect to this exception to the hearsay rule is also stated by the Supreme Court of the United States; "The rule rests upon the consideration that the entry, other writing, or parol declaration of the author, was within his ordinary business. . . . He has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath." *Fensterstein's Champagne*, 3 Wall. (U. S.) 145, 149, 18 L. ed. 121 (1865), per Mr. Justice Swayne.

2. § 2885.

3. *Davie v. Roland*, 3 Ala. App. 567, 57 So. 1034 (1912); *Walling v. Morgan Co.*, 126 Ala. 326, 28 So. 433 (1899); *McDonald v. Carnes*, 90 Ala. 147, 7 So. 919 (1890); *Avery's Ex'rs v. Avery*, 49 Ala. 193 (1873); *Livingston v. Tyler*, 14 Conn. 493 (1842); *Lord v. Moore*, 37 Me. 208 (1854); *Connecticut M. L. I. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294 (1876); *Chaffee v. U. S.*, 18 Wall. (U. S.) 542, 21 L. ed. 908 (1873).

A record, made in course of business, of the amount of plaintiff's flour delivered to the defendants, kept by a miller's bookkeeper, and frequently made up from memoranda filed with

is not sufficient for this purpose but will be ruled out under the general exclusion of hearsay.⁴ The knowledge called for by the rule must be based, in some considerable degree, upon the observation and personal experiences of the declarant. Should the speaker be grounding his statement directly upon information from one who knew the fact only by hearsay, the declaration will, for even stronger reasons, be rejected,⁵ although the information itself be furnished under and in pursuance of a duty to furnish it.⁶ One who knows nothing about the truth of the fact which he asserts can confer no relevancy upon it merely by making a record of it in a book which he is under a duty to keep. Thus, the secretary of a lodge cannot make his statement, upon the books kept by him, as to the *age* of an applicant for membership evidence of that fact.⁷

Administrative Expedients.—The complexity of modern business conditions necessarily limits the knowledge which any one of the numerous employees of a common establishment may have with regard to the sale and delivery of a given commodity. Even at a comparatively early period after the establishment of the present rule and that relating to shop-books,⁸ instances were found to arise where the clerk or bookkeeper possessed no personal knowledge with regard to the making of sales, the facts in relation to such transactions being within the exclusive knowledge of the salesman. As to the *delivery* of goods, the office force, the clerks, cashiers or bookkeepers, grew to be, under the conditions of an expanding business, normally as ignorant as they were of the particular facts attending the sales. Delivery, being conducted at a distance, be-

the bookkeeper by some one who had delivered flour in the latter's absence, is not competent. *Smith v. Lane*, 12 Serg. & R. (Pa.) 80 (1824).

4. *Smith v. Lane*, 12 Serg. & R. (Pa.) 80, 84 (1824).

5. **Baptismal record.**—Where the priest's duty at a baptism was to record the age on information obtained from the parents or sponsors, and there is nothing to show that he obtained his information from the parents who would know, the record is inadmissible to show age; the record in such case being open to suspicion that the fact of age may have been made known to him by the

sponsors, so that it would indicate hearsay on hearsay. *Baldwin v. Salgado*, (Tex. Civ. App. 1911) 135 S. W. 608.

6. Thus, where a sergeant of police kept a book in which he set down an account of all accidents which the other policemen had collected from hearsay, the book was not admitted as proof of any facts asserted in it. *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713 (1898).

7. *Connecticut, etc., Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294 (1876).

8. §§ 3051 *et seq.*

came the appropriate work of draymen, teamsters and the like, whose knowledge was reported to some one else or entered by the person making the delivery upon an independent book. Transactions of the number and variety occurring in a busy establishment could scarcely be remembered, in the average instance, as an act of independent recollection. The situation was obviously complicated by introducing several participants. Judicial administration, to enable the proponent fully to enjoy his conceded right of proving his case⁹ found itself compelled to resort to several expedients. Conspicuous among these were three: (1) Employing the joint knowledge of the various persons assisting in carrying through or recording the completed transaction, each testifying as a witness to his knowledge of the part performed by him. (2) Permitting the maker of an entry to employ it to refresh his memory.¹⁰ (3) Authorizing the employment of the entry, under proper conditions, as primary evidence of the facts asserted.¹¹

§ 2885. (Administrative Requirements; Subjective Relevancy; Adequate Knowledge); Joint Knowledge.—Should several persons possess individual knowledge covering the separate parts of a transaction which forms the subject of a given entry, the evidence of all such persons will be required in certain jurisdictions. Where its effect is to establish a complete chain of proof as to the existence of the fact in question, the judicial or extrajudicial statements of all the persons involved are to be submitted to the court,¹ any break in the line of proof being fatal to the

9. §§ 334 *et seq.*

10. § 2903.

11. §§ 3051 *et seq.*

"A party's own books of account and original entries are now, in most, if not all, of the United States, received as evidence of a sale and delivery of goods to or of work done for the adverse party. The practice is sanctioned in some jurisdictions by the decision of the courts; in others by express legislative enactment." 1 Smith's L. C. (9 Am. Ed.) 570.

§ 2885-1. *Kansas*.—Merywethers v. Youmans, 81 Kan. 309, 105 Pac. 545 (1909).

Massachusetts.—Littlefield v. Rice,

10 Mete. 287 (1845); Smith v. Sanford, 12 Pick. 139 (1831).

Michigan.—Cameron Lumber Co. v. Somerville, 129 Mich. 552, 89 N. W. 346 (1902).

New Hampshire.—State v. Shinnborn, 46 N. H. 497, 88 Am. Dec. 224 (1866).

New York.—Bloomington Min. Co. v. Brooklyn Hygienic Ice Co., 58 App. Div. 66, 68 N. Y. Suppl. 699 (1901) *affirmed* 171 N. Y. 673, 64 N. E. 1118 (1902); Cobb v. Wells, 124 N. Y. 77, 26 N. E. 284 (1891); New York v. Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 (1886).

admissibility of the remainder.² Should A. testify to the existence of a fact, and that he correctly reported it to B., B.'s entry, in the usual course of business, is admissible in connection with A.'s testimony, although B. is not shown to have possessed any

Pennsylvania.—Ingraham v. Bockins, 9 Serg. & R. 285, 11 Am. Dec. 730 (1823).

Texas.—Missouri Pac. R. Co. v. Johnson, (Sup. 1888), 7 S. W. 838.

Wisconsin.—Taylor v. Davis, 82 Wis. 455, 52 N. W. 756 (1892).

2. *California*.—San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 Pac. 999 (1909); Butler v. Estella Raisin V. Co., 124 Cal. 239, 56 Pac. 1040 (1899).

Colorado.—Stidger v. McPhee, 15 Colo. App. 252, 62 Pac. 332 (1900).

Louisiana.—White v. Wilkinson, 12 La. Ann. 359 (1857).

Massachusetts.—Delaney v. Framingham Gas, etc., Co., 202 Mass. 359, 88 N. E. 773 (1909) (hospital records); Kent v. Garvin, 1 Gray 148 (1854).

Michigan.—Swan v. Thurman, 112 Mich. 416, 70 N. W. 1023 (1897).

Minnesota.—Paine v. Sherwood, 21 Minn. 225 (1875).

New York.—Rathbone v. Hatch, 80 App. Div. 115, 80 N. Y. Suppl. 347 (1903); Shipman v. Glynn, 31 App. Div. 425, 52 N. Y. Suppl. 691 (1898); Powers v. Savin, 64 Hun 560, 19 N. Y. Suppl. 340, 28 Abb. N. C. 463 (1892); Irving v. Clogett, 9 N. Y. Suppl. 136 (1890).

Pennsylvania.—Imhoff v. Fleurer, 2 Phila. 35 (1856); Smith v. Lane, 12 Serg. & R. 80 (1824).

Vermont.—Coolidge v. Taylor, 80 Atl. 1038 (1911).

United States.—The Norma, 68 Fed. 509, 15 C. C. A. 553 (1895).

Canada.—Leslie v. Hanson, 12 New Bruns. 263 (1868).

See also § 2886.

Thus, in an action for the use of teams and drivers furnished by plaintiff to defendant, a book of items

made by plaintiff's bookkeeper from memoranda made by him from oral statements by the drivers as to their work, and afterward copied into the book, is inadmissible because mere hearsay. "The first entry or memorandum made by the witness on paper was but the oral statement of the teamsters. Such teamsters were not under oath, and were not brought into court so that their statements could be tested by cross-examination." San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 Pac. 999 (1909).

Proof that a clerk making an entry upon information furnished by another would have no interest to misrepresent the truth of the matter does not dispense with his actual testimony. Texas & P. Ry. Co. v. Leggett, 44 Tex. Civ. App. 296, 99 S. W. 176 (1906).

Hospital records.—Records kept by a witness upon the books of a hospital require, in order to be received in evidence, if made upon the statements of physicians, the testimony of the latter or a reasonable justification for failure to produce them as witnesses. Delaney v. Framingham Gas, Fuel & Power Co., 202 Mass. 359, 88 N. E. 773 (1909).

Pasteur Institute.—Where an experiment conducted by several persons results in the formation of an entry in the regular course of the business to which the experiment is an incident the testimony of all persons having knowledge of the matter or of any material part of it will be required.

Thus, on an issue involving the existence of rabies an investigation was submitted which had been scientifically made according to the system

independent knowledge on the subject.³ To A. and B. the names

in vogue at the Pasteur Institute. All the physicians who took part in it having testified as to their respective shares, making a complete chain of investigation, the entries in the record books and on a card in relation thereto were admitted in connection with their testimony. *Buck v. Brady*, 110 Md. 568, 73 Atl. 277, 132 Am. St. Rep. 459 (1909).

Train dispatchers.—The requirement that all persons whose knowledge is necessary to establish the truth of an entry in the course of business must be produced as witnesses has apparently been relaxed in case of the "train sheets" of train dispatchers. Thus, in an action for injuries from fire claimed to have been set by sparks from passing locomotives, it has been thought by the court to be proper to allow the train dispatcher to testify from information on his "train sheets" made up from telegraphic reports transmitted to him from stations along the line as to the time certain trains passed the station near which the fire occurred, where he stated that the record was made by him in the regular course of his business, that its entries were correct, and it did not appear to have been altered. *Cathey v. Missouri, K. & T. Ry. Co. of Texas*, (Tex. Civ. App. 1910) 124 S. W. 217. See also *L. & N. Ry. Co. v. Daniel*, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190n. (1906).

3. *Mayor, etc., of N. Y. v. Second Ave. R. R. Co.*, 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 (1886).

On an action to recover against the defendant for work and materials in paving the tracks of the defendant's road, the plaintiff introduced a time-book kept by one John B. Wilt, a foreman in the employ of the department of public works. In this book he entered the name of each man

employed. He visited the work twice a day, checked the time of each man as represented to him by the two gang foremen or head bosses. The latter did not see Wilt's entries. Wilt said that he knew the faces of the men and checked them off. Gang foremen testified that they had reported time correctly. The judge admitted the book. He also admitted an account in Wilt's handwriting of materials used. This was made up in the same general way, except that the gang foremen claimed no present knowledge of the quantity. They said they had reported correctly. One said that the count of stone was reported to him by the carmen who drew it, but not verified by him. The carmen were not called. As to this last item, the court say that it was mere hearsay, and if a specific objection had been taken against it that it would have been good. But being general, and the others being good, that also must be overruled. Court say business is, and must, be carried on in the way mentioned. "The case is of an account kept in the ordinary course of business, of laborers employed in the prosecution of work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master but of higher grade, who, in time, also in accordance with his duty, entered the time as reported." *Mayor, etc., of New York v. Second Ave. R. R. Co.*, 102 N. Y. 572, 580, 7 N. E. 905, 55 Am. Rep. 839 (1886), per Andrews, J.

At common law, where the clerk who made the entries had no knowledge of the correctness of the entries, but made them as the items were furnished by another, it was essential that the party furnishing the items should testify to their correctness, or

of *observer* and *entrant*, respectively, may be appropriately assigned. The entrant may properly testify to the truth of the entries so made by him upon the information so furnished.⁴

Precision of memory is, however, demanded only to the extent to which it is reasonably possible to furnish it. One, for example, who has made an oral statement or written entry may at times be permitted to infer that he actually made it because it was his customary duty to do so, no independent recollection of the truth of the facts asserted being present in the mind of the witness.

§ 2886. (*Administrative Requirements; Subjective Relevancy; Adequate Knowledge; Joint Knowledge*); Production of all Witnesses.—Whether, when the entrant in the due course of business or duty enters a fact upon information given to him by one who has observed it, it is necessary to produce or account for the nonproduction of both the entrant and the observer, is an administrative question as to which the practice of the courts is by no means uniform. Cases holding that production of all witnesses is necessary have been referred to in the preceding section.¹ On the other hand, by certain authorities, it has been held unnecessary to call any witness other than the entrant. In these jurisdictions, testimony by the entrant that he received the report upon which he has acted; in the regular course of business, will, if reinforced by evidence of the entrants having entered the fact correctly, admit the book as evidence of the facts stated in the entry.² Production of the observer will usually be excused where

that satisfactory proof thereof (such as the transactions were reasonably susceptible of), from other sources should be produced." *Stettauer v. White*, 98 Ill. 72, 77 (1881).

4. Where a marshal's office kept measurements of convicted persons and it was the practice for one of the clerks in the office to take and "call off" the measurements in question to one Carroll who wrote them in a book kept for the purpose, it was held not to be necessary to call any clerk but Carroll himself. The court say: "In a complicated transaction in which two persons participate, we do not think that it is essential that each one should have per-

sonal knowledge of all the steps in the transaction. For example, a merchant in his store in selling goods calls out the price and the character of goods, and his clerk writes them down. That is in the regular course of business, and it would not be necessary that the clerk should follow the merchant around and to have personal knowledge of all that passed between him and his customer." *U. S. v. Cross*, 9 Mackey (D. C.) 369, 380 writ of error dismissed, 145 U. S. 571, 12 Sup. Ct. 842, 36 L. ed. 821 (1892), per Mr. Justice Cox.

§ 2886-1. § 2885.

2. *District of Columbia*.— *United States v. Cross*, 20 D. C. 365 (1892).

he cannot be identified,³ or where, although identified, he has deceased⁴ or because, for some other satisfactory reason, he cannot be produced by the proponent. Certain courts, however, draw the line of admissibility, in such cases, immutably at *death*, declining to recognize any other disability, such as absence from the jurisdiction,⁵ or the like,⁶ as sufficient to excuse the production of the witness. That some reason should be alleged and shown as to why the observer is not produced seems to have been generally assumed.⁷ This practice of requiring production of the observer where he can be identified and has not deceased seems to have been enforced even in cases where the element of practical inconvenience would seem to warrant a different administrative course.

§ 2887. (*Administrative Requirements; Subjective Relevancy; Adequate Knowledge*); Books Best Evidence.—It has

Mississippi.—Chicago, St. L. & N. O. R. R. Co. v. Provine, 61 Miss. 288 (1883).

New York.—Payne v. Hodge, 7 Hun, (N. Y.) 12 (1876).

Pennsylvania.—Jones v. Long, 3 Watts (Pa.) 325 (1834).

West Virginia.—Architects & Builders v. Stewart, 68 W. Va. 506, 508, 50 So. 166, 36 L. R. A. (N. S.) 899n. (1911).

3. Meyer v. Brown, 130 Mich. 449, 90 N. W. 285 (1902).

Thus, where a book containing the numbers taken from certain logs sawn as written there by a large number of people, it was rejected unless all persons who had marked any logs were produced as witnesses. Leslie v. Hanson, 1 Han. (N. Br.) 263 (1869).

4. Stanley v. Wilkerson, 63 Ark. 556, 39 S. W. 1043 (1897); McNeill v. Elam, 7 Tenn. 268 (1823) (notary); American Surety Co. v. Pauly, 18 C. C. A. 644, 72 Fed. 470 *aff'd* 170 U. S. 133, 18 Sup. Ct. 552, 42 L. ed. 977 (1896) (bank teller).

5. Kent v. Garvin, 1 Gray (Mass.) 148 (1854).

6. Chicago Lumbering Co. v. Hewitt, 64 Fed. 314, 12 C. C. A. 129 (1894).

7. *California*.—Butler v. Estrella R. V. Co., 124 Cal. 239, 56 Pac. 1040 (1899).

Georgia.—Whitley Grocery Co. v. Roach, 115 Ga. 918, 42 S. E. 282 (1902).

Louisiana.—White v. Wilkinson, 12 La. Ann. 360 (1857).

Michigan.—Swan v. Thurman, 112 Mich. 416, 70 N. W. 1023 (1897).

Minnesota.—Price v. Standand L. & A. Ins. Co., 90 Minn. 264, 95 N. W. 1118 (1903) (physician to hospital superintendent); Carlton v. Carey, 83 Minn. 232, 86 N. W. 85 (1901).

New Jersey.—New Jersey Zinc & I. Co. v. L. Z. & I. Co., 59 N. J. L. 189, 35 Atl. 915 (1896).

New York.—Mayor of New York v. Sec. A. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 (1886) (subforeman to foreman).

Washington.—Tingley v. Land Co., 9 Wash. 34, 42, 36 Pac. 1098 (1894) (scalars of logs).

United States.—The Norma, 68 Fed. 509, 15 C. C. A. 553 (1894) (foreman and bookkeeper).

been observed, in connection with the disabilities which would entitle the proponent of a fact to establish it by the secondary evidence of unsworn statements made in the regular course of business, that the inconvenience of endeavoring to prove, in case of a large mercantile establishment, the sale and delivery of goods by those who alone could have actual knowledge of the facts, has been regarded as creating a sufficient necessity to admit secondary evidence of the entries themselves. A further administrative consideration has contributed in no small degree to the attainment of this result. It has come to be felt by discriminating judges that, in point of actual probative force the book entry could in no just sense be deemed secondary evidence as compared with the testimony of the declarant himself. It has been perceived, with increasing clearness, that in a multiplicity of small transactions, constantly recurring with practical uniformity, the existence of a contemporaneous record is far more cogent in creating belief, even after a short interval, than the actual memory of the average witness presumably could be. Indeed, the tenure of memory, under such circumstances, is so precarious that, in an administrative sense, the actual recollection of the witness is more nearly secondary evidence in relation to the primary evidence of the book. While the special importance of this fact lies in its connection with the evolution of a rule of procedure under which hearsay is primary evidence by virtue of the so-called relevancy of regularity¹ it has also an important bearing upon the reasonableness of the administrative requirements as to what shall be regarded as adequate knowledge under the present rule. Instances, illustrating the feeling of the court that, where many persons are called upon to do, in co-operation, a number of individually petty acts, the total result of which is eventually recorded, the record is the best "evidence" i. e., primary proof, as compared with the individual recollection of the witnesses, are numerous.² As the su-

§ 2887-1. § 3109.

2. Thus, for example, where the scale of logs cut in a logging camp was entered each day by the camp scalers upon cards, which cards were copied each day into scale-books, which were verified at regular intervals by inspectors who tested the record by their own measurements of

the logs themselves, the cutters being paid upon the faith of the scale book, it was held that the scale-books were admissible in evidence upon the testimony of the inspectors that the books were accurate. The trial judge presiding in the case, in admitting the books, very pointedly called attention to the important administrative

preme court of Tennessee say,³ in holding that it was sufficient to verify the accuracy of the books of a bank by the evidence of its cashier without calling the bookkeeper who made the entries themselves, "The court knows, as a matter of common information, that there are many persons in the employ of banks, and each has his different department, and each transaction passes through the hands of several — it may be of many persons. We take a deposit for instance. It goes into the hands of the receiving teller, thence into the hands of a journal clerk, thence to the individual bookkeeper, or such other officials as perform the functions of these

consideration that the books are far more satisfactory evidence of the actual scale of the logs than would be the misty personal memory of the camp-scalers. "It would seem, therefore, that the scale-books should be admitted in evidence, unless it appears that there is better evidence within the power of plaintiff to produce. It is said that the camp-scalers should have been hunted up, and their testimony be introduced, in order to show the number of logs, and the contents thereof, cut on plaintiff's land during the time in controversy. What is sought to be proved is the result, in number and quantity, of the logs cut. When the scalers made the count and measurements, two records thereof were made, — one in the memory of the scaler, the other in the scale-book. Which is now the best evidence? Years have elapsed. The entries on the scale-books remain unchanged. They are now just what they were when originally made. Can the same be said of the record made upon the memory of the scalers? If the scalers had been produced, and had testified that in the years past they had counted and measured a large quantity of logs, and had at the time entered the results upon scale-books prepared for the purpose, and that, as they now remembered it, the number and quantity were so and so, but, upon the production of the scale-

books, they showed a different quantity and measurement, which should control? The rule requiring the production of the best evidence of which the case is susceptible is intended to guard against fraud and mistake, and to aid in arriving at the truth." *Mississippi River Logging Co. v. Robson*, 69 Fed. 773, 781, 16 C. C. A. 400 (1895), per Thayer, J., quoting from opinion rendered by the Circuit Court. In affirming the ruling of the trial court, the Circuit Court of Appeals in this case, said; "For the reasons so well stated by the trial judge, we entertain no doubt that the scale-books in question were properly received in evidence. They appear to have been kept under conditions that were calculated to prevent mistakes therein, and to insure a high degree of accuracy. They were also identified by witnesses who were familiar with their contents, and whose special duty it was to see that they were properly and accurately kept. Under these circumstances, we think that the trial court would have erred if it had excluded the books on the ground that they had not been sufficiently identified, or that they were not the best evidence." *Mississippi River Logging Co. v. Robson*, 69 Fed. 773, 782, 16 C. C. A. 400 (1895).

3. *Continental Nat. Bank v. First Nat. Bank*, 108 Tenn. 374, 68 S. W. 497 (1902).

officers. When it reaches the hands of the bookkeeper who makes the final entry, which stands as the true statement between the bank and depositor, it has gone through the hands of a dozen parties, perhaps, and the last party only records what comes to him through so many hands, and knows nothing, it may be, of the actual transaction. It would seem that the cashier, whose function it is to overlook all transactions at the counter, and over the books, and test each transaction through all its stages, should be the person most competent to produce the books and vouch for their accuracy.”⁴

§ 2888. (*Administrative Requirements; Subjective Relevancy*); *Absence of Controlling Motive to Misrepresent.*—As in case of all statements, judicial or extrajudicial, it is required in the event of their use as secondary evidence of the facts asserted, not only that the declarant was possessed of adequate knowledge but that he was free from controlling motive to misrepresent.¹ This lack of motive to misrepresent, upon which the subjective relevancy of the evidence is based, is taken or assumed to be established by the automatism of habit, the regular doing of an act where the declarant has no motive to misrepresent but has every reason, in discharge of his business, professional, or official duty, to assert the truth. That upon which judicial administration relies to eliminate the perverting influence of self-interest through reflection is the semi-mechanical operation of an acquired way of doing things where accuracy is instinctive. It has, however, been suggested that in case of book entries the circumstance which intervenes to prevent their rejection as hearsay is the presence of the legal or moral duty to keep such books accurately² and that, therefore, a mere memorandum book, such as a diary,³ not kept in pursuance of such a duty is to be rejected. For the relevancy of

4. *Continental Nat. Bank v. First Nat. Bank*, 108 Tenn. 374, 381, 68 S. W. 497 (1902), per Wilkes, J.

§ 2888-1. *Arkansas.*—See *Burr v. Byers*, 10 Ark. 398, 52 Am. Dec. 239 (1850).

Maine.—*Lord v. Moore*, 37 Me. 208 (1854).

Massachusetts.—*Kennedy v. Doyle*, 10 Allen 161 (1865).

New Hampshire.—*Lassone v. B. &*

L. R. Co., 66 N. H. 345, 354, 24 Atl. 902, 17 L. R. A. 525 (1890).

England.—*Polini v. Gray*, L. R. 12 Ch. Div. 430 (1879); *Poole v. Dicas*, 1 Bing. N. C. 649 (1835).

Ireland.—*Malone v. L'Estrange*, 2 Ir. Eq. 16 (1839).

2. *Hutchins v. Berry*, 75 N. H. 416, 75 Atl. 650 (1910).

3. *Hutchins v. Berry*, 75 N. H. 416, 75 Atl. 650 (1910).

this species of evidence, it is essential that the declaration or entry in question should be made in the regular course of the business in which the declarant or entrant, meaning the maker of an oral or written statement, respectively, is engaged. It is not sufficient that the declaration or entry should have been made in the course of a business transaction. The latter must be part of the regular employment of the declarant or entrant. It follows that a satisfactory absence of motive to misrepresent cannot be obtained for the purposes of justice where the statement in question is made in connection with a transaction which does not form part of the regular business of the declarant.⁴

§ 2889. (*Administrative Requirements; Subjective Relevancy; Absence of Controlling Motive to Misrepresent*); Declarations May be Self-serving.—So strong is the probative force of an automatic habitual statement that it is by no means insisted by judicial administration that the extrajudicial declaration in course of business should be against the interest of the declarant. On the contrary, such utterances may properly be admitted, although distinctly self-serving.¹ For example, the entry of a tradesman or mechanic of work done,² goods sold and the like

4. Where the owner of a business, suspecting that an employee was not accounting to him for the proceeds of sales, had another employee make a list of these sales on a slip of paper, it was held that these were not entries in course of business. *Peck v. Valentine*, 94 N. Y. 569 (1884).

§ 2889-1. Entries in the account book of a deceased physician of charges for services as a surgeon in setting a fractured leg, made in course of business, are competent evidence, in a pauper settlement case, though not against the interest of the entrant. *Augusta v. Windsor*, 19 Me. 317 (1841).

A somewhat unusual proposition has been adopted to the effect that while an entry by a clerk favorable to the employer may be received after the clerk's decease, the entries made by the employer himself will not be deemed admissible if self-serving.

Evidence of entries in an account book by a deceased merchant, proved to be in his handwriting, have been rejected because, as is said, it is "a general rule of law that a party cannot make evidence for himself, and that a party cannot introduce his own declarations, oral or written, as evidence in his own behalf. . . . It is true that when entries have been made, in the usual course of business, by merchants' clerks, and such clerks are dead, these entries thus made are admissible as evidence; but we know of no case where such entries have been held admissible when in the handwriting of the party himself." *Bland v. Warren*, 65 N. C. 372, 373, 374 (1871), per Boyden, J.

2. "There is a distinction between entries made in the usual and regular course of business, and a private memorandum. The latter is mere

are competent, after the decease of the declarant in a suit between third persons, although the entry when made was favorable to the entrant.³

On the contrary, in addition to the other requirements prescribed by the rule, it has been demanded that the declaration or entry should also be *against the interest* of the declarant.⁴ This would seem to be an excess of administrative caution, a statement against proprietary or pecuniary interest exhibiting an individual ground of relevancy elsewhere considered.⁵ Under such a requirement, nice administrative questions may arise where, as well may happen, the declaration is in part against the interest of the declarant and partly in his favor. Where this is so, it has been said that the statements are to be balanced, and if those in favor of interest equal or preponderate over those against interest the declaration is not admissible; otherwise it is.⁶

§ 2890. (Administrative Requirements; Subjective Relevancy); Contemporaneousness Required.—Judicial administration, whose work has been hardened by the doctrine of *stare decisis* into the procedural requirements of the rule under consideration, demands not only that the entry or declaration should have been made in the *regular* course of business or official duty, but also that it should have been customary to make these declarations or entries substantially *contemporaneous* with the happening of the

hearsay, and inadmissible in evidence after the death of the person who made it. Entries made in the regular and usual course of business stand differently. When shop-books are kept and the entries are made contemporaneously with the delivery of goods or the performance of labor by a person whose duty it was to make them, they are admissible, unless the nature of the subject is such as to render better evidence attainable. Mr. Greenleaf says the remark that this evidence is admitted contrary to the rules of the common law is incorrect; that 'in general its admission will be found in perfect harmony with those rules, the entry being admitted only when it was evi-

dently contemporaneous with the fact and part of the *res gestae*.'" *Lassone v. B. & L. Co.*, 66 N. H. 345, 358, 24 Atl. 902, 17 L. R. A. 525 (1890), per Smith, J.

3. Indeed, the making of any entry or declaration on the subject is, almost of necessity, intended to be self-serving—usually by removing the risk of loss by death of a necessary witness or through defective memory.

4. *Massee v. Felton Lumber Co. v. Sirmans*, 122 Ga. 277, 50 S. E. 92 (1905).

5. §§ 2774 *et seq.*

6. *Massee-Felton Lumber Company v. Sirmans*, 122 Ga. 277, 50 S. E. 92 (1905).

events to which they refer.¹

Absolute contemporaneousness is, naturally, not required. It is sufficient if the statement be made at practically or substantially the same time as the act is done.² In other words, a regu-

§ 2890-1. *Connecticut*.—*Bridgewater v. Roxbury*, 54 Conn. 217, 6 Atl. 415 (1886).

Illinois.—*House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 367 (1892).

Missouri.—*Penn adm'r v. Watson*, 20 Mo. 13 (1854).

New Jersey.—*Rumsey v. New York & N. J. Telegh. Co.*, 49 N. J. L. 322, 8 Atl. 290 (1887).

North Carolina.—*Ray v. Castle*, 79 N. C. 580 (1878).

Oregon.—*Harmon v. Decker*, 41 Oreg. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748 (1902).

Pennsylvania.—*McKnight v. Newell*, 207 Pa. St. 562, 57 Atl. 39 (1904); *Smith v. Lane*, 12 Serg. & R. 80 (1824).

Texas.—*Duty v. Storrs*, (Civ. App. 1902), 70 S. W. 357.

Washington.—*Union Electric Co. v. Seattle Theatre Co.*, 18 Wash. 213, 51 Pac. 367 (1897).

Wisconsin.—*Milwaukee Trust Co. v. Warren*, 112 Wis. 505, 87 N. W. 101 (1902).

Canada.—*Barton v. Dundas*, 24 N. C. Q. B. 273 (1865).

England.—*Doe v. Turford*, 3 B. & Ad. 890, 896 (1832); *Champneys v. Peck*, 1 Stark. 404 (1816).

2. *R. R. Co. v. Henderson*, 57 Ark. 402, 415 (1893). *Kennedy v. Doyle*, 10 Allen (Mass.) 161 (1865); *Chaffee v. U. S.*, 15 Wall. (U. S.) 516, 541, 21 L. ed. 908 (1873).

Affirmative proof.—In case of any particular declaration or entry, affirmative proof upon this point of contemporaneousness will be required. *Elliott v. Dycke*, 78 Ala. 150, 157 (1884); *Ray v. Castle*, 79 N. C. 580 (1878). No important a circumstance will not be assumed by

judicial administration from the mere production of the book itself, even where it comes from the most unimpeachable custody. It will not be taken for granted, for example, that a surveyor's minutes were made contemporaneously with the events which they state. "The proposed evidence falls under the class of hearsay testimony, as to which the general rule is that it is inadmissible, to which rule, however, there are several exceptions, of which the present with certain qualifications is one. Business entries of deceased persons when made in the line of their duty are admissible in evidence. This is the rule, but it is subject to the qualification that such entries to be admissible must be, first, original; and second, contemporaneous with the facts they record; and these requisites must be established by evidence other than what may be derived from the entries themselves. The field notes of a surveyor since deceased, made in the discharge of his official duties and contemporaneous with the survey, are admissible, because such entries are made under a sense of business responsibility, and by an officer having no interest to make untrue entries.

It has been held that where an entry has been made against interest, proof of the handwriting of the party and his death is enough to authorize its reception at whatever time it is made; but in the case of entries in the course of business, they must be contemporaneous with the transaction, and if there is any doubt whether the entries were made at the time of the transaction, they are in-

lar habit of making a statement or entry at a period unreasonably remote from the occurrence of the events themselves would not constitute such a course of business as would render the oral or written assertion so made admissible under the present rule. In several related ways, contemporaneousness tends to enhance the subjective probative relevancy of the hearsay utterance made in the course of private or official business. (1) The freshness of the memory from which a contemporaneous assertion springs constitutes a probative element in which judicial administration reposes much confidence, increasing, as it does, belief in the Adequate Knowledge of the declarant.³ (2) The probative relevancy of the declaration or entry covered by the present rule is almost directly proportionate to the shortness of the interval permitted to elapse between the impulse, suggestion or prompting to make a declaration or entry and the actual making of it. For reasons partly set forth in an immediately succeeding section,⁴ the natural impulse, at least over a large field of the operation of the rule, is to state the truth. Delays, however, are often dangerous here as elsewhere. They bring reflection. Automatism gives way to self interest. Much of the trustworthiness of the statement made in the course of private or official business may, therefore, be said to be dependent upon the existence of a short reaction time between the stimulus and the appropriate action. (3) To state the same proposition in still another form, the spontaneity⁵ of a delayed utterance may be partially or wholly lost. For various purposes, it may be desirable, in case of a hearsay statement, to separate in thought the Relevancy of Spontaneity⁶ from that of Regularity.⁷ Certainly, the two rules or administrative principles are chiefly operative in distinct fields. Yet the fact that they are brought together in Prof. Greenleaf's view of the principle of the *res gestae*⁸ may well serve as a reminder that they have a very important, if not all important, feature in common, viz., spontaneity. In both forms of relevancy, this seems to be, for judicial purposes, the active probative principle. In each automatism, instinct, intui-

admissible." Ray v. Castle, 79 N. C. 580, 582 (1878), per Bynum, J.

That an entry was contemporaneous cannot be proved by means of an inference arising from the contents of the entry itself. Barton v. Dundas, 24 Q. B. U. C. 273 (1865).

3. § 2884.

4. § 2892.

5. § 2982.

6. § 2983.

7. § 3051 *et seq.*

8. § 2891.

tion, replace, with a corresponding increase in confidence on the part of judicial administration, the promptings of self interest. True, in case of the Relevancy of Spontaneity,⁹ these promptings are most often, as it were *stunned* into immobility by an overwhelming force from without while in case of the Relevancy of Regularity,¹⁰ they seem more frequently *lulled* into inactivity by the power of a self-acquired mental habit on the part of the declarant. So superficial a difference, however, in no way disguises the significant fact that in both cases the proving power of the hearsay statement lies in its spontaneousness, the true line of cleavage between these two forms of relevancy consisting principally in the *means* by which the impulse to this spontaneous action is created.¹¹

Narrative excluded.— From what has been said, it follows that where the element of spontaneity is entirely lacking and nothing obstructs the influence of self-interest, the subjective relevancy upon which the present rule is based disappears and the evidence so affected is not removed from under the ban of the hearsay rule. Entries which are made subsequent to a period which may reasonably be deemed contemporaneous, are mere narrative transactions of past events; and will not be received to affect the rights of the parties.¹² Such a situation is frequently described by saying that the declaration or entry is not part of the *res gestae*, i. e., has no spontaneous force. Thus entries, if made by one party to a transaction a substantial time after the respective rights have become fixed, are, therefore, inadmissible as proof of the facts asserted.¹³

§ 2891. (Administrative Requirements; Subjective Relevancy; Contemporaneousness Required); Greenleaf's View.— This requirement of contemporaneousness in connection with the

9. § 2983.

10. §§ 3051 *et seq.*

11. Such being the case, that contemporaneousness should be required by judicial administration in connection with both forms of relevancy (§§ 2991, 3000, 3073, 3077, 3078) seems a natural sequence.

12. *Burley v. German-Am. Bank*, 11 U. S. 216, 4 Sup. Ct. 341., 28 L. ed. 406, 5 Civ. Pro. Rep. 172 (1883).

13. "The rights of the defendant

could not be varied by entries thus made, because they were not contemporaneous entries, made in the due course of the business, as a part of the *res gestae*, but were made by one of the parties after the rights of the other party had become fixed." *Burley v. German-Am. Bank*, 111 U. S. 216, 221, 4 Sup. Ct. 341, 28 L. ed. 406, 5 Civ. Proc. Rep. 172 (1883), per Mr. Justice Blatchford.

making of a declaration in the regular course of private or official business or duty is, it will be noticed, sanctioned by the authority of Prof. Greenleaf.¹ Apparently, the connection referred to in the

§ 2891-1. 1 Greenlf., Ev. (15th ed.) § 120.

"Returning now to the admission of entries made by clerks and third persons, it may be remarked that in most of, if not all, the reported cases, the clerk or person who made the entries was dead; and the entries were received upon proof of his handwriting. But it is conceived that the fact of his death is not material to the admissibility of this kind of evidence. There are two classes of admissible entries, between which there is a clear distinction, in regard to the principle on which they are received in evidence. The one class consists of entries made against the interest of the party making them; and these derive their admissibility from this circumstance alone. It is, therefore, not material when they were made. The testimony of the party who made them would be the best evidence of the fact; but, if he is dead, the entry of the fact made by him in the ordinary course of his business, and against his interest, is received as secondary evidence in a controversy between third persons. The other class of entries consists of those which constitute parts of a chain or combination of transactions between the parties, the proof of one raising a presumption that another has taken place. Here, the value of the entry, as evidence, lies in this, that it was *contemporaneous with the principal fact done*, forming a link in the chain of events, and being *part of the res gestae*. It is not merely the declaration of the party, but it is a verbal contemporaneous act, belonging, not necessarily indeed, but ordinarily and naturally, to the principal thing. It is on this ground, that this latter

class of entries is admitted; and therefore it can make no difference, as to their admissibility, whether the party who made them be living or dead, nor whether he was, or was not, interested in making them, his interest going only to affect the credibility or weight of the evidence when received." 1 Glf. Ev., (15th ed.) § 120.

It seems, however, that a clear distinction exists between the rules relating to the *res gestae* and the entries by third persons since deceased in the regular course of business, professional, or official duty. This latter rule has all the ear-marks of an exception to the hearsay rule. It is an unsworn statement, admitted as secondary evidence of the fact stated, when the primary evidence—the testimony of the declarant as a witness—has been rendered unattainable by reason of his death. Adequate knowledge and lack of motive to misrepresent are demanded. The latter element—lack of motive to misrepresent—is supplied by this element of a regular and contemporaneous discharge of a duty.

This element of contemporaneousness is also part of the subjective relevancy of a declaration part of a fact in the *res gestae* used in its assertive capacity. § 2991. In this connection, however, the element of contemporaneousness is entirely disassociated from that of regularity with which it unites in connection with the shop-book rule, that relating to entries by deceased persons in the course of business and the other branches of the general relevancy of regularity in business. Contemporaneousness in the *res gestae* rule is an essential element of the relevancy of

preceding section between the proving power of spontaneity and the presence of contemporaneousness is here predicated as the ground for the admissibility of statements of this class. It is carefully to be observed, however, that the learned author employs the phrase "part of the *res gestae*" instead of and practically synonymous with spontaneity. Assuming from this substitution that the two expressions, "spontaneous" and "part of the *res gestae*" meant the same to this eminent writer, his use of the term *res gestae*, which on account of his preponderating influence in this branch of the law has been generally adopted by the American courts, becomes somewhat less unintelligible. Employing the term *res gestae* in its English, proper or restricted sense,² it is found, as is stated elsewhere,³ that the element of probative force which makes an extrajudicial statement said to be part of the *res gestae* evidence of the facts which it asserts is apparently that of spontaneity. Where the circumstances attending the happening of the *res gestae*, properly so called, are such as to make a declaration uttered during their occurrence, *dum ferver opus*, a spontaneous one, replacing the promptings of self-interest and of reflection with the automatism of natural instinctive utterance, the statement is probative of the existence of the facts alleged. Spontaneity, however, and the happening of the *res gestae*, properly so-called, have no necessary connection with each other. Many true *res gestae*, e. g., the formation of a contract by means of a leisurely correspondence, may develop during the occurrence no element of spontaneity. What is much more to the present purpose, the reverse is equally true. Spontaneous statements, with all their probative force, may well be made at other times than during the progress of the real *res gestae*. In other words, a spontaneous utterance may as well accompany, characterize or be part of a probative fact,⁴ as of a *res gestae* one.⁵ To take a common example, the exclamation of a fugitive from justice, hotly pur-

spontaneity,—it being obviously necessary that the statement which is forced from a declarant by an event or state, should be made during the continuance of its influence and in that sense, contemporaneous with it. In connection with the rules relating to the *res gestae* the other salient peculiarities of an exception

to the hearsay rule are lacking. It is not necessary that the declarant be dead or unavailable as a witness, the statement is not secondary, but primary evidence. § 464.

2. § 2582.

3. § 2983.

4. § 51.

5. § 47.

sued by officers of the law seeking his capture, may be quite as spontaneous as those of the victim of an assault immediately upon being shot or stabbed. Yet, properly considered, the former fact is a probative one, the latter one of the *res gestae*. Professor Greenleaf and, following him, a large number of the American courts, have seemingly adopted the proposition that as statements part of the *res gestae* are often spontaneous, therefore all spontaneous statements are part of the *res gestae*. That the judicial mind should detect and appreciate, even without so naming it, the element of probative force which has been called spontaneity, has been, at all times, a matter of course. That its presence should have been made the touchstone between statements to be admitted because probative of the facts asserted and those to be rejected because they were not, has been almost inevitable. It is much to be regretted, that it should have been necessary, in so doing, to minimize the usefulness of the phrase *res gestae* by applying it indifferently to all admissible facts in connection with which a spontaneous extrajudicial statement has been exhibited.⁶

§ 2892. (Administrative Requirements; Subjective Relevancy); Psychology of Book-keeping.— It will be borne in mind, as an important administrative consideration that where books are regularly and systematically kept as a daily record of the transactions of a mercantile business, the controlling motives which operate upon those who are charged with the duty of keeping the accounts are usually entirely inconsistent with any attempt to record and perpetuate error. Indeed, the establishment of the habit of automatically putting down in a properly kept set of numerous books, each serving as in some sense a check and balance upon the other, in a routine sort of way, facts furnished by others as to which the entrant knows and usually cares but little, if anything tend to create a situation with several very distinct elements of trustworthiness. Anything less than absolute accuracy is recognized as involving, in case of purely commercial transactions, a large amount of trouble, annoyance and constant danger of self-deception, which, in the great majority of cases, would greatly outweigh any possible gain to be made by the deception of an-

6. It might have been better to have announced the doctrine that an extrajudicial statement proved to be spontaneous would be received as primary evidence of the facts asserted in it.

other. The clerical entrant is daily trained to habits of accuracy and is keenly conscious of the personal and business consequences of mistake. It is further to be said, that the modern systems of bookkeeping, with various offsetting entries which must stand in predetermined relations to each other, tend constantly by their own operation to force into relief the anomalous unadjustable false entry and require constant renewals of deception to offset and prevent detection. This can, as a rule, be done only where the intent to deceive is contemporaneous with the first entry. It calls for the existence of some very powerful motive. It is much easier as well as more natural to enter the truth upon books of original entry. As Chief Justice Tindal says:¹ "It is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred." These and similar considerations, the displeasure of the employer,² the customary lack of interest in a clerk himself to misrepresent, the improbability of error remaining undetected, have frequently been the subject of judicial comment. Men do not, as a rule, misstate facts which are merely placed on record as part of a routine obligation to which accuracy is essential; nor are they apt to make, without strong motive, false entries which will require constant vigilance and a number of correlated fictitious entries if the falsity of the original one is to escape detection or fail to cause confusion in the accounts.

§ 2893. (*Administrative Requirements; Subjective Relevancy*); Regularity.—In case of books of account, or those containing other entries in course of business, affirmative proof must be offered that the book has been regularly and accurately kept.¹

§ 2892-1. *Poole v. Dicas*, 1 Bing. N. C. 649, 653 (1835).

2. *Poole v. Dicas*, 1 Bing. N. C. 349 (1835). "A false entry would be likely to bring him into disgrace with his employer. Again, the book in which the entry was made was open to all the clerks in the office, so that an entry if false would be exposed to speedy discovery." *Poole v. Dicas*, 1 Bing. N. S. 649, 653 (1835), per Tindal, C. J.

§ 2893-1. *Gambler v. Molaver*, 1

Watts & S. (Pa.) 60 (1841); *Budden v. Petricken*, 5 *Watts (Pa.)* 286 (1836); *Patterson & Co. v. Gulf, etc., Ry. Co.*, (Tex. Civ. App. 1910) 126 S. W. 336; *Gale v. Norris*, 9 Fed. Cas. No. 5,190, 2 *McLean* 469 (1841).

Accuracy.—The accuracy with which a set of books has been kept may be stated, as a matter of fact, by any person possessing adequate knowledge upon the subject. Thus, the evidence of the secretary and general manager of a corporation

To a certain extent, the necessary condition of subjective relevancy may be assumed from the existence of regularity and contemporaneousness, essential requisites for the application of this particular exception to the hearsay rule. This procedural rule is based upon the implied assertion that there is an essential administrative difference between statements viewed as evidence of their truth and other facts. The fundamental element in this attempt at distinction is the feeling — undoubtedly justified in large measure — that the uniformity observable in a natural world between a cause and its effect does not apply between the existence of a fact and the observer's statement of it. Far removed from the immutability of natural law is the sequence which experience has shown to exist between the sense perception of physical or psychological phenomena and the absolute variety of the observer's statement of it. Reporting the phenomena of the natural world to a judicial tribunal the verities of actual existence go through a human mind with all its absence of accurate observation, failures in correct reasoning, lapses of memory and, above all, distortion of self-interest, by which the prejudiced observer, intentionally or unintentionally, sees what he hopes to see and states as true that which he thinks will help him. Presumably, it is this latter element, motive to mistake or mislead, which is the underlying objection to hearsay; the others could scarcely disqualify as they are part of the mental frailty which impairs the value of all human testimony. At some risk of repetition, it may be said that this disturbing factor of self-interest is eliminated and the assertive statement correspondingly enhanced in probative force in proportion as the element of *reflection* may be taken to have been removed. In so far as the mind is found to be controlled and dominated by the physical surroundings under which it is acting, does the uniformity of natural law replace the variations of a self-serving volition. In the degree to which this occurs man, as it were, becomes a creature in the realm of nature, subject to its laws, guided by its uniformity, rather than a free agent acting in the domain of mind.

From a juridical point of view, the situations which are of especial importance in connection with the action of this natural law are two, viz.: first, when an observer at the time of making his statement as to it is under the influence of intense pain or a powerful emotion and; second, when he is in the control of a fixed

and definite *habit*. The law of evidence, recognizing the elimination of motives of self-interest by their automatic, reflexive, intuitive mental processes has apparently come to feel that as to these situations the basis of the hearsay rule is practically gone. The grounds for regarding hearsay as secondary evidence disappear. Where the necessary conditions are present, the modern law therefore regards the unsworn statement as primary and permits it to be taken as evidence of its truth. Should it happen that the operation of reflection has, in any given case, been removed by the presence of an overpowering physiological or psychological state the relevancy created has been designated that of spontaneity;—treated elsewhere in connection with extrajudicial statements part of the *res gestae* in their assertive capacity.² Where this same danger to judicial administration from the intentional or unconscious perversion of self-interest is removed by the automatic action of an established and regular *habit* in discharge of business or official duty, the relevancy so³ created has been spoken of as that of regularity.⁴

who has made out an account sued on from the books of the company to the effect that these books were correctly kept is admissible, although the witness has never kept the books. *Pelican Lumber Co. v. Johnson*, 44, Tex. Civ. App. 6, 98 S. W. 207 (1906). "If the element of personal knowledge is present, it can make no difference on principle that the bookkeeper himself is dead or otherwise absent." *Pelican Lumber Co. v. Johnson*, 44 Tex. Civ. App. 6, 98 S. W. 207, 208 (1906), per Speer, J.

2. §§ 2982 *et seq.*

3. "What a man has actually done and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury." *Welsh v. Barrett*, 15 Mass. 380, 385 (1819), per Parker, C. J.

Regular business.—It is not sufficient that the extrajudicial state-

ment, written or oral, should have been made in the course of doing some business or duty. It must be part of the duty to make the statement or entry; and it is further required that it should be the regular practice of the declarant to make entries of this nature. Thus, the oral statement of one Mathias, a collector of stock subscriptions, to the effect that A. has paid him a certain sum on his subscription to the stock is not, after the death of the declarant, evidence of the fact of payment. *Western Maryland R. Co. v. Manro*, 32 Md. 280, 284 (1870). As the court say in this case: "It has never been held, and is not yet the law, that any declaration is admissible because it was made while in the discharge of a duty, but it must be such as enters into and forms a part of the ordinary course and routine of the particular business as it is usually conducted and carried on. Had there been an entry by Mathias of the payment by the appellee, in his stock

§ 2894. (*Administrative Requirements; Subjective Relevancy; Regularity*); Element of Duty Essential.—No small portion of the subjective relevancy of statements by deceased persons in course of business in connection with the absence of any controlling motive to misrepresent consists in the circumstance that the statement is made in pursuance of some *duty* resting on the declarant. Under the English rule,¹ this element of trustworthiness is greatly increased, even at the sacrifice of other advantages to the cause of justice. The American rule, though much less strict, insists upon retaining a portion of this probative force. There should be a duty of some kind.² The declarant must, in a

subscription-book, it might then have been claimed that such an entry was admissible, because, in the usual and ordinary course of duty. But, it cannot be presumed that it was in the ordinary course of his duty to make oral declarations of such payment. Equally reasonable would be the presumption that it was his duty to declare orally who had taken shares of stock." Per Brent, J.

A purely temporary purpose, as to detect the suspected pilferings of a clerk, *Peck v. Valentine*, 94 N. Y. 569 (1884), is not sufficient.

Nor is a single act of writing, such as the signing by a captain of a bill of lading (*Dickson v. Lodge*, 1 Stark. 226 (1816)), necessarily admissible because it pertains to business. It is required that the declaration should be made as part of the declarant's regular business. *Barton v. Dundas*, 24 U. C. Q. B. 273, 275 (1865).

In other words, it is implied in the reasons upon which the probative force of the exception rests, that there must be a systematic, regular established practice of doing acts and making entries of their having been done. As has been variously phrased, the entry must have been made "by a person in the ordinary course of his business of acts which his duty, in such business, requires him to do for others," *Nicholls v. Webb*, 8 Wheat.

(U. S.) 326 (1823), per Mr. Justice Story, "in the usual and ordinary course of their business in relation to acts coming within the scope of their authority and duty," *Watts v. Howart*, 7 Metc. (Mass.) 478 (1844), per Shaw, C. J., or however otherwise the unambiguous rule may be stated. *Dow v. Sawyer*, 29 Me. 117 (1848), ("regularly as he had occasion to make them in the course of his business"); *Kennedy v. Doyle*, 10 Allen 161 (1865) (ordinary course of business).

In Vermont the requirements of the rule approach closely those of the one adopted in England. The entries must have been made by the entrant "in the regular course of business and it was his business to make them." *State v. Phair*, 48 Vt. 366, 378 (1875).

4. It will be perceived that an element of proving power common to both the relevancy of spontaneity and that of regularity is contemporaneity.

§ 2894-1. § 2871.

2. The book in which the entries are made must have some "connection with the business of the plaintiff." *Avery's Ex'rs v. Avery*, 49 Ala. 193 (1873).

Diaries.—The mere statement in a diary of a payment of sums of money is not admissible as entries in the

certain sense, have acted under the compulsion of obligation. Indeed, it is this element of business, legal or moral compulsion which, united with the force of contemporaneousness and regularity, constitute the relevancy upon which the exception itself is founded. Something habitual must be established, a course or method of doing things with which the entrant proposes or is expected to comply.

§ 2895. Declarations in Course of Business Distinguished from Memoranda.—It is further necessary to distinguish from the species of evidence now under consideration another in which contemporaneousness is also employed as an essential requisite, the use of mere memoranda to refresh memory.¹ There is, of course, this point of resemblance between the two. The memorandum, like the entry, must have been made practically contemporaneously with the transaction to which it relates. Each, moreover, may properly be made in a book of account or in a private or public volume. The point of essential difference is that in the one case there is a *duty* to make the entry. None necessarily exists for making the memorandum. A manifest tendency to confuse and blend the rule which authorizes the reception of the memorandum made on an account book upon proof by the declarant that he knew it was accurate with the rule admitting entries in course of business as an exception to the rule against hearsay, is, however, distinctly visible upon the face of the authorities.

§ 2896. Fact of Non-entry.—The circumstance that no entry appears at the place where it would have appeared had the transaction taken place, may reasonably be regarded as a negative fact from the existence of which — if existence may properly be predicated of a negative fact — an inference may be drawn that the transaction which naturally would have been there set down did not take place.¹ There is authority to the effect that, under certain circumstances, such evidence is not admissible.²

course of business. *Costello v. Crowell*, 139 Mass. 588, 2 N. E. 698 (1885). See also *Whitaker v. White*, 69 Hun (N. Y.) 258, 23 N. Y. Supp. 487, 53 N. Y. St. Rep. 243 (1893). "It is sufficient if the entry was the natural concomitant of the transaction

to which it relates, and usually accompanies it." *Fisher v. Mayor*, 57 N. Y. 73, 77 (1876), per Andrews, J.

§ 2895-1. *Lassone v. Boston & Lowell R. Co.*, 66 N. H. 345, 358, 24 Atl. 902, 17 L. R. A. 525 (1890).

§ 2896-1. *State v. McCormick*, 57

§ 2897. Form of Statement; Oral.—The form of statement is important on the question of weight rather than on that of admissibility where the other conditions exist for receiving the evidence. With the exceptions hereafter to be noticed, the declaration in course of business may properly be oral as well as in any written form.

The admissibility of the oral declaration, e. g., the report of a constable,¹ is well established in England.² The application of the rule to oral statements is not, however, frequently referred to in the American cases;³ though there is no apparent reason for making any distinction between oral and written statements in this connection.⁴ In mercantile and business houses oral reports are regularly made and a duty undoubtedly exists for making them and with correctness. No element of trustworthiness is, therefore, lacking. In practical operation, it is upon these regular oral reports — the narrative perhaps refreshing his memory by a fugitive or temporary memorandum — that a large number of entries are made of facts regarding which the entrant has himself no personal knowledge.

Physician.—Among such oral declarations may properly be classed a somewhat anomalous set of statements by an attending physician, since deceased, as to the cause of a patient's death, made in the course of professional attendance and discharge of duty. Such declarations are deemed admissible evidence of the truth of the fact asserted.⁵

§ 2898. (Form of Statement); Written.—Among the more frequently used forms of making written declarations in regular course of business are book entries, endorsements, official registers, reports and the like. Naturally, the carefully kept books of account where the item in question is intimately woven into the "warp and woof" of a day's business stand in a somewhat dif-

Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341 (1896); *Bastrop State Bank v. Levy*, 106 La. 586, 31 So. 164 (1901).

2. *Vandyke v. Memphis, etc., Packet Co.*, (Ky. 1903) 71 S. W. 441, 24 Ky. Law Rep. 1283; *Sanborn v. Ins. Co.*, 16 Gray (Mass.) 448, 452, 455 (1869).

§ 2897-1. *R. v. Buckley*, 13 Cox Cr. C. 293 (1873).

2. A declaration by word of mouth

or by writing made in the course of the business are alike admitted. *Sussex Peerage Case*, 11 Cl. & F. 85, 113 (1844), per Lord Campbell.

3. *Fennerstein's Champagne*, 3 Wall. (U. S.) 145, 18 L. ed. 121 (1865).

4. *Western Maryland Co. v. Manro*, 32 Md. 280, 283 (1870).

5. *McNair v. Nat. Life Ins. Co.*, 13 Hun (N. Y.) 144 (1878).

ferent probative position from endorsements on separate and often fugitive sheets of paper or even from a loosely kept baptismal record. Any form of written statement which is intelligible or interpretable is, however, competent¹ if made under the required conditions.

§ 2899. (*Form of Statement; Written*); Entries in Account Books.—Among the most frequently employed forms of making a declaration in course of business, is an entry on an account book. But nothing, however, is settled as to admissibility by the simple fact that the entry is on such a book. The basis of probative force lies not in the fact that the book is a book of account; but upon the probability that a contemporaneous entry in course of business is accurate. Where an account book, for example, had not been used for ten years and then taken up for the purpose of adding the item in question, it was rejected.¹

§ 2900. (*Form of Statement; Written; Entries in Account Books*); Proof of Entry.—To establish the fact of a book entry it must, in some manner, be made to appear that such entry was actually made by the person whose work it purports to be. Customarily, such proof is made by showing that the entry is in the handwriting of the declarant.¹ In the absence of special circumstances only the original entry is provable in this way.² It follows that should a clerk copy or transcribe an original entry, that entry cannot be admitted upon proof of the handwriting of the copyist³ or transcriber. Recourse, however, to the original memoranda from which the entry was made is not required.⁴

§ 2898-1. *North Bank v. Abbot*, 13 Pick. (Mass.) 465, 471, 25 Am. Dec. 334 (1883).

§ 2899-1. *Kibbe v. Bancroft*, 77 Ill. 18 (1875).

§ 2900-1. *Welsh v. Barrett*, 15 Mass. 380 (1819); *Chaffee v. U. S.*, 18 Wall. (U. S.) 516, 541, 21 L. ed. 908 (1873).

2. *St. L., etc., R. Co. v. Henderson*, 57 Ark. 402, 21 S. W. 878 (1893); *Cresswell v. Slack*, 68 Iowa 110, 26 N. W. 42 (1885); *James v. Wharton*, 13 Fed. Cas. No. 7,187, 3 McLean (U. S.) 492 (1844). See also § 2901.

3. *James v. Wharton*, 13 Fed. Cas. No. 7,187, 3 McLean (U. S.) 492 (1844). See also *Creswell v. Slack*, 68 Iowa 110, 26 N. W. 42 (1885).

"This is not a book of original entries, but a mere transcript from that book, made by a clerk, who did not make those entries. The ground on which alone proof of the handwriting of the clerk gives validity to the book of accounts is, that it is the book of original entries; that the clerk is supposed to be cognisant of the transactions which it records; and, that the entries made by him, were made at

§ 2901. (Form of Statement; Written; Entries in Account Books; Proof of Entry); Original Must be Produced.—The best evidence rule¹ so far as it requires that the contents of a document should be proved, primarily, by the production of the document itself for inspection, applies to the proof of entries in course of business.² The requirements of this canon of administration are satisfied when the original is shown to have been lost, or, for some other reason³ to be practically inaccessible to the proponent at the time of trial. Either for use of a memorandum

or near the time they purport to have been made; and are, therefore, a part of the *res gestae*. As a mere copy, made by a clerk who did not keep the original book, proof of his handwriting in no way conduces to establish the authenticity of the book offered in evidence; and it is, therefore, excluded from the consideration of the jury." *James v. Wharton*, 13 Fed. Cas. No. 7,187, 3 McLean (U. S.) 492 (1844).

4. *Redlich v. Bauerlee*, 98 Ill. 134, 38 Am. Rep. 87 (1881).

§ 2901-1. § 1001.

2. *Alabama*.—*Baird Lumber Co. v. Devlin*, 124 Ala. 245, 27 So. 425 (1899).

California.—*Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122 (1888).

Colorado.—*Jones v. Henshall*, 3 Colo. App. 448, 34 Pac. 254 (1893).

Georgia.—*Bracken & Elsworth v. Dillon & Sons*, 64 Ga. 243, 37 Am. Rep. 70 (1879).

Illinois.—*Lewis v. Richheimer & Co.*, 157 Ill. App. 231 (1910); *Schellbacker v. McLaughlin Plumbing Co.*, 108 Ill. App. 486 (1902); *Bradley v. Gardner*, 87 Ill. App. 404 (1899).

Iowa.—*Peck v. Parchen*, 52 Iowa 46, 52, 2 N. W. 597 (1879); *Churchill v. Fulliam*, 8 Iowa 45 (1859).

Louisiana.—*Herring v. Levy*, 4 Mart. (N. S.) (La.) 383 (1826).

Maryland.—*Doggett v. Tatham*, 116 Md. 147, 81 Atl. 376 (1911); *Hoogewerf v. Flack*, 101 Md. 371, 61

Atl. 184 (1905); *Thomas v. Price*, 30 Md. 483 (1869).

Missouri.—*Owen v. Bray*, 80 Mo. App. 526 (1899).

New Jersey.—*New Jersey Zinc & I. Co. v. Lehigh Zinc & I. Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896).

Oregon.—*Harmon v. Decker*, 41 Oreg. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748 (1902).

Pennsylvania.—*Greiner v. Cent. Mut. Fire Ins. Co.*, 40 Pa. Super. Ct. 379 (1909); *Bishop v. Goodhart*, 135 Pa. St. 374, 19 Atl. 1026 (1890); *Cooper v. Morrel*, 4 Yeates, 341 (1807).

Texas.—*Wills Point Bank v. Bates*, 72 Tex. 137, 10 S. W. 348 (1888).

West Virginia.—*Architects & Builders v. Stewart*, 68 W. Va. 506, 508, 70 S. E. 113, 36 L. R. A. (N. S.) 899n. (1911).

United States.—*Keyburn v. Queen City Sav. Bank & T. Co.*, 171 Fed. 609, 99 C. C. A. 373 (1909); *Lake County v. Keene Five Cents Sav. Bank*, 108 Fed. 505, 47 C. C. A. 464 (1901); *Chandler v. Pomeroy*, 87 Fed. 262, *aff'd* 96 Fed. 156, 37 C. C. A. 430 (1898); *Fendall v. Billy*, 8 Fed. Cas. No. 4725, 1 Cranch C. C. 872 (1802); *Fendall v. Turner*, 8 Fed. Cas. No. 4727, 1 Cranch C. C. 35 (1802).

3. *Holmes v. Marden*, 12 Pick. (Mass.) 169 (1831); *Rigby v. Logan*, 45 S. C. 651, 24 S. E. 56 (1896); *Burton v. Driggs*, 20 Wall. (U. S.) 135, 22 L. ed. 299 (1873).

to refresh memory,⁴ as evidence, after the death of the declarant,⁵ or when produced as evidence of the facts asserted in it,⁶ upon proof of the handwriting of the declarant⁷ it is regarded as essential that the original be produced.⁸

§ 2902. (Form of Statement; Written); Endorsements.—Endorsements on notes, made by attorneys¹ or others are within the rule.

§ 2903. (Form of Statement; Written); Memoranda.—A Memoranda made by declarants even in a temporary and impermanent sort of way, may be received as declarations in course of business. Thus, the memoranda of a surveyor¹ made while in the regular exercise of his profession have been received. But where the rule is applied only to “entries” in course of business, a mere memorandum will be rejected,² as evidence of the facts asserted,³ except they were made under such circumstances as to constitute them a part of the *res gestae*.⁴

4. § 2903.

5. *Welsh v. Barrett*, 15 Mass. 380 (1819); *Chaffee v. U. S.*, 18 Wall. (U. S.) 516, 21 L. ed. 908 (1873).

For corresponding provision under shop-book rule, see § 3083.

6. *Larue v. Rowland*, 7 Barb. (N. Y.) 107 (1849).

7. The handwriting properly to be proved is that of the original entrant, should the latter become unavailable as a witness. The original entrant may have been a clerk. If so, the entries should, it is said, be authenticated by his oath if he is living and his testimony can be procured. If he is dead, or is out of the jurisdiction of the court, or cannot be found, the entries may be admitted on proof of his handwriting. *R. R. Co. v. Henderson*, 57 Ark. 402 (1893).

See also *Chaffee & Co. v. U. S.*, 18 Wall. (U. S.) 516, 21 L. ed. 908 (1873).

8. *Culver v. Marks*, 122 Ind. 554, 562, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377 (1889); *Ray v.*

Castle, 79 N. C. 580 (1878). See also § 2900.

§ 2902-1. *Lilly v. Larkin*, 66 Ala. 110 (1880).

§ 2903-1. *Walker v. Curtis*, 116 Mass. 98, 101 (1874).

2. *Barley v. Byrd*, 95 Va. 316, 23 S. E. 329 (1897). See also *Kelley v. Crawford*, 112 Wis. 368, 88 N. W. 296 (1901).

3. *Alabama*.—*Alabama Constr. Co. v. Wagnon Bros.*, 137 Ala. 388, 34 So. 352 (1902); *Nashville, etc., R. Co. v. Parker*, 123 Ala. 683, 27 So. 323 (1898); *Kling v. Tunstall*, 109 Ala. 608, 19 So. 907 (1895); *Jeffries v. Castleman*, 68 Ala. 432 (1880); *Harrison's Exrs. v. Cordle*, 22 Ala. 457 (1853).

Arkansas.—*Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959 (1896).

California.—*Thompson v. Orena*, 134 Cal. 26, 66 Pac. 24 (1901); *Baum v. Reay*, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561, *aff'd* 96 Cal. 462, 31 Pac. 561 (1892). See also *Peter-*

son Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162 (1903).

Colorado.—Straus v. Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822 (1897).

District of Columbia.—Page v. Burnstine, 3 MacArthur 194, reversed 102 U. S. 664, 26 L. ed. 268 (1879).

Florida.—Germania F. Ins. Co. v. Stone, 21 Fla. 555 (1885).

Georgia.—Ingram v. Hilton, etc., Lumber Co., 108 Ga. 194, 33 S. E. 961 (1899).

Illinois.—Baltimore, etc., R. Co. v. Tripp, 175 Ill. 251, 51 N. E. 833 (1898); Henderson v. Miller, 36 Ill. App. 232 (1890).

Iowa.—Porter v. Madrid State Bank, 136 N. W. 666 (1912); Taylor v. Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 64 (1890).

Kentucky.—Crawford v. Gamm, 5 Ky. L. Rep. (abstract) 688 (1884).

Louisiana.—Watson v. Yates, 10 Mart. 687 (1822); Urquhart v. Robinson, 1 Mart. 236, 5 Am. Dec. 710 (1811). See also Dalcour v. McCan, 37 La. Ann. 7 (1885).

Maryland.—Atwell v. Miller, 6 Md. 10, 61 Am. Dec. 294 (1854).

Massachusetts.—Fiske v. Cole, 152 Mass. 335, 25 N. E. 608 (1890); Mair v. Bassett, 117 Mass. 356 (1875); Snow v. Warner, 10 Metc. 132, 43 Am. Dec. 417 (1845).

Minnesota.—Granning v. Swenson, 49 Minn. 381, 52 N. W. 30 (1892); Hoffman v. Chicago, etc., R. Co., 40 Minn. 60, 41 N. W. 301 (1889). See also Beebe v. Wilkinson, 30 Minn. 548, 16 N. W. 450 (1883).

Mississippi.—Commercial Bank v. Chisholm, 6 Sm. & M. 457 (1846).

Missouri.—Elliott v. Sheppard, 179 Mo. 382, 78 S. W. 627 (1904).

Montana.—Kipp v. Silverman, 25 Mont. 296, 64 Pac. 884 (1901).

Nebraska.—Lipscomb v. Lyon, 19 Nebr. 511, 27 N. W. 731 (1886). See also, Wittenberg v. Mollyneaux, 55 Nebr. 429, 75 N. W. 835 (1898).

New Hampshire.—Wallace v. Good-

all, 18 N. H. 439 (1846); Harris v. Burley, 10 N. H. 171 (1839). See also Page v. Parker, 40 N. H. 47 (1860).

New Jersey.—Lindenthal v. Hatch, 61 N. J. L. 29, 39 Atl. 662 (1897).

New York.—State Nat. Bank v. Weed, 57 N. Y. Suppl. 706, 39 N. Y. App. Div. 602 (1899); Whitaker v. White, 69 Hun 258, 23 N. Y. Supp. 487, 53 N. Y. St. Rep. 243 (1893); Judd & Co. v. Cushing, 50 Hun 181, 2 N. Y. Suppl. 836, 22 Abb. N. Cas. 358, 19 N. Y. St. Rep. 722 (1888); Howard v. McDonough, 77 N. Y. 592 (1879); McCormick v. Pennsylvania R. Co., 49 N. Y. 303 (1872).

Pennsylvania.—Hottle v. Weaver, 206 Pa. St. 87, 55 Atl. 838 (1903); Franklin F. Ins. Co. v. Updegraff, 43 Pa. St. 350 (1862). Compare Riche v. Broadfield, 1 Dall. 16, 1 L. ed. 18 (1768).

South Carolina.—Hicks v. Southern R. Co., 63 S. C. 559, 41 S. E. 753 (1901).

Texas.—Tobler v. Austin (Civ. App. 1902) 71 S. W. 407; Turner v. Cochran, 30 Tex. Civ. App. 549, 70 S. W. 1024 (1902).

Vermont.—Pingree v. Johnson, 69 Vt. 225, 39 Atl. 202 (1896); Godding v. Orcutt, 44 Vt. 54 (1871); Lapham v. Kelly, 35 Vt. 195 (1862).

Virginia.—Wells' Adm'r. v. Ayers, et als., 84 Va. 341, 5 S. E. 21 (1888).

West Virginia.—Rowan v. Chenowith, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796 (1901); Vinal v. Gilman, 21 W. Va. 301, 45 Am. Rep. 562 (1883).

Wisconsin.—Anderson v. Fetzner, 75 Wis. 562, 44 N. W. 838 (1890).

Wyoming.—Hay v. Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581 (1896).

Compare Buckley v. Buckley, 16 Nev. 180 (1881).

4. National Ulster County Bank v. Madden, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633 (1889); Moore v. Meacham, 10 N. Y. 207 (1851).

§ 2904. (*Form of Statement; Written*); Reports.—In like manner, the reports of employees to their superior officers,¹ may form the vehicle for secondary evidence of the facts asserted under this exception.

§ 2905. *Nature of Occupation*.—No limitation or restriction has been placed as to the nature of the occupation to which the rule admitting declarations of deceased persons in the course of business shall apply. Any line of human activity, professional or lay, in which work is done and a record of it regularly kept, whether voluntarily or under requirement of law, is within the rule, as formulated in America. The matter to which the entry relates need not be one within the exclusive or even the principal business of the declarant. Thus, should the manager, for example, of an insane asylum maintain a record of the weather for a series of years and do so systematically and regularly, it will be admissible after the death of the entrant.¹

§ 2906. (*Nature of Occupation*); Commercial.—A very important proportion of the scope of the rule is undoubtedly in connection with commercial affairs. The endorsements of officers or clerks, made in the regular course of business,¹ as of a bank cashier that he has sent notice of the non-payment of a note,² are competent. In the same way, the records of a notary,³ concerning the presentation for payment of negotiable instruments, the protest of notes, bills of exchange⁴ or the like, have customarily been received by the courts under this rule. Entries made in regular books of account and even in special books kept for a particular purpose by those in a given business, e. g., a register of policies kept by an insurance agent,⁵ are among the most familiar applications of the rule. In like manner, certificates of inspectors⁶ and other public officers may be received, after the decease of the entrant, as evidence of the truth of the fact entered.

§ 2904-1. *Culver v. Alabama M. R. Co.*, 108 Ala. 330, 18 So. 827 (1895).

§ 2905-1. *De Armond v. Neasmith*, 32 Mich. 231 (1875). See also *Hart v. Walker*, 100 Mich. 406, 410, 59 N. W. 174 (1894).

§ 2906-1. *Champneys v. Peck*, 1 Stark. 404 (1816).

2. *Nichols & Luce v. Goldsmith*, 7 Wend. (N. Y.) 162 (1831).

3. *Sasscer v. Farmers' Bank*, 4 Md. 409 (1853).

4. *Halliday v. Martinet*, 20 Johns. (N. Y.) 168, 11 Am. Dec. 262 (1822).

5. *Roberts v. Rice*, 69 N. H. 472, 45 Atl. 237 (1898).

6. *Perkins v. Augusta Ins. & B. Co.*, 10 Gray (Mass.) 312, 324, 71 Am. Dec. 654 (1858).

§ 2907. (*Nature of Occupation*); *Mechanical*.—The entries of one who performs or supplies labor of any kind may furnish secondary evidence of the facts asserted. Thus, the time-book of one who does teaming¹ has been admitted for this purpose.

§ 2908. (*Nature of Occupation*); *Professional*.—The regularly kept entries of professional men are admissible where it is necessary to resort to secondary evidence under the rule. Thus, the entries of a physician will be received after he has become mentally incapacitated to testify.¹ In the same way, the entries of an attorney may prove the proceedings taken in a case,² or other facts connected with his profession.³ Nor need the professional work be of a secular nature. A record of baptisms⁴ kept by a Roman Catholic priest, or a Protestant minister may furnish secondary evidence under the present rule.⁵

§ 2909. (*Nature of Occupation*); *Service of Process*.—The service of writs, notices, orders,¹ and other process, or the doing of any act relating thereto may properly be shown in this way. The entry or endorsement of a sheriff may show his doings;—e. g., receipt of money on a judgment.

§ 2907-1. *Dickens v. Winters*, 169 Pa. St. 126, 135, 32 Atl. 289 (1895).

§ 2908-1. *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415 (1886).

Statements by physicians.—The opinions expressed by physicians while engaged in examining the patient as to his condition have been deemed to be in the nature of *res gestae*. "The opinions expressed at the time with reference to the subject of consideration by the one or the other in the course of their examination were, in our opinion, in the nature of *res gestae* and so admissible. The declarations were made in the course of their business and while engaged in a professional duty. They were coincident business declara-

tions." *Mutual Life Ins. Co. of New York v. Tillman*, 84 Tex. 31, 36, 19 S. W. 294 (1892), per Tarlton, J.

2. *Leland v. Cameron*, 31 N. Y. 115 (1865).

3. *Fisher v. Mayor*, 67 N. Y. 73 (1876).

4. "An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger, or notary, an attorney or solicitor, or a physician, in the course of his secular occupation." *Kennedy v. Doyle*, 10 Allen (Mass.) 161, 168 (1865), per Gray, J.

5. See § 2877.

§ 2909-1. *R. v. Cope*, 7 C. & P. 720 (1835).

CHAPTER XLIII.

HEARSAY AS SECONDARY EVIDENCE ; DECLARATIONS CONCERNING
PEDIGREE.

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§ 2910. **The Pedigree Exception.**—Closely analogous in its reasoning to that upon which the unsworn statement relating to matters of public and general interest has been found to rest,¹ and based upon a similar forensic necessity,² is the exception to the hearsay rule which admits, as secondary³ proof of the facts asserted declarations of certain persons relating to matters of pedigree. The family is looked upon by judicial administration as a

§ 2910-1. § 2791.

2. "This exception has been recognized on the ground of necessity; for, as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice." *Fulkerson v. Holmes*, 117 U. S. 389, 397, 6 S. Ct. 780, 29 L. ed. 915 (1885), per Woods, J.

See also § 2912.

3. **Primary evidence.**—As will abundantly appear in the sequel not all pedigree evidence is secondary. Much of it, including extrajudicial independently relevant statements, is primary or, as is more commonly said,

original evidence. The administrative status of secondary evidence in this connection is limited to the extrajudicial statement of a deceased member of the family used in its assertive capacity, the probative force of the declaration resting, mainly, if not exclusively, upon the personal credit of the declarant. Some confusion has been caused in the decisions by failure to observe this distinction. Thus, it has been said that the declarations of deceased members of the family are primary evidence on questions of pedigree turning on an issue of marriage, and that they are not admitted as evidence in its nature secondary. It is received because it is the best obtainable. *Crawford v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323 (1860).

miniature community. In case of the general community the interest of the inhabitants affected by the matter in question to reach the truth and the guaranty of trustworthiness which results from the general discussion concerning so interesting a topic is regarded as insuring a satisfactory degree of probative force. So in the smaller circle of the family, the self-interest of the members to reach the truth, the mutual correction implied in family discussions of topics relating to the common interest are thought to be safely trusted to promote justice.⁴

§ 2911. Rule Stated; Unsworn Statements as to Pedigree.—The unsworn statement of a deceased¹ member of the family² or

4. The law resorts to hearsay evidence in cases of pedigree on the ground of the interest of the declarant in the person from whom the descent is made out. *Scott v. Herrell*, 27 App. D. C. 395 (1906).

"This rule rests upon the principle that natural effusions of those who talk over family affairs, when no special reason for bias or passion exists, are fairly trustworthy, and should be given weight by judges and juries, as they are in the ordinary affairs of life." *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 262, 98 S. W. 665 (1906), per Neill, J.

§ 2911-1. *Alabama*.—*Chambers v. Morris*, 159 Ala. 606, 48 So. 687 (1909).

Iowa.—*Ross v. Loomis*, 64 Iowa 432, 20 N. W. 749 (1884).

Vermont.—*In re Hurlburt*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

England.—*Butler v. Mountgerret*, 7 H. L. Cas. 633, 648 (1851).

Canada.—*May v. Logie*, 27 Can. Sup. 443 (1897); *Doe v. Servos*, 5 U. C. Q. B. (O. S.) 282, 284 (1848).

The more reasonable rule that the unavailability of the declarant, not only because of death, but also because of insanity, absence from the jurisdiction and the like, is sufficient, has been adopted by statute in a few

jurisdictions and finds some support in common law decisions. *Young v. Shulenberg*, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730 (1910); *Campbell v. Wilson*, 23 Tex. 252, 76 Am. Dec. 67 (1859).

2. *Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26 (1906); *In re Carroll*, 149 Iowa 617, 128 N. W. 929 (1910); *Jackson v. Browner*, 18 Johns. (N. Y.) 37 (1820); *Northern Pacific R. Co. v. King*, 181 Fed. 913, 104 C. C. A. 351 (1910); *Stein v. Bowman*, 13 Pet. (U. S.) 209, 10 L. ed. 129 (1839).

It is only necessary to show that a declarant, since deceased, was a member of a family to which it is sought to attach a third person, to render proofs of the statements of the declarant with respect to the pedigree of the third person admissible in evidence. *Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26 (1906).

If it is not shown that a declaration was made by a member of the family it will be excluded. *Northern Pacific R. Co. v. King*, 181 Fed. 913, 104 C. C. A. 351 (1910); *Hovey v. Long*, 33 N. Brunsw. 462 (1896). Therefore where no satisfactory proof of relationship of the declarant to the family is offered, his statement will be rejected. *Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26 (1906).

of the husband³ or wife⁴ or such member will, under certain minor conditions, be received, as an exception to the rule against the admission of hearsay⁵ in proof of the facts directly⁶ or in-

3. See § 2915

4. See § 2915.

5. *Alabama*.—White v. Strother, 11 Ala. 720 (1847).

Illinois.—Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052n. (1907).

Maine.—Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615 (1884).

Maryland.—Craufurd v. Blackburn, 17 Md. 49, 77 Am. Dec. 323 (1860).

Massachusetts.—Haddock v. Boston, etc., R. Co., 3 Allen 298, 81 Am. Dec. 656 (1862).

New Jersey.—Hubatka v. Maierhofer (Err. & App. 1911), 79 Atl. 346, reversing judgment Hubatka v. Meyerhofer (N. J. Sup. 1910), 75 Atl. 454.

Oregon.—State v. McDonald, 55 Oregon 419, 104 Pac. 967 (1909), rehearing denied 106 Pac. 444 (1910) (statute).

Tennessee.—Carter v. Montgomery, 2 Tenn. Ch. 216 (1875).

United States.—Northern Pac. Ry. Co. v. King, 181 Fed. 913 (1910); Flora v. Anderson, 75 Fed. 217 (1896); Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1886); Blackburn v. Crawford Lessee, 3 Wall. 175 (U. S.) 18 L. ed. 186 (1865); Jewell v. Jewell, 1 How. 219, 11 L. ed. 108 (1843).

England.—Doe v. Barton, 2 M. & Rob. 28 (1837); Monkton v. Atty.-Gen., 2 Russ. & M. 147, 159, 11 Eng. Ch. 147 (1831); Johnson v. Lawson, 2 Bing. 86, 2 L. J. C. P. (O. S.) 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493 (1824); Vowles v. Young, 13 Ves. Jr. 140, 147, 9 Rev. Rep. 154, 33 Eng. Reprint 247 (1806).

"It has, therefore, become a universally recognized exception to the general rule excluding hearsay, based

on various sound considerations, that as to certain facts of family history, usually denominated pedigree, comprising *inter alia*, birth, death and marriage, together with their respective dates, and, in a qualified sense, legitimacy and illegitimacy, declarations are admissible; (1) When it appears by evidence *dehors* the declarations that the declarant was lawfully related by blood or marriage to the person or family whose history the facts concern; (2) That the declarant was dead when the declarations were tendered; and (3) That they were made *ante litem motam*." Northrop v. Hale, 76 Me. 306, 310, 49 Am. Rep. 615 (1884), per Virgin, J.

6. *Alabama*.—Elder v. State, 123 Ala. 35, 26 South. 213 (1898); Rowland v. Ladiga's Heirs, 21 Ala. 9 (1852). See Locklayer v. Locklayer, 139 Ala. 354, 35 South. 1008 (1903).

Arkansas.—Kelly v. McGuire, 15 Ark. 555 (1855).

California.—Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351 (1909); Anderson v. Parker, 6 Cal. 197 (1856).

Georgia.—Malone v. Adams, 113 Ga. 791, 39 S. E. 507, 84 Am. St. Rep. 259 (1901).

Illinois.—Harland v. Eastman, 107 Ill. 535 (1883); Cuddy v. Brown, 78 Ill. 415 (1875).

Indiana.—De Haven v. De Haven, 77 Ind. 236 (1881).

Kentucky.—Whalen v. Nisbet, 95 Ky. 464, 26 S. W. 188, 16 Ky. L. Rep. 52 (1894).

Maine.—Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615 (1884).

Maryland.—Jones v. Jones, 36 Md. 447, 11 Am. Rep. 505 (1872); Craufurd v. Blackburn, 17 Md. 49, 77 Am. Dec. 323 (1860); Walkup v. Pratt, 5 Harr. & J. 51 (1820).

cidentally⁷ asserted as to pedigree.⁸ Among these minor conditions to which reference has been made, are those to the effect that the declaration must have been made *ante litem motam*⁹ and that relationship to the family should be affirmatively established, to the satisfaction of the presiding judge, by evidence outside the statement itself.¹⁰ Such relationship presupposes adequate knowledge of and interest in matters relating to pedigree.

The declarations of the party concerning whom a pedigree fact is sought to be established are admissible under the same conditions as those of any other member of the family.¹¹

Necessity that the relationship of declarant be legitimate.—That an illegitimate member of a family is not a competent declarant of genealogical facts concerning the family was held in an early English case and seems never to have been directly questioned.¹² The closely related query whether the relationship of the declarant to the person concerning whom a pedigree fact is sought to be established must be legitimate has proved troublesome

Minnesota.—*Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12 (1891).

New Hampshire.—*Morrill v. Foster*, 33 N. H. 379 (1856).

New York.—*Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836 (1891); *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877); *People v. Fulton F. Ins. Co.*, 25 Wend. 205 (1840).

Pennsylvania.—*Gehr v. Fisher*, 143 Pa. St. 311, 22 Atl. 859 (1891).

South Carolina.—*Dobson v. Cothran*, 34 S. C. 518, 13 S. E. 679 (1890).

Texas.—*Wolf v. Wilhelm* (Civ. App. 1912), 146 S. W. 216; *Wren v. Howland*, 33 Civ. App. 87, 75 S. W. 894 (1903); *Davidson v. Wallingford*, 88 Tex. 619, 32 S. W. 1030 (1895); *Fowler v. Simpson*, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370 (1891); *Louder v. Schluter*, 78 Tex. 103, 14 S. W. 205, 207 (1890).

Vermont.—*Mason v. Fuller*, 45 Vt. 29 (1872).

Wisconsin.—*Du Pont v. Davis*, 30 Wis. 170 (1872); *Eaton v. Tallmadge*, 24 Wis. 217 (1869).

United States.—*Blackburn v. Craw-*

fords, 3 Wall. 175, 18 L. ed. 186 (1865); *Elliott v. Peirsol*, 1 Pet. (U. S.) 328, 7 L. ed. 164 (1828); *Strickland v. Poole*, 1 Dall. 14, 1 L. ed. 17 (1765).

England.—*Rex v. Erith*, 8 East 539 (1807).

Canada.—*Wallbridge v. Jones*, 33 U. C. Q. B. 613 (1873).

7. § 2939.

8. "The phrase, 'pedigree,' embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened." *Kelly v. McGuire*, 15 Ark. 555, 604 (1855), per *Hempstead, J.*

9. § 2919.

10. §§ 2915, 2937.

11. *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570 (1910); *Taylor v. Grand Lodge A. O. U. W.*, 101 Minn. 72, 111 N. W. 919, 11 L. R. A. (N. S.) 92n, 118 Am. St. Rep. 606 (1907). Compare *Doe v. Ford*, 3 U. C. Q. B. 352 (1847).

12. *Bamford v. Barton*, 2 M. & Rob. 28 (1837).

to the courts. Under the common law, which regards an illegitimate child as the child of nobody, belonging to no family,¹³ one who comes into court with such a brand upon him and seeks to establish the unlawful relation as the basis of a claim to an inheritance, cannot introduce evidence of declarations of members of the family to which he proposes to show his *de facto* relation.¹⁴ It will be observed that this forms an exception to the general rule, which has often been questioned, that in order to prove relationship between A. and B., the declarations of a deceased person, shown to be related to either, may be introduced in evidence.¹⁵ However, where a statute has modified the rigors of the common law in regard to illegitimates, giving to them, under certain conditions, the rights of legitimates, to a greater or less extent, the rule is to the contrary.¹⁶

A situation which is often confused with those just mentioned arises where a relationship is acknowledged as a matter of fact, and its lawfulness only is disputed. In such a case, it is beyond question proper to receive evidence of declarations of members of the family tending to show the nature of the relationship, whether legitimate or illegitimate.¹⁷ For example, where a plaintiff claimed as a legitimate son of a decedent, the will of the decedent,

13. *Crispin v. Doglioni*, 3 Swab. & Tr. 44, 32 L. J. Mat. 109, 8 L. T. 91, 11 W. R. 500 (1863).

14. *Flora v. Anderson*, 75 Fed. 217 (1896); *Crispin v. Doglioni*, 3 Swab. & Tr. 44, 32 L. J. Mat. 109, 8 L. T. 91, 11 W. R. 500 (1863).

Thus, one claiming an inheritance from a decedent on the ground that he is the natural son of said decedent, cannot show declarations of the decedent's deceased brother in regard to such relationship. *Crispin v. Doglioni*, 3 Swab. & Tr. 44, 32 L. J. Mat. 109, 8 L. T. 91, 11 W. R. 500 (1863).

15. § 2933

16. *California*.—*In re Heaton's Estate*, 135 Cal. 385, 67 Pac. 321 (1902).

Illinois.—*Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052 (1907).

Iowa.—*Alston v. Alston*, 114 Iowa 29, 86 N. W. 55 (1901); *Watson v.*

Richardson, 110 Iowa 673, 80 N. W. 407 (1899).

Maine.—*Northrup v. Hale*, 76 Me. 306 (1884).

Wisconsin.—*Smith v. Smith*, 140 Wis. 599, 123 N. W. 146 (1909).

Thus, in a jurisdiction having a statute which gives an illegitimate child the right to inherit from his father, it was proper, in an action for partition, to admit evidence of declarations of the alleged father of a claimant in regard to his relationship with the latter who claimed a share of the property as an illegitimate son. *Alston v. Alston*, 114 Iowa 29, 86 N. W. 55 (1901).

17. *Iowa*.—*Niles v. Sprague*, 13 Iowa 198 (1862).

Maryland.—*Craufurd v. Blackburn*, 17 Md. 49 (1860).

Massachusetts.—*Haddock v. Boston & M. R. Co.*, 3 Allen 298, 81 Am. Dec. 656 (1862).

containing declarations tending to show illegitimacy, was properly admitted in evidence.¹⁸ Likewise, in an escheat proceeding, where the claim of the state was that the intestate, who had died without issue, was an illegitimate, hence his property could not descend to his collateral relatives; and the defendants claimed that he was legitimate and, therefore, they as collateral relatives could take, the declarations of various relatives to the effect that the intestate was illegitimate were admissible.¹⁹ This rule does not apply where the child was born in lawful wedlock.²⁰

§ 2912. Administrative Requirements; Necessity; General and Special.—Pedigree declarations, being secondary evidence of the facts asserted, must be affirmatively shown by the proponent to be necessary to proof of his case and *relevant* to the issue. As to the necessity for receiving the evidence it will be required by judicial administration that a reason, satisfactory to the presiding judge, be shown as to why the primary evidence, the testimony of the declarant, is not produced.¹ This necessity may be *general* or *special*, according as it applies to pedigree evidence as a whole or in relation to the statements of a particular witness. Each case, as it arises, is determined by the application of the same canon of administration. The proponent is entitled to prove his contention by the best evidence which is practically in his power to produce,² whether this requires the use of secondary evidence

Oregon.—State v. McDonald, 55 Oreg. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444 (1910).

England.—Murray v. Milner, L. R. 12 Ch. D. 89, 48 L. J. Ch. 775, 41 L. T. 213, 27 W. R. 881 (1879).

See, also, Flora v. Anderson, 75 Fed. 217 (1896).

18. Murray v. Milner, L. R. 12 Ch. D. 849, 48 L. J. Ch. 775, 41 L. T. 213, 27 W. R. 881 (1879).

19. State v. McDonald, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444 (1910).

20. Craufurd v. Blackburn, 17 Md. 49 (1860); Watts v. Owens, 62 Wis. 512, 22 N. W. 720 (1885); Goodright v. Moss, 2 Cowp. 591 (1777).

§ 2912-1. Copes v. Pearce, 7 Gill (Md.) 247 (1848); Denoyer v. Ryan,

24 Fed. 77 (1885); Berkeley's Case, 4 Campb. 401 (1811); Vowles v. Young, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247 (1806).

When other evidence of the fact is attainable, the extrajudicial statement will not, it is said, be received. Rogers v. De Bardeleben Coal, etc., Co., 97 Ala. 154, 12 So. 81 (1893); Covert v. Hertzog, 4 Pa. St. 145 (1846).

In case of a death so recent as presumably to be known to the living relatives of the deceased, no necessity arises for using declarations regarding pedigree. Metropolitan Life Ins. Co. v. Lyons, (Ind. App. 1912) 98 N. E. 824.

2. §§ 334 *et seq.*

at all or secondary proof of the declarations of a particular witness. Should it appear that the proponent can establish the genealogical facts necessary to the proof of his contention by the direct evidence of witnesses, the court, as an administrative matter, may very properly decline to admit secondary evidence in the form of hearsay declarations³ as to pedigree, until, at least, further proof rebutting the proponent's case is introduced. Thus, where witnesses having adequate knowledge attend for the purpose of testifying to the age of a given person, the record of his birth in a family Bible may properly be rejected.⁴ In the same way, extrajudicial statements relating to marriage may be excluded when primary evidence is available.⁵ All this, however, bears rather upon the question of administration than upon that of procedure. Apparently, no rule of law exists to the effect that, before secondary evidence of a pedigree fact can be offered, it must in all cases appear that the fact cannot be established by the use of living witnesses or that primary proof is not available.⁶ On the other hand, should the administrative necessity for admitting hearsay as secondary evidence be made to appear to the satisfaction of the court, and the extrajudicial statement of A. be offered as proof of the genealogical fact under such a ruling, the proponent would still be called upon to show a *special* necessity for offering the unsworn statement of A. instead of presenting the latter as a witness.⁷ The general necessity for resorting to unsworn state-

3. Wolf v. Wilhelm, (Tex. Civ. App. 1912) 146 S. W. 216.

4. Bigliben v. State, (Tex. Civ. App. 1912) 151 S. W. 1044; Rowan v. State, 57 Tex. Cr. Rep. 625, 124 S. W. 668 (1910); Smith v. Geer, 10 Tex. Civ. App. 252, 30 S. W. 1108 (1895); Campbell v. Wilson, 23 Tex. 252, 76 Am. Dec. 67 (1859).

5. Craufurd v. Blackburn, 17 Md. 49, 77 Am. Dec. 323 (1860).

6. If a proponent would have a fair right to use the testimony of A, were he alive, as reasonably necessary to the proof of his contention regarding a fact of genealogy, he should be at liberty to use the extrajudicial statement of A, if properly qualified, as secondary evidence of the facts as-

serted. Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351 (1909).

Declarations of deceased persons are admitted as primary evidence. They do not stand upon the footing of secondary evidence to be excluded when a witness can be had who can speak from his own knowledge, hence the declarations of a deceased mother as to the time of birth of her son are admissible, though the father is living and not called. Craufurd v. Blackburn, 17 Md. 49 (1860).

7. Where the deposition of a relative has been read, the proponent is not entitled to insist upon proving his extrajudicial declarations upon the point. Gordon v. Gordon, 3 Swanst. 400, 19 Rev. Rep. 230 (1816).

ments, on issues of pedigree as secondary proof of the facts asserted, as well as to circumstantially or probatively relevant facts, is undoubtedly due to the peculiar nature of the subject matter. Facts at once so exact and so trivial can scarcely be expected, even in the case of persons of a present generation, to dwell in the memory of those not especially interested as members of the family. After the death of this limited number of persons, details, often of considerable importance, can be established only by the extrajudicial declarations of qualified members of the family or by the use of circumstantial proof.⁵

§ 2913. (*Administrative Requirements; Necessity*); Special.

— The recognized special necessity for receiving the extrajudicial statement of a declarant in the pedigree declaration is that the latter has deceased.¹ The fact of death must be proved to the sat-

8. § 2952 *et seq.*

§ 2913-1. *Alabama*.—Chambers v. Morris, 156 Ala. 626, 48 South. 687 (1909); Rogers v. De Bardeleben Coal, etc., Co., 97 Ala. 154, 12 So. 81 (1893); White v. Strother, 11 Ala. 720 (1847).

California.—In re Hartman's Estate, 157 Cal. 206, 107 Pac. 105, 36 L. R. A. (N. S.) 530n. (1910).

Illinois.—Champion v. McCarthy, 238 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052n. (1907); Harland v. Eastman, 107 Ill. 535 (1883).

Iowa.—State v. Trusty, 122 Iowa 82, 97 N. W. 989 (1904); Greenleaf v. Dubuque, etc., R. Co., 30 Iowa 301 (1870).

Kentucky.—Dupoyster v. Gagani, 84 Ky. 403, 1 S. W. 652, 8 Ky. Law Rep. 392 (1886). See also, Jones v. Letcher, 13 B. Mon. 363 (1852).

Maine.—Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615 (1884).

Massachusetts.—Haddock v. Boston, etc., R. Co., 3 Allen 298, 81 Am. Dec. 656 (1862).

Missouri.—Vantine v. Butler, 240 Mo. 521, 144 S. W. 807, 39 L. R. A. (N. S.) 1117 (1912).

New Hampshire.—Mooers v.unker, 29 N. H. 420 (1854).

New York.—Nolan v. Nolan, 35 N. Y. App. Div. 339, 54 N. Y. Suppl. 975 (1898); McCarty v. Hodges, 2 Edm. Sel. Cas. 433 (1846).

North Carolina.—Kaywood v. Barnett, 20 N. C. 88 (1838).

Oregon.—State v. McDonald, 55 Oreg. 419, 106 Pac. 444 (1910).

South Carolina.—Robinson v. Blakely, 4 Rich. Law 586, 55 Am. Dec. 703 (1851).

Texas.—Wolf v. Wilhelm, (Civ. App. 1912) 146 S. W. 216; Gorham v. Settegast, 44 Tex. Civ. App. 254, 98 S. W. 665 (1906); Summerhill v. Darrow, 94 Tex. 71, 57 S. W. 942 (1900). See also Wallace v. Howard, (Civ. App. 1895) 30 S. W. 711 (1895).

United States.—Branch v. Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92 (1893).

England.—Smith v. Tebbitt, L. R. 1 P. 354, 36 L. J. P. & M. 35, 15 L. T. Rep. (N. S.) 594, 15 Wkly. Rep. 562 (1867); Butler v. Mountgarrett, 7 H. L. Cas. 633, 11 Eng. Reprint 252 (1859).

Canada.—Doe v. Servos, 5 U. C. Q. B. (O. S.) 284 (1849).

isfaction of the court, although it may be inferred from lapse of time² or other relevant circumstances. The fact that the testimony of the declarant as a witness cannot be procured by the proponent for some other reason than that of his death, for instance, insanity or absence from the jurisdiction, has been made by statute in a few jurisdictions sufficient to admit the declarations. Some common law decisions also indicate approval of such a rule.³ Should it appear, therefore, that the proposed declarant is alive and available as a witness⁴ his extrajudicial statement relating to a fact of pedigree will not be received.⁵

§ 2914. (*Administrative Requirements*); Relevancy.—Passing over the objective relevancy of a declaration concerning pedigree, as presenting no peculiarity in this connection, objective relevancy being an absolute requirement in respect to evidence of every class, it may be appropriate to consider the subjective relevancy¹ of such statements, which requires that when they are offered as proof of the facts asserted the declarant be shown (1) to have possessed adequate knowledge of the facts which he asserts,² and (2) to have been free from a controlling motive to misrepresent.³ The qualifications of the declarant must be shown in advance by the proponent as a condition of the admissibility of the declarations.⁴ Of course, where the declarations concern the declarant only, adequate knowledge need not be shown as an in-

2. *Mann v. Cavanaugh*, 110 Ky. 776, 62 S. W. 854, 23 Ky. Law Rep. 238 (1901).

3. *Young v. Schulenberg*, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730 (1910); *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 665 (1906); *Campbell v. Wilson*, 23 Tex. 252, 76 Am. Dec. 67 (1859).

4. *Smith v. Geer*, 10 Tex. Civ. App. 252, 30 S. W. 1108 (1895); *Campbell v. Wilson*, 23 Tex. 252, 76 Am. Dec. 67 (1859).

5. *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 665 (1906).

§ 2914-1. § 2915.

2. § 2915.

3. § 2918.

4. *Illinois*.—*Harland v. Eastman*, 107 Ill. 535 (1883).

New Hampshire.—*Emerson v. White*, 29 N. H. 482 (1854).

New York.—*Young v. Shulenberg*, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730 (1910).

Oregon.—*Thompson v. Woolf*, 8 Ore. 454 (1880).

Pennsylvania.—*Sitler v. Gehr*, 105 Pa. 577, 51 Am. Rep. 207 (1884).

Wisconsin.—*Eaton v. Tallmadge*, 24 Wis. 217 (1869).

United States.—*Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1886).

Canada.—*Doe v. Servos*, 5 U. C. Q. B. (O. S.) 282, 284 (1849).

dependent fact, as it is axiomatic that a person may speak concerning himself.⁵

§ 2915. (*Administrative Requirements*); *Subjective Relevancy*; *Adequate Knowledge*.—Adequate knowledge on the part of the declarant of the facts concerning which he speaks is a fundamental requisite for the competency of extrajudicial declarations. Affirmatively, however, to establish, in case of such a declaration concerning pedigree, that the declarant possessed adequate knowledge regarding the facts stated will often be extremely difficult. To require such proof would nullify the indulgence accorded by the rule. Under these untoward circumstances, judicial administration relies upon the assumption that declarants otherwise properly qualified under the rule possess adequate knowledge. All persons connected with the family in question by blood¹ or adoption² or by being the husband³ or wife⁴ of one so

5. See *Malone v. Adams*, 113 Ga. 791, 39 S. E. 507 (1901).

§ 2915-1. *Alabama*.—*Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26 (1906).

Illinois.—*Greenwood v. Spiller*, 3 Ill. 502 (1840).

Indiana.—*De Haven v. De Haven*, 77 Ind. 236 (1881).

New Hampshire.—*Tyler v. Flanders*, 57 N. H. 618 (1876).

New Jersey.—*Bernards Tp. v. Bedminster Tp.*, 74 N. J. Law 92, 64 Atl. 960 (1906).

New York.—*McCarty v. Hodges*, 2 Edm. Sel. Cas. 433 (1846).

Pennsylvania.—*Sitler v. Gehr*, 105 Pa. St. 577, 51 Am. Rep. 207 (1884).

Texas.—*Fowler v. Simpson*, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370 (1891).

United States.—*Flora v. Anderson*, 75 Fed. 217 (1896); *Connecticut Mut. L. Ins. Co. v. Schwenck*, 94 U. S. 593, 24 L. ed. 294 (1876); *Stein v. Bowman*, 13 Pet. 209, 10 L. ed. 129 (1839).

England.—*Doe v. Randall*, 2 M. & P. 20, 17 E. C. L. 622 (1828); *Doe v. Ridgway*, 4 B. & Ald. 53, 6 E. C. L. 387 (1820).

Declarations of a deceased person are admissible to prove matters of family history, etc., on an issue as to the title to land although it is not first shown that declarant was related either by blood or marriage to the person who died seised. It is sufficient if he be related to the alleged heir. *Overby v. Johnston*, 42 Tex. Civ. App. 348, 94 S. W. 131 (1906).

2. *Alston v. Alston*, 114 Iowa 29, 86 N. W. 55 (1901).

3. *Illinois*.—*Harland v. Eastman*, 107 Ill. 535 (1883).

Iowa.—*In re Carroll*, 149 Iowa 617, 620, 128 N. W. 929 (1910).

New York.—*In re Fail's Will*, 107 N. Y. Suppl. 224, 56 Misc. Rep. 217 (1907).

Texas.—*Wall v. Lubbock*, (Tex. Civ. App. 1909) 118 S. W. 886.

United States.—*Jewell's Lessee v. Jewell*, 1 How. 219, 11 L. ed. 108 (1843).

England.—*Shrewsbury Peerage Case*, 7 H. L. Cas. 1, 11 Eng. Reprint 1 (1858); *Davis v. Lowndes*, 12 L. J. Exch. 506, 6 M. & G. 471, 7 Scott N. R. 141, 46 E. C. L. 471 (1843); *Doe v. Harvey*, R. & M. 297, 21 E. C. L. 756 (1825); *Vowles v. Young*, 13 Ves.

related may be assumed, in the absence of evidence to the contrary, to possess adequate knowledge as to the truth of facts stated by them.⁵

The relationship of the declarant to the family must be established by evidence independent of the declaration itself. His statements cannot be relied on for this purpose.⁶ This principle needs no comment, as to hold otherwise would be manifestly absurd. An apparent exception exists in a case where the declarant himself is the person with whom a relationship is sought to be proved, or concerning whom any pedigree fact is sought to be

Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247 (1806).

"As far as hearsay is evidence of anything within the knowledge of a man, no man can be supposed ignorant of the reputation of the descent of his wife. . . . But it must be considered whether that can extend to mere collateral declarations of this kind, where there is no interest in the husband. . . . Consider, then, whether the knowledge of the husband as to the legitimacy of his wife, is not likely to be more intimate, and his interest stronger, than that of any relation, however near in blood. First, if she has an estate tail, he is tenant by the curtesy. Has he not an interest in knowing her legitimacy: his expectation depending upon it? So as to her personal estate, he is entitled to all that comes to her. Is not that a strong interest?" *Vowles v. Young*, 13 Ves. Jr. 140, 143, 144, 147, 9 Rev. Rep. 154, 33 Eng. Reprint 247 (1806), per Lord Erskine.

4. *In re Carroll's Estate*, 149 Iowa 617, 128 N. W. 929 (1910); *Wren v. Howland*, 33 Tex. Civ. App. 87, 75 S. W. 894 (1903); *Shrewsbury Peerage Case*, 7 H. L. Cas. 1, 11 Eng. Reprint 1 (1858); *Doe v. Randall*, 2 M. & P. 20 (1828).

"Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that a party by marriage is more likely to be informed of the state of the family

of which he is become a member than a relation who is only distantly connected by blood; as, by frequent conversation, the former may hear the particulars and characters of branches of the family long since dead." *Doe v. Randall*, 2 M. & P. 20, 25, per Best, L. C. J.

Wife's relatives.—The declarations of the deceased relatives of the wife are not receivable in proof of facts of pedigree relating to the family of the husband. *Blackburn v. Crawford*, 3 Wall. (U. S.) 175, 18 L. ed. 186 (1865) (sister); *Shrewsbury Peerage Case*, 7 H. L. Cas. 1, 11 Eng. Reprint 1 (1858) (father).

5. A pedigree in the handwriting of a member of the family is admissible, at least, as to the parts concerning which the author may be presumed to have had personal knowledge. *Davies v. Lowndes*, 6 M. & G. 471, 7 Scott N. R. 141, 46 E. C. L. 471 (1843).

Where a paper purporting to give genealogical facts concerning a family is proved to be in the handwriting of a member of the family, it is not necessary to show that it was made public during the lifetime of the author. *Eastman v. Martin*, 19 N. H. 152 (1848); *Monkton v. Atty.-Gen.*, 2 Russ. & M. 147, 11 Eng. Ch. 147, 39 Eng. Reprint 350 (1831).

6. *Greene v. Almand*, 111 Ga. 735, 36 S. E. 957 (1900); *Doe v. Servos*, 5 U. C. Q. B. (O. S.) 284 (1849).

shown. For example, one claiming the property of an intestate may show declarations of the latter tending to establish relationship with the claimant,⁷ or in an action for benefit insurance where the defense is that the insured misrepresented his age when applying for insurance, declarations of the deceased regarding his age are admissible.⁸ Similarly, declarations are admissible to show that the deceased was married⁹ or had no children.¹⁰ Of course, upon examination, it is apparent that in such a case the question of showing the relationship of the declarant to the family does not arise as it is obvious that an individual is a member of his own family.¹¹

Actual knowledge.—Should it affirmatively appear¹² that the declarant is actually possessed of adequate knowledge¹³ or has enjoyed such opportunities for acquiring it as lead to a rational inference that he is so possessed¹⁴ a sufficient ground is furnished for receiving the pedigree statement.¹⁵ It is not necessary that the declarations be founded upon actual personal knowledge.¹⁶

Adequate knowledge shown circumstantially by acquiescence.—

7. *Malone v. Adams*, 113 Ga. 791, 39 S. E. 507, 84 Am. St. Rep. 259 (1901); *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381 (1882); *Young v. State*, 36 Or. 417, 59 Pac. 812, 60 Pac. 711, 47 L. R. A. 548 (1900).

8. *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570 (1910); *Taylor v. Grand Lodge A. O. U. W.*, 101 Minn. 72, 11 L. R. A. (N. S.) 92n., 118 Am. St. Rep. 606 (1907).

9. *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836 (1891).

10. *Washington v. Bank for Savings*, 171 N. Y. 166, 63 N. E. 831, 89 Am. St. Rep. 800 (1902).

11. *Smith v. Tebbitt*, L. R. 1 P. & D. 354 (1867).

12. *Kaywood v. Barnett*, 20 N. C. 88 (1838).

13. *Illinois*.—*Harland v. Eastman*, 107 Ill. 535 (1883); *Greenwood v. Spiller*, 3 Ill. 502 (1840).

New Hampshire.—*Eastman v. Martin*, 19 N. H. 152 (1848).

New York.—*McCarty v. Hodges*, 2 Edm. Sel. Cas. 433 (1846).

United States.—*Stein v. Bowman*, 13 Pet. 209, 10 L. ed. 129 (1839).

England.—*Lovat Peerage Case*, 10 App. Case 763 (1885); *Crawford, etc., Peerage Case*, 2 H. L. Cas. 534, 9 Eng. Reprint 1196 (1848).

Mental capacity.—The declarant need not be shown to be a man possessed of mental faculties sufficient to enable him to manage his own property. It is sufficient if he knows who his relatives are. *Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052n. (1907).

14. *McCarty v. Hodges*, 2 Edm. Sel. Cas. (N. Y.) 433 (1846). See also *Denoyer v. Ryan*, 24 Fed. 77 (1885).

15. It follows that one who testifies from information furnished by a member of the family must disclose the source of his knowledge. *Munn v. Mayes*, 9 Tex. Civ. App. 366, 30 S. W. 479 (1895).

16. *Monkton v. Atty.-Gen.*, 2 Russ. & M. 147, 11 Eng. Ch. 147, 39 Eng. Reprint 350 (1831).

It often occurs that the author of a pedigree declaration cannot be identified as having been a person bearing the required relationship to the family in question, or that his identity is entirely unknown. Such a situation is met in the process of administration by accepting circumstantial proof of the integrity of the declaration, sufficient to render it worthy of consideration in a court of justice. Such proof is furnished by showing acquiescence in the declaration on the part of those who would naturally be interested in connecting a misstatement if one should exist. Thus, declarations in a great variety of forms and without regard to authorship are admissible as evidence of any facts of pedigree and family history asserted, provided it is shown by direct or circumstantial evidence that the declarations were brought to the attention of some member of the family, who presumably knew the facts, and who would naturally have been inclined to correct any misrepresentation concerning matters of pedigree and family history. Of course, it will be observed that this acquiescence goes much farther than to merely raise a presumption that the author of the declaration had adequate knowledge for it, in fact, raises a presumption that what he said was actually true. This entire topic is treated elsewhere in this volume.¹⁷

Contemporaneousness not required.—It has sometimes been said that for a declaration concerning pedigree to be admissible it must be shown to have been made contemporaneously with the happening of the event or the existence of the facts to which it refers. This view is held to be erroneous.¹⁸ The time when entries were made in a family record may, however, have a bearing upon their probative force.¹⁹ Thus, the fact that such entries all appear to have been made at one time, in one handwriting and with the same pen and ink, is a circumstance which may throw doubt upon the authenticity of the record.²⁰

17. §§ 2955-59.

18. *Swift & Co. v. Rennard*, 119 Ill. App. 173 (1905).

"A person's declaration that his grandmother's maiden name was A. B. has never to this time been questioned as admissible, although it cannot by possibility be what is called a contemporary declaration, because no man can by possibility have contemporary knowledge of what his

grandmother's name was before she was married." *Monkton v. Atty-Gen.*, 2 Russ. & M. 147, 158, 11 Eng. Ch. 147, 39 Eng. Reprint 350 (1831), per Lord Brougham.

19. *Weaver v. Leiman*, 52 Md. 708 (1879).

20. *Supreme Council G. S. F. v. Conklin*, 60 N. J. L. 565, 38 Atl. 659, 41 L. R. A. 449 (1897).

§ 2916. (*Administrative Requirements; Subjective Relevancy; Adequate Knowledge*); Incompetent Declarants.—Notwithstanding the position of the earlier law, in admitting, on an issue of pedigree, the unsworn statements of persons such as attending physicians,¹ intimate friends,² those living in the family,³ trusty servants⁴ and the like, shown to be possessed of adequate knowledge or of opportunities for acquiring it,⁵ the law is well settled at the present day that only those connected with the family by blood or marriage are competent declarants under the present exception to the hearsay rule.⁶ Neighbors,⁷ and friends, re-

§ 2916-1. Walker v. Wingfield, 18 Ves. Jr. 443, 11 Rev. Rep. 232, 34 Eng. Reprint 384 (1812).

2. Bridger v. Huett, 2 F. & F. 35 (1860). See also Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277 (1817); Osborne v. Ramsay, (Wash. 1911) 191 Fed. 114, 111 C. C. A. 594.

3. Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277 (1817); Jackson v. Cooley, 8 Johns. (N. Y.) 128 (1811); Rex v. Eriswell, 3 T. R. 707 (1790).

4. Walker v. Wingfield, 18 Ves. Jr. 443, 11 Rev. Rep. 232, 34 Eng. Reprint 384 (1812).

5. Greenwood v. Spiller, 3 Ill. 502 (1840).

6. Alabama.—Chambers v. Morris, 159 Ala. 606, 48 So. 687 (1909).

Arkansas.—Wilson v. Brownlee, 24 Ark. 586 (1867).

Illinois.—Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052n. (1907).

New Hampshire.—Tyler v. Flinders, 57 N. H. 618 (1876).

Texas.—Gorham v. Settegast, 44 Tex. Civ. App. 254, 98 S. W. 665 (1906).

United States.—Flora v. Anderson, 75 Fed. 217 (1896); Branch v. Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92 (1893); Banert v. Day, 2 Fed. Cas. No. 836, 3 Wash. C. C. 243 (1814).

England.—Casey v. O'Shaughnessy, 7 Jur. 1140 (1843); Johnson v. Law-

son, 2 Bing. 86, 2 L. J. C. P. O. S. 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493 (1824).

See also Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35 (1903); Polini v. Gray, L. R. 12 Ch. D. 426 (1879); Doe v. Auldjo, 5 U. C. Q. B. 175 (1848).

Compare Hoyt v. Lightbody, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 358n. (1906).

On an issue of pedigree, testimony of declarations of decedent's administrator, who was not connected with the family of decedent, that there was a tradition in said family as to decedent's relationship to it is inadmissible. State v. McDonald, 55 Ore. 419, 103 Pac. 512, 104 Pac. 967, 105 Pac. 444 (1910).

To rebut the presumption of death arising from seven years absence, declarations of persons not members of the family tending to show that the person in question has been heard of as living within that period are admissible. Posey v. Hanson, 10 App. Cas. (D. C.) 496, 507 (1897); Flynn v. Coffee, 12 Allen (Mass.) 133 (1866).

7. De Haven v. De Haven, 77 Ind. 236 (1881); Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615 (1884); Branch v. Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92 (1893).

"Parties cannot establish pedigree by proving what the neighbors thought or said upon the subject of

gardless of the degree of intimacy enjoyed by them⁸ are not regarded as competent declarants under the rule in question.⁹ The extrajudicial statements of old servants¹⁰ relating to facts of genealogy in the family with which they have been connected will not be received,¹¹ regardless of the term of service.¹² That, in any particular instance, the jury might rationally rely upon an extrajudicial statement relating to pedigree not made by a member of the family furnishes no sufficient ground for accepting it as evidence.¹³

§ 2917. (*Administrative Requirements; Subjective Relevancy; Adequate Knowledge*); Reporting Witnesses.—An extrajudicial statement with regard to pedigree may be testified to

the paternity of the person whose pedigree is in dispute. Proof of pedigree is restricted to the declarations of deceased persons who are related by blood or marriage to the person whose parentage is the subject of investigation." *De Haven v. De Haven*, 77 Ind. 236, 239 (1881), per Elliott, C. J.

8. *Johnson v. Lawson*, 2 Bing. 86, 2 L. J. C. P. (O. S.) 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493 (1824).

A family attorney or solicitor is not a competent declarant under the modern rule. *Scot v. Herrell*, 27 App. Cas. (D. C.) 395 (1906).

9. *Flora v. Anderson*, 75 Fed. 217 (1896); *Johnson v. Lawson*, 2 Bing. 86, 2 L. J. C. P. (O. S.) 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493 (1824).

10. *Flora v. Anderson*, 75 Fed. 217 (1896); *Johnson v. Lawson*, 2 Bing. 86, 2 L. J. C. P. (O. S.) 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493 (1824); *Doe v. Auldjo*, 5 U. C. Q. B. 171 (1848).

11. *Doe d Arnold v. Auldjo*, 5 Q. B. U. C. 171 (1848).

12. *Johnson v. Lawson*, 2 Bing. 86, 92, 2 L. J. C. P. (O. S.) 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493 (1824); *Doe v. Auldjo*, 5 U. C. Q. B. 171 (1848). "Evidence of that

kind must be subject to limitation, otherwise it would be a source of great uncertainty, and the limitation hitherto pursued, namely, the confining such evidence to the declarations of relations of the family, affords a rule at once certain and intelligible. If the admissibility of such evidence were not so restrained, we should, on every occasion, before the testimony could be admitted, have to enter upon a long enquiry as to the degree of intimacy or confidence that subsisted between the party and the deceased declarant." *Johnson v. Lawson*, 2 Bing. 86, 89, 2 L. J. C. P. (O. S.) 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493 (1824), per Best, C. J.

"If we go beyond, where are we to stop? Is the declaration of a groom to be admitted? of a steward? of a chambermaid? of a nurse? May it be admitted if made a week after they have joined the family? And if not, at what time after?" *Johnson v. Lawson*, 2 Bing. 86, 92, 2 L. J. C. P. (O. S.) 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493 (1824), per Burroughs, J.

13. *Johnson v. Lawson*, 2 Bing. 85, 2 L. J. C. P. (O. S.) 136, 9 Moore C. P. 183, 27 Rev. Rep. 558, 9 E. C. L. 493 (1824); *Doe v. Servos*, 5 U. C. Q. B. (O. S.) 284 (1849).

by any one who heard it.¹ While the number of competent extrajudicial declarants as to a matter of pedigree is limited by the fixed condition of relation to the family, no such restriction limits the number of witnesses deemed competent regarding the making of the statement itself.² A person may act as his own reporting witness when the question of his age is at issue, and may testify in regard thereto.³ The source of his information is not considered as material in the first instance though it may be inquired into on cross-examination for the purpose of testing his statement.⁴

§ 2918. (*Administrative Requirements; Subjective Relevancy*); Absence of Controlling Motive to Misrepresent.—Subjective relevancy demands not only adequate knowledge,¹ but also that the declarant should be shown or assumed to be without a controlling motive to misrepresent.² Partly on account of the ad-

§ 2917-1. *Alabama*.—Elder v. State, 124 Ala. 69, 27 South. 305 (1899).

California.—Anderson v. Parker, 6 Cal. 197 (1856).

Kentucky.—Dupoyster v. Gagoni, 84 Ky. 403, 1 S. W. 652, 8 Ky. Law Rep. 392 (1886).

New Hampshire.—Waldron v. Tuttle, 4 N. H. 371 (1828).

New York.—Arents v. Long Island R. Co., 156 N. Y. 1, 50 N. E. 422 (1898).

Texas.—Nunn v. Mayes, 9 Tex. Civ. App. 366, 30 S. W. 479 (1895).

Vermont.—Mason v. Fuller, 45 Vt. 29 (1872).

Wisconsin.—Du Pont v. Davis, 30 Wis. 170 (1872).

England.—Essex v. Hodgson, 15 Wkly. Rep. 960 (1867).

2. State v. McDonald, 55 Oreg. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444 (1910).

3. People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896); Central R. Co. v. Coggin, 73 Ga. 689 (1884); State v. Bowser, 21 Mont. 133, 53 Pac. 179 (1898); Kaester v. Rochester Candy Works, 194 N. Y. 92, 87 N. E. 77, 19 L. R. A. (N. S.) 783 (1909).

4. Central R. Co. v. Coggin, 73 Ga. 689 (1884); State v. Bowser, 21 Mont. 133, 53 Pac. 179 (1898).

§ 2918-1. § 2915.

2. *Connecticut*.—Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277 (1817).

Indiana.—De Haven v. De Haven, 77 Ind. 236 (1881).

Louisiana.—David v. Sittig, 1 Mart. (N. S.) 147, 14 Am. Dec. 179 (1823).

North Carolina.—Brady v. Wilson, 11 N. C. 93 (1825).

South Dakota.—In re McClellan's Estate, 20 S. D. 498, 107 N. W. 681 (1906).

England.—Doe v. Davies, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314 (1847).

In an action against a beneficial association where the defense is a false statement as to age made by the deceased member, a coffin plate prepared by the undertaker who received his information from members of the deceased's family, is inadmissible on the question of the age of the deceased, as is likewise a certificate of the board of health based on the report of the undertaker. Dinan v. Supreme Council Catholic Mut. Ben. Assoc., 201 Pa. St. 363, 50 Atl. 999 (1902).

ministrative situation and, in part, because of the greatly increased influence of Procedure at the time when the rule took shape, both these elements of relevancy are determined by formal equivalences. Given a certain definite relation to the family on the part of a declarant, adequate knowledge is assumed. Should it appear, in a similar way, that the pedigree statement was made *ante litem motam*, it is assumed to have been made without controlling motive to misrepresent,³ the declarant being regarded as disinterested.⁴ No attempt is made to determine the actual mental state of the declarant. Nor, in the absence of cross-examination would such an attempt be likely to prove either easy or profitable for the discovery of truth.

A self-serving pedigree declaration is not *per se* inadmissible,⁵

3. Connecticut.—Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277 (1817).

Indiana.—Collins v. Grantham, 12 Ind. 440 (1859).

Louisiana.—David v. Sittig, 1 Mart. (N. S.) 147, 14 Am. Dec. 179 (1823).

Maine.—Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615 (1884).

Maryland.—Barnum v. Barnum, 42 Md. 251 (1875).

New York.—Caujolle v. Ferrie, 26 Barb. 177 *affirmed* 23 N. Y. 90 (1857); People v. Fulton F. Ins. Co., 25 Wend. 205 (1840).

North Carolina.—Brady v. Wilson, 11 N. C. 93 (1825).

Texas.—Kirby v. Boaz, 41 Tex. Civ. App. 282, 91 S. W. 642 (1906); Summerhill v. Darrow, 94 Tex. 71, 57 S. W. 942 (1900); Schott v. Pellerim, (Civ. App. 1897) 43 S. W. 944.

Vermont.—*In re Hurlburt*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

United States.—Hall's Deposition, 11 Fed. Cas. No. 5,924, 1 Wall. Jr. 85 (1843); Elliott v. Peirsol, 1 Pet. 328, 7 L. ed. 164 (1828).

England.—Frederick v. Atty. Gen., L. R. 3 P. 270, 44 L. J. P. & M. 1, 32 L. T. Rep. (N. S.) 39 (1874); Hill v. Hibbitt, 19 Wkly. Rep. 250 (1871);

Smith v. Tebbitt, L. R. 1 P. 354, 36 L. J. P. & M. 35, 15 L. T. Rep. (N. S.) 594, 15 Wkly. Rep. 562 (1867); Webb v. Haycock, 19 Beav. 342 (1854); Crouch v. Hooper, 16 Beav. 182, 1 Wkly. Rep. 10 (1852); Doe v. Tarver, R. & M. 141, 21 E. C. L. 719 (1824).

By "controlling" in this connection and, generally, in relation to subjective relevancy, is meant not only that a motive is present calculated to affect the mind of the declarant, but that it is such as to dominate his will, rendering it irrational for the jury to follow his declaration.

4. District of Columbia.—Green v. Norment, 5 Mackey 80 (1886).

Kentucky.—Speed v. Brooks, 7 J. J. Marsh. 119 (1832).

New Hampshire.—Emerson v. White, 29 N. H. 482 (1854); Waldron v. Tuttle, 4 N. H. 371 (1828).

New York.—People v. Fulton F. Ins. Co., 25 Wend. 205 (1840).

England.—Monkton v. Atty. Gen., 2 Russ. & M. 147, 11 Eng. Ch. 147 (1831).

5. Webb v. Haycock, 19 Beav. 342 (1854).

"No dispute existed; but the parties did what they had a right to do, if members of the family. Almost every declaration of relationship is

but, where there is a strong probability that such a declaration was made to be used as evidence in a controversy in the contemplation of the declarant at the time of making the declaration, or where the declaration was made under circumstances indicating strong bias on the part of the declarant, it will not be received.⁶ This latter principle of exclusion has been greatly extended in some cases.⁷

In a broad general way, reliance is placed upon the observed

accompanied with some feeling of interest, which will often cast suspicion on the declarations, but has never been held to render them inadmissible." *Doe v. Davies*, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314 (1847).

"The father is proved to have declared, that he made such entry for the express purpose of establishing the legitimacy of his son, and the time of birth, in case the same should be called in question after the father's death. The opinion of the judges is, that the entry would be receivable in evidence, notwithstanding the professed view with which it was made. Its particularity would be a strong circumstance of suspicion; but still it would be receivable, whatever the credit might be to which it would be entitled." *Berkeley Peerage Case*, 4 Camp. 401, 418 (1801), per Mansfield, C. J.

6. *De Haven v. De Haven*, 77 Ind. 236 (1881). See also *Chapman v. Chapman*, 2 Conn. 347, 349, 7 Am. Dec. 277 (1817); *Monkton v. Attorney-General*, 2 Russ. & M. 147, 11 Eng. Ch. 147, 39 Eng. Reprint 350 (1831).

"Perhaps the learned judge was right in rejecting the evidence, on the ground that any declaration made by Thomas Taylor, the father, on the subject, . . . would be a declaration by a person whose mind could not be free from bias. It was manifestly in many ways directly for his interest to make a declaration tend-

ing to disavow his first marriage, or having a tendency to shew that it was an illegal marriage, and consequently did not invalidate the second. No case has been cited in which the declaration of a deceased person, obviously for his interest, has ever been received." *Plant v. Taylor*, 7 H. & N. 211, 237 (1861), per Channell, B.

The declaration of a decedent, a young man, at the time of making his will, concerning his age, the asserted age being sufficient to give him testamentary capacity, has been held inadmissible. *Doe v. Ford*, 3 U. C. Q. B. 352 (1847).

7. *Lewis v. Bergess*, 22 Tex. Civ. App. 252, 54 S. W. 609 (1899); *Turner v. Sealock*, 21 Tex. Civ. App. 594, 54 S. W. 358 (1899).

Where bounty warrants for land had been issued to the heirs of a soldier who had been killed in a massacre in Texas and two sets of persons claimed as such heirs, it was an error to admit, for the purpose of identifying the deceased soldier, the declarations of the father of one of the claimants that he had a nephew, of the same name as said deceased, who went to Texas and was killed at a time and place corresponding with the time and place of the massacre, because it established the declarant as the latter's sole heir. *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760 (1895), *distinguishing* *Fowler v. Simpson*, 79 Tex. 611, 614, 15 S. W. 682, 23 Am. St. Rep. 370 (1891).

fact that persons are apt to speak the truth until the warmth of controversy or the promptings of interest suggest a deviation in support of a particular contention.

Forms of interest other than partisanship in an existing quarrel are not conclusive against the use of the unsworn statement as evidence. The circumstance that the declaration is made in response to questions designed to elicit a particular answer is not necessarily fatal to admissibility,⁸ although it may diminish probative force.⁹

§ 2919. (Administrative Requirements; Subjective Relevancy; Absence of Controlling Motive to Misrepresent); Lis Mota.—Absence of controlling motive to misrepresent has been thought by judicial administration to have been insured by providing that pedigree declarations must, to be admissible, have been made *ante litem motam*,¹ and not in anticipation of litigation with regard to family genealogy.² That the probative impairment due to the arising of *lis mota* should exist, it is by no means essential that an actual suit should have been begun.³

8. *Hurst v. Jones*, 112 Fed. Cas. No. 6,934, 1 Wall. Jr. appendix 111 (1801).

9. *Crouch v. Hooper*, 16 Beav. 182, 1 Wkly. Rep. 10 (1852).

§ 2919-1. *California*.—*In re Hartman's Estate*, 157 Cal. 206, 107 Pac. 105, 36 L. R. A. (N. S.) 530 n. (1910).

Illinois.—*Harvick v. Modern Woodmen of America*, 158 Ill. App. 570 (1910).

Iowa.—*In re Carroll's Estate*, 149 Ia. 617, 128 N. W. 929 (1910).

Missouri.—*Vantine v. Butler*, 240 Mo. 521, 144 S. W. 519, 39 L. R. A. (N. S.) 1177 (1912).

North Carolina.—*Hodges v. Hodges*, 106 N. C. 374, 11 S. E. 364 (1890).

South Dakota.—*In re McClellan's Estate*, 20 S. D. 498, 107 N. W. 681 (1906).

Texas.—*Wolf v. Wilhelm* (Civ. App. 1912), 146 S. W. 216; *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 665 (1906).

Vermont.—*In re Hurlburt*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

United States.—*Osborne v. Ramsay*, 191 Fed. 114, 111 C. C. A. 594 (1911); *Stein v. Bowman*, 13 Pet. 209, 10 L. ed. 129 (1839).

2. *Osborne v. Ramsay*, 191 Fed. 114, 111 C. C. A. 594 (1911).

Repeated statements.—Statements made *ante litem motam* may be repeated after the arising of the controversy, the latter declarations being regarded as competent in such case. *Wolf v. Wilhelm*, (Tex. Civ. App. 1912) 146 S. W. 216; *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 665 (1906).

3. *Rollins v. Wicker*, 154 N. C. 559, 70 S. E. 934 (1911); *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 665 (1906); *Nehring v. McMurrian*, 53 S. W. 381 (*reversed* 94 Tex. 45, 57 S. W. 943) (1900); *Stein v. Bowman*, 13 Pet. (U. S.) 209, 10 L. ed. 129 (1839); *Butler v. Mountgarret*, 7 H.

Whatever may be the point at which the subjective precision of mental action is affected, there the admissibility of unsworn statements ceases.⁴ Should *lis mota* actually exist, the fact that the declarant did not know of it is not material,⁵ any more than is the circumstance that the stage of litigation has not yet been reached.⁶ The existence of a pending litigation constitutes a clear *lis mota*, excluding the extrajudicial statement. On the other hand, the mere existence of a state of affairs out of which a controversy may at some future time arise⁷ or is even fairly certain to do so, though the probability is so great as to induce the declarant to

L. Cas. 633 (1859); Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034 (1844).

"The element to be avoided is a bias in the mind of a declarant; and this is sufficiently probable if a dispute or controversy is actually in progress, even though it may not have reached the stage of legal proceedings." *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 262, 98 S. W. 665 (1906), per Neill, J.

"The courts insist that the dip into the stream of time which flows from the event in question shall be taken at some place above the point where strife or dissension may have polluted the water." *Gillett, Ind. & Col. lat. Ev.*, § 133.

4. *Kirby v. Boaz*, 41 Tex. Civ. App. 282, 91 S. W. 642 (1906); *Shedden v. Atty.-Gen.*, 6 Jur. (N. S.) 1163, 30 L. J. P. & M. 217, 3 L. T. Rep. (N. S.) 592, 2 Swab. & Tr. 170, 9 Wkly. Rep. 285 (1860); *Walker v. Beauchamp*, 6 C. & P. 552, 25 E. C. L. 571 (1834).

For a statement to have been made *ante litem motam* within the meaning of the rule judicial administration requires that it must not only have been made before an action was started, but before any controversy or prospect of controversy arose. *Rolins v. Wicker*, 154 N. C. 559, 70 S. E. 934 (1911).

Collecting evidence. — The attempt

on the part of the declarant to collect evidence to substantiate one side of the matter in controversy is a starting of it so far, at least, as he is concerned, and his unsworn statements while engaged in this work are incompetent as having been made *post litem motam*. *Lovat Peerage Case*, 10 App. Cas. 763 (1885); *Dysart Peerage Case*, 6 App. Cas. 489 (1881).

Life insurance. — A *lis mota* does not arise in case of a policy of life insurance until after the death of the insured. *Mutual Reserve Life Ins. Co. v. Jay*, 50 Tex. Civ. App. 165, 109 S. W. 1116 (1908).

5. *Shedden v. Atty.-Gen.*, 6 Jur. N. S. 1163, 30 L. J. P. & M. 217, 3 L. T. Rep. N. S. 592, 2 Swab. & Tr. 170, 9 Wkly. Rep. 285 (1861); *Berkeley's Peerage Case*, 4 Campb. 401, 417 (1811).

"If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted and great confusion would be produced." *Berkley Peerage Case*, 4 Campb. 401, 417 (1811), per Lord Mansfield, C. J.

6. *Dysart Peerage Case*, 6 App. Cas. 489 (1881); *Butler v. Montgarrett*, 7 H. L. Cas. 633, 11 Eng. Reprint 252 (1859).

7. *Reilly v. Fitzgerald*, 6 Ir. Eq. 335 (1843).

make his statement for the express purpose of forestalling or preventing it⁸ is not sufficient to exclude an otherwise competent declaration regarding pedigree. It thus appears that the mere presence in the community of the raw material, as it were, of a future controversy, the fuel for a remotely anticipated fire, does not constitute a *lis mota*⁹ and statements made at that time are not objectionable.¹⁰ Under these circumstances there may properly be said to be a *lis mota* but that it has not yet started. The arising of a controversy regarding a cognate matter is not sufficient to exclude a pedigree declaration as to the main subject,¹¹ unless, indeed, the former clearly foreshadows a controversy as to the latter,¹² culminating in litigation between the same parties as those which appear in the cause in which the declaration is offered.¹³ Some doubt, however, concerning the wisdom of the principle last stated has been judicially expressed.¹⁴

8. *Shedden v. Atty.-Gen.*, 6 Jur. N. S. 1163, 30 L. J. P. & M. 217, 3 L. T. Rep. N. S. 592, 2 Swab. & Tr. 170, 9 Wkly. Rep. 285 (1861).

Pedigree declarations do not cease to be deemed admissible because they were made for the purpose of preventing a controversy. *Berkeley Peerage Case*, 4 Campb. 401, 417 (1811).

See, also, *Gee v. Ward*, 7 E. & B. 509, 515 (1857).

9. *Doe v. Davies*, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314 (1847); *Berkeley Peerage Case*, 4 Campb. 401 (1811).

10. The commencement of the controversy, and not of the situation from which it springs, is the beginning of the *lis mota* terminating the admissibility of family declarations. *Shedden v. Atty.-Gen.*, 6 Jur. (N. S.) 1163, 30 L. J. P. & M. 217, 3 L. T. Rep. N. S. 592, 2 Swab. & Tr. 170, 9 Wkly. Rep. 285 (1861). But see *Walker v. Beauchamp*, 6 C. & P. 552, 25 E. C. L. 571 (1834).

11. *Shedden v. Patrick*, 2 Swab. Tr. 170, 188 (1860); *Gee v. Ward*, 7 E. & B. 509, 3 Jur. (N. S.) 692, 5 Wkly. Rep. 579, 90 E. C. L. 509 (1856).

See, also, *Elliott v. Peirsol*, 1 Pet. (U. S.) 328, 7 L. ed. 164 (1828); *Freeman v. Philipps*, 4 M. & S. 486, 497 (1816).

12. *Elliott v. Peirsol*, 1 Pet. (U. S.) 328, 7 L. ed. 164 (1828); *Gee v. Ward*, 7 E. & B. 509, 3 Jur. (N. S.) 692, 5 Wkly. Rep. 579, 90 E. C. L. 509 (1856); *Reilly v. Fitzgerald*, 1 Dew. 122, 6 Tr. Eq. 335 (1843).

13. *Shedden v. Atty.-Gen.*, 6 Jur. N. S. 1163, 30 L. J. P. & M. 217, 3 L. T. Rep. N. S. 592, 2 Swab. & Tr. 170, 9 Wkly. Rep. 285 (1861).

14. "If the rule 'that actual litigation or litigious controversy without actual suit always vitiates the hearsay declaration of those in whose family it existed,' be narrowed down to controversies upon the very point afterwards sought to be ascertained, and strictly and legally involving it, the reason of the rule is lost sight of. The result would be to exclude such family traditions, when the parties had an accurate knowledge of their legal rights, or the legal grounds of their claim, whilst it would admit them in cases, where the claim pursued with equal ardor and interest is erroneously understood by the par-

Burden of Proof.—Since absence of *lis mota* is a requirement for the admissibility of evidence of a declaration, the party offering it has the burden of showing such fact affirmatively.¹⁵

Former controversy.—The existence of a former controversy, now entirely a thing of the past, does not affect the subjective relevancy of a subsequent declaration on the point.¹⁶

§ 2920. (Administrative Requirements; Subjective Relevancy; Absence of Controlling Motive to Misrepresent); Administrative Value of Requirement that Pedigree Statement Should have been Made Ante Litem Motam.—In estimating the administrative value of the requirement that pedigree statements must have been made *ante litem motam*, regardless of whether the person making the statements was aware of the *lis mota* or not, as a means of insuring that element of subjective relevancy termed absence of a controlling motive to misrepresent, it should be borne in mind that in formulating this and other rules laid down during the formative period of the law of evidence, English judges necessarily adapted their administrative practice to meet conditions of life as they existed in the England with which they were acquainted. Where such conditions no longer exist, it well may follow that much if not all of the value which they contributed to the practical administration of justice has disappeared. As in case of the proof of veracity by reputation, procedure assumes that the average English community knows of all facts of interest existing within its limits. Obviously, such an assumption implies certain conditions, density of population, harmony of viewpoints, unity of language, lack of other absorbing interests and the like. The assumption might be true of the average English community of Lord Mansfield's time and yet the rule of procedure based upon it, that pedigree declarations must have been

ties themselves, and where, for that very reason, they and their friends are more exposed to see the whole question and its evidence through a false medium, and to suffer their feelings to disturb or discolor their recollections or relations of facts. The spirit and reason of the rule, in my judgment, therefore, extend to every ancient controversy involving or affected by the question afterwards

in litigation, or supposed at the time, to involve it, or be affected by it." *People v. Fire Ins. Co.*, 25 Wend. (N. Y.) 205, 223 (1840), per Verplanck, Sen.

15. *Hodges v. Hodges*, 106 N. C. 374, 11 S. E. 364 (1890); *Morgan v. Purnell*, 4 Hawks L. (N. C.) 97 (1825).

16. *Gregory v. Baugh*, 2 Leigh (Va.) 665 (1830) (thirty years).

made *ante litem motam*, be only a drag upon practical administration when applied to a community more dense or more scattered, more cosmopolitan or more interested in other matters.

§ 2921. (Administrative Requirements); Validity of Documents not Demanded.—The instrument containing a pedigree statement need not itself be valid for the purpose for which it was intended. The pedigree assertion contained in a will or circumstantially employed as proof of pedigree may be equally effective, for example, although the will itself fail of operation.¹ The essential requirement is that the pedigree assertion should be identified as having been made by a competent declarant. This result is secured though the instrument in which it is contained fail to accomplish its original purpose. A written statement may be made by any person whose oral declaration on the same subject would be competent.² If made under his direction,³ it would be equally admissible. This being so the admissibility of the written declaration is not dependent upon the validity of the instrument in which it is contained.

§ 2922. (Administrative Requirements); Issue Must be One of Genealogy.—In many jurisdictions, it seems to be a fairly well established rule that, in order that hearsay evidence may be admitted under the pedigree exception, it is essential that the issue upon which the testimony is offered be one of genealogy.¹ Even on the closely analogous issues raised in relation to pauper settle-

§ 2921-1. *Jennings v. Webb*, 8 App. Cas. (D. C.) 43 (1896); *In re Lambert*, 56 L. J. Ch. 122, 56 L. T. Rep. N. S. 15 (1886).

2. *Eastman v. Martin*, 19 N. H. 152 (1848); *Berkeley Peerage Case*, 4 Campb. 401 (1811).

"I know no difference between a father writing any thing respecting his son in a bible, and his writing it in any other book, or on any other piece of paper; and therefore the answer I would give is, that such a writing by a father in a bible, or in any other book, or upon any other piece of paper, would be a declaration of that father in the understanding of the law, and like other declara-

tions of the father might be admitted in evidence." *Berkeley Peerage Case*, 4 Campb. 401, 418 (1811), per Lord Mansfield, C. J.

3. *State v. Joest*, 51 Ind. 287 (1875); *Wiseman v. Cornish*, 53 N. C. 218 (1860).

§ 2922-1. *People v. Mayne*, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256 (1897); *Bowen v. Preferred Acc. Ins. Co.*, 74 N. Y. Suppl. 101, 68 App. Div. 342 (1902); *People v. Miller*, 63 N. Y. Suppl. 949, 30 Misc. (N. Y.) Rep. 355, 14 N. Y. Cr. Rep. 407 (1900); *Fidelity Mutual L. Ass'n v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. ed. 922 (1902); *Haines v. Guthrie*, 13 Q. B. D. 818, 48 J. P.

ments,² the evidence has been rejected. Thus, in an action for goods sold and delivered where the defense is infancy, an affidavit made by the defendant's father, since deceased, in an administration suit, is inadmissible to prove the defendant's age.³ Likewise, in a criminal prosecution for statutory rape, in which the age of the prosecutrix is an essential element, the family record is not admissible to prove such fact.⁴

No sufficient or satisfactory reason for this view appears to have been enunciated.⁵ The rule apparently is a marked departure

756, 53 L. J. Q. B. 521, 51 L. T. Rep. (N. S.) 645, 33 Wkly. Rep. 99 (1884).

See, also, *Com. v. Felch*, 132 Mass. 22 (1882); *Connecticut Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593, 598, 24 L. ed. 294 (1876); *Figg v. Wedderburne*, 11 L. J. Q. B. 45 (1841).

This view has been approved by the Court of Appeals of New York.

"As to what is a case of pedigree, an examination of the question shows that a case is not necessarily one of that kind, because it may involve questions of birth, parentage, age or relationship. Where these questions are merely incidental and the judgment will simply establish a debt, or a person's liability on a contract, or his proper settlement as a pauper and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death or birth are incidentally inquired of." *Eisenlord v. Clum*, 126 N. Y. 552, 566, 27 N. E. 1024, 12 L. R. A. 836 (1891), per Peckham, J.

Hearsay declarations under the pedigree exception "are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not to cases in which it is only relevant to the issue." *Stephen Dig. of Law of Ev.*, Art. 31, quoted with approval in *People v. Miller*, 63 N. Y. Suppl. 949, 30 Misc. 355, 14 N. Y. Cr. 407 (1900).

The fact moreover, must be one of a genealogical nature, and if such be

the case, will be received, if made by a competent declarant, §§ 2911, 2916, whether the pedigree fact be directly § 2928 *et seq.* or inferentially § 2952 *et seq.* asserted. Where the fact is otherwise neither the extrajudicial declarations of deceased members of the family, whether oral or written *Bowen v. Preferred Acc. Ins. Co.*, 74 N. Y. Suppl. 101, 68 App. Div. 342 (1902); *People v. Miller*, 63 N. Y. Suppl. 949, 30 Misc. (N. Y.) Rep. 355, 14 N. Y. Cr. Rep. 407 (1900); *Haines v. Guthrie*, 13 Q. B. D. 818, 48 J. P. 756, 53 L. J. Q. B. 521, 51 L. T. Rep. (N. S.) 645, 33 Wkly. Rep. 99 (1884), or reputation in the family, *Fidelity Mutual L. Ass'n v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. ed. 922 (1902), are receivable under the pedigree exception.

2. § 2924 and cases cited.

3. *Haines v. Guthrie*, 13 Q. B. D. 818, 48 J. P. 756, 53 L. J. Q. B. 521, 51 L. T. Rep. (N. S.) 645, 33 Wkly. Rep. 99 (1884).

4. *People v. Mayne*, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256 (1897).

5. In *Bowen v. Preferred Accident Ins. Co.*, 68 N. Y. App. Div. 342, 74 N. Y. Suppl. 101 (1902), wherein it was sought to prove the age of the insured by a letter of his deceased brother, the court holding the evidence inadmissible, said: "I think the reason for the rule that makes such testimony admissible in cases of pedigree does not exist in a case

from sound administration. There is surely no logical reason why the nature of the issue involved in a case should govern the admission of evidence. An unsworn statement which is trustworthy, when offered to prove a fact of family history for the purpose of establishing a claim to property by descent, is equally trustworthy when offered for the purpose of establishing, for example, the defense of misrepresentation of age by the insured in an action on a life insurance policy. Moreover, the fundamental basis for the admission of pedigree declarations, namely, necessity, is frequently present in cases in which the issue is other than pedigree. It is significant that in a jurisdiction which purports to be a stronghold of this doctrine, its unfortunate consequences have been avoided by liberally construing what constitutes an issue of genealogy.⁶

§ 2923. (*Administrative Requirements; Issue Must be One of Genealogy*); A Contrary View.—The courts in some jurisdictions maintain a less restricted view of the administrative position of pedigree declarations, relying upon the general principle upon which extrajudicial statements are admitted as an exception to the hearsay rule. In such jurisdictions, declarations of genealogical facts, including facts of family history incidental thereto, are admitted in evidence upon compliance with the administrative requirements¹ without regard to the nature of the issue of the case in which they are offered.² This view finds further support in a

of the kind at bar. Necessity does not require it, the fact to be proved is not marked by such publicity, or is not articulated with other facts, so as to make the falsity of the evidence easy of detection.”

6. In an action by an administratrix to recover funds from a savings bank which had been deposited by the intestate in trust for persons represented to be her children, a declaration of the intestate that she never had any children was held admissible. *Washington v. New York Sav. Bank*, 72 N. Y. Suppl. 752, 65 App. Div. 338 (1901).

§ 2923-1. § 2912 *et seq.*

2. *Indiana*.—*Metropolitan Life Ins.*

Co. v. Lyons (App. 1912), 98 N. E. 824.

Massachusetts.—*North Brookfield v. Warren*, 16 Gray 171 (1860).

Missouri.—*State v. Marshall*, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63 (1896).

Texas.—*Summerhill v. Darrow*, 94 Tex. 71, 57 S. W. 942 (1900); *Primm v. Stewart*, 7 Tex. 178 (1851).

Vermont.—*In re Hurlburt's Est.*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

“It may be laid down, however, as a general rule sustained by the decided weight of authority, especially in this country, that the death of an individual, though disconnected

large number of cases where pedigree declarations have been admitted upon issues which were decidedly not genealogical, but wherein the specific question of the nature of the issue was not discussed.³ This has occurred in controversies involving, for instance, questions of liability on a promissory note,⁴ criminal lia-

with any question of pedigree, and for whatever purpose sought to be established, may be proven by hearsay, subject to the same restrictions that are applicable in cases where matters of pedigree are involved." *Wilson v. Brownlee*, 24 Ark. 586, 589, 91 Am. Dec. 523 (1867).

In an action on a life insurance policy where a defense is that the insured misstated her age when applying for the policy, a witness may properly testify as to the age of the insured from having heard her state her age and from having seen the date of her birth carved on her tombstone, even though the issue is not one of pedigree. *Mut. L. Ins. Co. of N. Y. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286 (1894).

"In England the rule is limited strictly to cases involving pedigree and does not apply to proof of the facts which go to make up pedigree, such as birth, death and marriage, when they have to be proved for other purposes. *Haines v. Guthrie*, L. R. 13 Q. B. 818 (1884). But in this state, and generally in this country, we think, the rule goes further, and you may prove these facts in that manner in any case where they become material." *In re Hurlburt's Est.*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

3. *Alabama*.—*Cherry v. State*, 68 Ala. 29 (1880); *Bain v. State*, 61 Ala. 75 (1878).

California.—*Morrell v. Morgan*, 65 Cal. 575, 4 Pac. 580 (1884).

Colorado.—*Kansas Pac. R. Co. v. Miller*, 2 Colo. 442 (1874).

Georgia.—*Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535 (1874).

Illinois.—*Harwick v. Modern Woodmen of America*, 158 Ill. App. 570 (1910).

Indiana.—*Collins v. Grantham*, 12 Ind. 440 (1859).

Kentucky.—*Traveler's Ins. Co. v. Henderson Cotton Mills*, 120 Ky. 218, 85 S. W. 1090, 27 Ky. Law Rep. 653, 17 Am. St. Rep. 585 (1905); *Whalen v. Nisbet*, 95 Ky. 464, 26 S. W. 188, 16 Ky. L. Rep. 52 (1894).

Michigan.—*Lamoreaux v. Attorney-General*, 89 Mich. 146, 50 N. W. 812 (1891); *Hunt v. Supreme Council, O. of C. F.*, 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855 (1887); *Fraser v. Jennison*, 42 Mich. 206, 235, 3 N. W. 882 (1879).

Minnesota.—*Taylor v. Grand Lodge, A. O. U. W.*, 101 Minn. 72, 111 N. W. 919, 11 L. R. A. (N. S.) 92 n, 118 Am. St. Rep. 606 (1907); *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541 (1892).

New Jersey.—*Rollins v. Atlantic City R. Co.*, 73 N. J. L. 64, 62 Atl. 929 (1905).

North Carolina.—*State v. Best*, 108 N. C. 747, 12 S. E. 907 (1891).

Pennsylvania.—*Watson v. Brewster*, 1 Pa. St. 381 (1845); *Carskadden v. Poorman*, 10 Watts 82, 36 Am. Dec. 145 (1840).

Tennessee.—*Swink v. French*, 11 Lea 78, 47 Am. Rep. 277 (1883); *Ford v. Ford*, 7 Humph. 92 (1846).

Vermont.—*Masons v. Fuller*, 45 Vt. 29 (1872).

Virginia.—*Union Ins. Co. v. Polard*, 94 Va. 146, 26 S. E. 421 (1896).

Wisconsin.—*Hart v. Stickney*, 41 Wis. 630, 22 Am. Rep. 728 (1877).

4. *Collins v. Grantham*, 12 Ind. 440 (1859); *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541 (1892);

bility for selling intoxicants to a minor,⁵ and the like. As has already been indicated,⁶ this view is more in harmony with the spirit and reason of the pedigree exception than the narrower one.

§ 2924. (*Administrative Requirements; Issue Must be One of Genealogy*); Pauper Settlements; Declarations of Pauper.—

In settlement cases, an attempt was made in the early English decisions to establish the admissibility of the statements of a deceased pauper as to his place of birth and residence. It was thought that this might be done as part of the exception relating to pedigree and a favorable ruling was actually made, although by an equally divided court.¹ Later, this case was overruled, the doctrine remaining settled since that time that the declarations of a pauper² or member of his family³ will not be received after their decease regarding the place of birth⁴ or residence of the pauper.⁵ The rule is the same whether the declarations are oral or written.⁶

Difficulty is experienced in discovering the true reason underlying the decisions on this question. The reason assigned, in some instances, is that, in a pauper settlement case, the question at issue is not one of genealogy but purely one of locality.⁷ In other

Watson v. Brewster, 1 Pa. St. 381 (1845).

5. *Cherry v. State*, 68 Ala. 29 (1880); *Bain v. State*, 61 Ala. 75 (1878); *State v. Best*, 108 N. C. 747, 12 S. E. 907 (1891).

6. § 2922.

§ 2924-1. *Rex v. Eriswell*, 3 T. R. 707 (1790).

2. *Rex v. Ferry Frystone*, 2 East 54 (1801).

3. *Connecticut*.—*Union v. Plainfield*, 39 Conn. 563 (1873).

Maine.—*Greenfield v. Camden*, 74 Me. 56 (1882).

Massachusetts.—*Braintree v. Hingham*, 1 Pick. 245 (1822).

New Jersey.—*Independence v. Pompton*, 9 N. J. Law 209 (1827).

Vermont.—*Londonderry v. Andover*, 28 Vt. 416 (1856).

England.—*Rex v. Erith*, 8 East 539 (1807); *Rex v. Chadderton*, 2 East 27 (1801).

4. *Connecticut*.—*Union v. Plainfield*, 39 Conn. 563 (1873) (father).

New Jersey.—*Independence v. Pompton*, 9 N. J. Law 209 (1827) (parents).

Maine.—*Greenfield v. Camden*, 74 Me. 56 (1882).

Massachusetts.—*Wilmington v. Burlington*, 4 Pick. 174 (1826).

England.—*Rex v. Erith*, 8 East 539 (1807).

5. *Braintree v. Hingham*, 1 Pick. (Mass.) 245 (1822); *Londonderry v. Andover*, 28 Vt. 416 (1856); *Rex v. Frystone*, 2 East 54 (1801); *Rex v. Chadderton*, 2 East 27 (1801).

Records, belonging to a town which is a party to the suit, bearing upon the question of the residence of the pauper's ancestry, are competent; they are part of the *res gestae* and partake of the character of declarations made by the town. *Greenfield v. Camden*, 74 Me. 56 (1882).

6. *Rex v. Ferry Frystone*, 2 East 54 (1801).

7. *Union v. Plainfield*, 39 Conn. 563 (1873); *Londonderry v. Andover*, 28

instances, the reason apparently relied on is that the place of birth or residence of a pauper is not a pedigree fact.⁸ Again, there are other decisions wherein the courts specify no reason but simply cite the principle laid down in certain authorities that place of birth and kindred facts relating to family history⁹ are not within the pedigree exception.¹⁰ That the true reason is to be found in the principle that the pedigree exception applies only where the issue in the case is one of genealogy is doubtful in view of the decisions in Maine and Massachusetts. In those jurisdictions, hearsay is not admitted in a pauper settlement case to prove the *place* of birth or residence of a pauper;¹¹ but, in such a case, hearsay is admitted to prove the *date* of a pauper's birth.¹²

A pauper is incompetent to testify concerning the place of his birth.¹³ This follows naturally as a corollary to the main proposition, as the pauper must necessarily, for the most part, rely on statements of others for the source of his information, he acting as a reporting witness. Of course, the circumstance that he was living in a certain place at the date of his earliest recollection and perhaps some other circumstances, may strengthen him in his conclusion. It has also been held that a prior marriage of a pauper's alleged husband could not be shown by declarations of the said husband and the alleged prior wife, the court stating that the marriage was an independent fact not related to a question of pedigree.¹⁴

§ 2925. (*Administrative Requirements; Issue Must be One of Genealogy; Pauper Settlements*); Unsworn Declarations by Third Person.—Declarations by members of the pauper's family have already been treated.¹ Declarations by persons not members

Vt. 416 (1856); *Rex v. Erith*, 8 East 539 (1807).

8. *Braintree v. Hingham*, 1 Pick. (Mass.) 245 (1822); *Independence v. Pompton*, 9 N. J. Law 209 (1827).

9. § 2939.

10. *Adams v. Swansea*, 113 Mass. 591 (1875); *Wilmington v. Burlington*, 4 Pick. (Mass.) 174 (1826).

11. *Greenfield v. Camden*, 74 Me. 56 (1882); *Adams v. Swansea*, 116 Mass. 591 (1875); *Wilmington v. Burlington*, 4 Pick. 174 (1826);

Braintree v. Hingham, 1 Pick. 245 (1822).

12. *Greenfield v. Camden*, 74 Me. 56 (1882); *North Brookfield v. Warren*, 16 Gray (Mass.) 171 (1860).

13. *Reg. v. Rishworth*, 2 Q. B. 476, 1 G. & D. 597, 11 L. J. M. C. 34, 42 E. C. L. 768 (1842); *Reg. v. Lydeard St. Lawrence*, 11 A. & E. 616, 1 G. & D. 191, 6 Jur. 32, 10 L. J. M. C. 147, 39 E. C. L. 333 (1841).

14. *Westfield v. Warren*, 8 N. J. L. 249 (1823).

§ 2925-1, § 2924.

of the family of the pauper, although closely associated so as to possess adequate knowledge of the facts are not admissible in a pauper settlement case to show place of birth² or residence of the pauper. General reputation is likewise incompetent to prove his place of residence.³

§ 2926. (Administrative Requirements; Issue Must be One of Genealogy; Pauper Settlements); Circumstantial Evidence.

— The place of birth or residence of a pauper may be shown by circumstantial evidence.¹ Such proof must, however, be convincing. Slight evidence, for example, as that a child was residing in a certain place when he was four years of age, standing alone, furnishes no presumption that he was born there.² In spite of the circumstance of acquiescence³ of the members of the family in a family record, such record is not admissible to show the place of birth of the pauper.⁴

§ 2927. (Administrative Requirements); Statement Must be One of Fact.— Like the oral testimony for which the unsworn statement is in a sense a substitute, the declaration must be one of fact, an expression of an opinion being inadmissible. For example, the expression of an opinion by a deceased member of the family that a certain relationship existed between two persons cannot be shown.

§ 2928. Scope of Rule; Facts Directly Asserted.— The immediate and primary purpose of an extrajudicial declaration, admissible under the present rule as secondary evidence of the truth of its assertions, is to state a fact of pedigree.¹ The familiar general range of facts admissible in this connection is thus defined in a comparatively early English case: “Declarations of the nature of pedigree, that is to say, of who was related to whom, by what

2. *Wilmington v. Burlington*, 4 Pick. (Mass.) 174 (1826).

3. *Albion v. Maple Lake*, 71 Minn. 503, 74 N. W. 282 (1898).

§ 2926-1. *Greenfield v. Camden*, 74 Me. 56 (1882).

2. *Union v. Plainfield*, 39 Conn. 563 (1873).

3. § 2955 *et seq.*

4. *Union v. Plainfield*, 39 Conn. 563 (1873).

§ 2928-1. The rule allowing hearsay evidence on the issue of pedigree cannot be invoked to show the source of money which it is alleged was received by one member of a family from another member. *Bispham v. Turner*, 83 Ark. 331, 103 S. W. 1135 (1907).

links the relationship was made out, whether it was a relationship of consanguinity or of affinity only, when the parties died, or whether they are actually dead;—everything in short, which is, strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family, by the declarations of deceased persons who, by evidence *de hors* those declarations, have been previously connected with the family respecting which their declarations are tendered.”² The rule is thus seen to have a broad scope. Prominent among facts of genealogy which may be directly asserted in the unsworn declaration of a member of the family, are age,³ birth,⁴ death,⁵ marriage⁶ and relationship.⁷ It may be convenient to examine these facts in the same order.

§ 2929. (Scope of Rule; Facts Directly Asserted); Age.—

The assertion of age may constitute the subject-matter of a pedigree declaration.¹ The form of statement is immaterial in respect to admissibility, as distinguished from probative force. The declaration may be oral or in writing. If brought to the tribunal in written form the latter may be in casual or transitory form,² or, on

2. *Monkton v. Atty.-Gen.*, 2 Russ & M. 147, 156, 11 Eng. Ch. 147 (1831), per Brougham, Ch.

3. § 2929.

4. § 2930.

5. § 2931.

6. § 2932.

7. §§ 2933 *et seq.*

§ 2929-1. *Georgia*.—Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535 (1874).

Indiana.—Collins v. Grantham, 12 Ind. 440 (1859).

Kentucky.—Travelers' Ins. Co. v. Henderson Cotton Mills, 120 Ky. 218, 85 S. W. 1090, 27 Ky. Law Rep. 653, 117 Am. St. Rep. 585 (1905); Woodard v. Spiller, 1 Dana 179, 25 Am. Dec. 139 (1833).

Louisiana.—David v. Sittig, 1 Mart. (N. S.) 147, 14 Am. Dec. 179 (1823).

Michigan.—Hunt v. Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855 (1887).

Nebraska.—Grand Lodge A. O. U. W. v. Bartes, 69 Neb. 631, 96 N. W.

186, 98 N. W. 715 (1904), *vacating* on rehearing, 111 Am. St. Rep. 577 (1903).

New Jersey.—Hancock v. Supreme Council Catholic Benev. Legion, 67 N. J. Law 614, 52 Atl. 301, 69 N. J. Law 308, 55 Atl. 246 (1902).

New York.—Fox's Estate, 30 N. Y. Suppl. 835, 9 Misc. Rep. 661, 62 N. Y. St. Rep. 412 (1894).

Pennsylvania.—Watson v. Brewster, 1 Pa. St. 381 (1845).

Texas.—Smith v. State, (Cr. App.) 73 S. W. 401 (1903).

Compare, Bowen v. Preferred Acc. Ins. Co., 81 N. Y. Suppl. 840, 82 N. Y. App. Div. 458 (1903).

“That this species of evidence must be admitted has always been held, for otherwise a person could not prove his own age; for where no family record is made, he can only show it from the declarations of his parents.” Watson v. Brewster, 1 Pa. St. 381 (1845), per Rogers, J.

2. A leaf taken from a soldier's record book, after his death, containing

the contrary, in one of a solemn nature designed to be permanent,³ e. g., a family Bible.⁴ Such evidence may not be resorted to where better evidence is obtainable.⁵ A person may testify concerning his own age although the testimony is clearly hearsay and the witness simply acts as a reporter of declarations made by others.⁶ A declaration, however, of a deceased person in regard to

the names of the soldier and his wife, and the names, ages and places of birth of all his children, on a printed form designed for use by all soldiers in the British service is admissible in evidence to prove the ages of the children. *Hunt v. Supreme Council O. of C. F.*, 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855 (1887).

A paper kept in the family upon which the neighbors, at the request of the father, had from time to time recorded in lead pencil the births of the children is admissible upon the question of the age of the prosecutrix in a criminal action for inducing a female under the age of eighteen years to leave her father's home for purposes of concubinage. *State v. Neasby*, 188 Mo. 467, 87 S. W. 468 (1905).

3. Admissible hearsay not the best evidence.—The fact that the age of a child appears in the family record, does not make the production of such record obligatory as being the best evidence of the age of the child. The father's testimony on the subject is competent without the production of the record. *Dobson v. Cothran*, 34 S. C. 518, 13 S. E. 679 (1890).

4. *Bertram v. Witherspoon*, 138 Ky. 116, 127 S. W. 533, 22 Am. & Eng. Ann. Cas. 1217 (1910); *Bryant v. McKinney*, 96 S. W. 809, 29 Ky. Law Rep. 951 (1906); *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617 (1905); *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 34 Am. St. Rep. 715, 36 L. R. A. 271 (1896).

Original entries required.—Where the form employed by the declarant

is that of an entry in a family Bible it is necessary for admissibility that the entry should be the original one. Entries copied from one Bible on to the fly-leaf of another will not be received. *Bryant v. McKinney*, 96 S. W. 809, 29 Ky. Law Rep. 951 (1906).

5. A record of a date of birth in a family Bible made about the time of birth by the father of the child is admissible in evidence on the question of age but, when the father is living and in attendance on court, he must be called to testify in regard to the time of making the entry. *Bigliben v. State*, (Tex. Cr. App. 1912) 151 S. W. 1044. See, also, *State v. Miller*, 71 Kan. 200, 80 Pac. 51 (1905).

Entries in the family Bible made by a mother are inadmissible when she is present in court. *Rowan v. State*, 57 Tex. Cr. Rep. 625, 124 S. W. 668 (1910).

Entries in a family Bible are inadmissible on the question of the date of a person's birth where the mother of such person is living and within reach of the process of the court. *Campbell v. Wilson*, 23 Tex. 252, 76 Am. Dec. 67 (1859).

6. *California*.—*People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896); *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. 580 (1884).

Georgia.—*Central R. Co. v. Coggin*, 73 Ga. 689 (1884).

Kansas.—*State v. Miller*, 71 Kan. 200, 80 Pac. 51 (1905); *State v. McClain*, 49 Kan. 730, 31 Pac. 790 (1892).

Massachusetts.—*Com. v. Stevenson*, 142 Mass. 466, 8 N. E. 341 (1886);

his own age will not be admitted if made under circumstances indicating strong self-interest.⁷

§ 2930. (*Scope of Rule; Facts Directly Asserted*); Birth.—Birth, a genealogical fact closely connected with age, is equally prominent as a subject of pedigree declarations.¹ It may be proved

Hill v. Eldridge, 126 Mass. 234 (1879).

Michigan.—*Cheever v. Congdon*, 34 Mich. 296 (1876).

Minnesota.—*Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541 (1892).

Montana.—*State v. Bowser*, 21 Mont. 133, 53 Pac. 179 (1898).

New York.—*Koester v. Rochester Candy Works*, 194 N. Y. 92, 87 N. E. 77, 19 L. R. A. (N. S.) 783 (1909).

North Carolina.—*State v. Best*, 108 N. C. 747, 12 S. E. 907 (1891).

Oklahoma.—*Stevens v. Elliott*, 30 Okla. 41, 118 Pac. 40 (1911).

Texas.—*Vaughn v. State*, (Cr. App. 1911) 136 S. W. 476.

Washington.—*State v. Rackich*, 66 Wash. 390, 119 Pac. 843 (1911).

West Virginia.—*State v. Cain*, 9 W. Va. 559 (1876).

Wisconsin.—*Loose v. State*, 120 Wis. 115, 97 N. W. 526 (1903).

"The date of a person's birth may be testified to by himself or by the members of his family, although he must, and they may, know the fact only by hearsay based on family tradition. No rule is better established than this one; and when it is shown that the witness is a member of the family of the person whose age is the subject of inquiry, the presumption obtains that the witness is competent without laying any foundation therefor; but on cross-examination it may be shown that, although a member of the family and *prima facie* qualified to testify as to age or pedigree, the witness is not qualified, either because he has no knowledge in fact on the question involved, from not having

heard it discussed, or that his opportunities for obtaining knowledge on the question have been insufficient to make him a competent witness." *Grand Lodge A. O. U. W. v. Bartes*, 69 Neb. 631, 634, 98 N. W. 715, 111 Am. St. Rep. 577 (1904), per Duffie, C.

7. *Doe v. Ford*, 3 U. C. Q. B. 352 (1847).

§ 2930-1. *Kansas*.—*Smith v. Brown*, 8 Kan. 608 (1871).

Maine.—*Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615 (1884).

Maryland.—*Copes v. Pearce*, 7 Gill 247 (1848).

Minnesota.—*Houlton v. Manteuffel*, 51 Minn. 185 (1892); *Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12 (1891).

Nebraska.—*Grand Lodge A. O. U. W. v. Bartes*, 69 Neb. 636, 98 N. W. 715, 111 Am. St. Rep. 577 (1904), *vacating* on rehearing, 69 Neb. 631, 96 N. W. 486 (1903).

Pennsylvania.—*American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875).

Tennessee.—*Swink v. French*, 11 Lea 78, 42 Am. Rep. 277 (1883).

Texas.—*Mutual Reserve Life Ins. Co. v. Jay*, (Civ. App. 1907) 101 S. W. 545; *Smith v. State*, (Cr. App. 1903) 73 S. W. 401.

Vermont.—*Derby v. Salem*, 30 Vt. 722 (1858).

United States.—*Branch v. Texas Lumber Mfg. Co.*, 56 Fed. 707, 6 C. C. A. 92 (1893). But see *Albertson v. Robeson*, 1 Dall. (U. S.) 9, 1 L. ed. 14 (1764).

England.—*In re Thompson*, 12 P. D. 100, 56 L. J. P. & Adm. 46, 57 L.

by a statement of a deceased member of the family, although a record in a family register of births is not produced or its absence accounted for.² In case of a record the entry need not be contemporaneous with the birth itself.³ Birth may also be proved by general repute in the family,⁴ or the declarations of a member of the family may be received after his decease in proof of the date of his birth.⁵ Hearsay of any nature is, however, incompetent to prove illegitimate a child born in lawful wedlock.⁶

§ 2931. (Scope of Rule; Facts Directly Asserted); Death.—

Death, in the same way, is a fact frequently established by the secondary evidence of extrajudicial statements relating to pedigree.¹

T. Rep. (N. S.) 373, 35 Wkly. Rep. 384 (1887); Haines v. Guthrie, 13 Q. B. D. 818, 48 J. P. 756, 53 L. J. Q. B. 521, 51 L. T. Rep. (N. S.) 646, 33 Wkly. Rep. 99 (1884); Vulliamy v. Huskisson, 2 Jur. 656, 3 Y. & Coll. 80 (1838); Goodright v. Moss, 2 Cowp. 591 (1777).

Declarations of deceased parents as to place of birth and baptism of child are inadmissible. Rider v. Malbon, 8 L. J. M. C. (O. S.) 127 (1830). Likewise a family record is not competent to prove place of birth. Currie v. Stairs, 25 N. Brunsw. 4 (1885) (see discussion of this question, § 2939).

2. Clements v. Hunt, 1 Jones (N. C.) Law 400 (1854).

3. Swift & Co. v. Rennard, 119 Ill. App. 173 (1905).

4. Luke v. Hill, 137 Ga. 159, 73 S. E. 345, 38 L. R. A. (N. S.) 559 n. (1911).

5. Taylor v. Grand Lodge A. O. U. W. of Minnesota, 101 Minn. 72, 111 N. W. 919, 11 L. R. A. (N. S.) 92 n., 118 Am. St. Rep. 606 (1907).

6. Craufurd v. Blackburn, 17 Md. 49, 77 Am. Dec. 323 (1860); Watts v. Owens, 62 Wis. 512, 22 N. W. 720 (1885); Goodright v. Moss, 2 Cowp. 591 (1777).

§ 2931-1. *California*.—Anderson v. Parker, 6 Cal. 197 (1856).

Illinois.—Stumpf v. Osterhage, 111 Ill. 82 (1884).

Kansas.—Smith v. Brown, 8 Kan. 608 (1871).

Maryland.—Copes v. Pearce, 7 Gill. 247 (1848); Raborg v. Hammond, 2 Harr. & G. 42 (1827).

Michigan.—Van Sickle v. Gibson, 40 Mich. 170 (1879).

Minnesota.—Dawson v. Mayall, 45 Minn. 408, 48 N. W. 12 (1891).

Mississippi.—Spears v. Burton, 31 Miss. 547 (1856).

New Hampshire.—Morrill v. Foster, 33 N. H. 379 (1856).

New York.—Hunt v. Johnson, 19 N. Y. 279 (1859).

Pennsylvania.—American L. Ins., etc., Co. v. Rosenagle, 77 Pa. St. 507 (1875).

Texas.—Kirby v. Boaz, 121 S. W. 223 (1909), *affirmed* 131 S. W. 533; Kirby v. Hayden, 44 Tex. Civ. App. 207, 99 S. W. 746 (1907); Lord v. New York L. Ins. Co., 27 Tex. Civ. App. 139, 65 S. W. 699 (1901); Davidson v. Wallingford, 88 Tex. 619, 32 S. W. 1030 (1895).

Vermont.—Mason v. Fuller, 45 Vt. 29 (1872).

Wisconsin.—Du Pont v. Davis, 30 Wis. 170 (1872).

§ 2931a. (Scope of Rule; Facts Directly Asserted); Identity.—The declarations of deceased members of the family may establish the identity of a particular person connected therewith by blood or marriage.¹ A decedent's declarations are equally admissible for the purpose of establishing his own identity.² Facts stated for purposes of identification in this connection must have a clear tendency to establish it.³

Names.—As a means of identification, and for other purposes, the declarant may state the names of members of the family.⁴

§ 2932. (Scope of Rule; Facts Directly Asserted); Marriage.—Among the most critically important and frequently controverted genealogical facts covered by extrajudicial statements of members of the family is that of marriage.¹ Not only may the

United States.—Branch v. Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92 (1893); Lewis v. Marshall, 5 Pet. 470, 8 L. ed. 195 (1831).

England.—*In re Thompson*, 12 P. D. 100, 56 L. J. P. & Adm. 46, 57 L. T. Rep. (N. S.) 373, 35 Wkly. Rep. 384 (1887).

A recital in a deed that the grantor, a woman shown to have been at one time married, was a widow is competent in proof of her husband's death. Harman v. Stearns, 95 Va. 58, 27 S. E. 601 (1897).

§ 2931a-1. Cuddy v. Brown, 78 Ill. 415 (1875); Kirby v. Boaz, (Tex. Supreme Ct. 1910) 131 S. W. 533; Cox v. Brice, 159 Fed. 378, 86 C. C. A. 378 (1908). See, also, Keck v. Woodward, 53 Tex. Civ. App. 267, 116 S. W. 75 (1909).

Where there was testimony that a deceased intestate had at one time during his life changed his name, it was proper to admit, on the question of identity, declarations of the deceased that he had killed a man, fled the country and was going to change his name. Howard v. Russell, 75 Tex. 171, 12 S. W. 525 (1889).

2. Malone v. Adams, 113 Ga. 791, 39 S. E. 507, 84 Am. St. Rep. 259 (1901); Wise v. Wynn, 59 Miss. 588,

42 Am. Rep. 281 (1882); Young v. State, 36 Or. 417, 59 Pac. 812, 60 Pac. 711, 47 L. R. A. 548 (1900).

3. Welch v. Lynch, 30 App. D. C. 122 (1907).

4. Kirby v. Hayden, 44 Tex. Civ. App. 207, 99 S. W. 746 (1907).

§ 2932-1. California.—Pearson v. Pearson, 46 Cal. 609 (1873).

Colorado.—Kansas Pac. R. Co. v. Miller, 2 Colo. 442 (1874).

District of Columbia.—Jennings v. Webb, 8 App. Cas. 43 (1896).

Kansas.—Shorten v. Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587 (1895); Smith v. Brown, 8 Kan. 608 (1871).

Kentucky.—Dannelli v. Dannelli, 4 Bush 51 (1868).

Maine.—Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615 (1884).

Maryland.—Jackson v. Jackson, 80 Md. 176, 30 Atl. 752 (1894); Barnum v. Barnum, 42 Md. 251 (1875); Craufurd v. Blackburn, 17 Md. 49, 77 Am. Dec. 323 (1860).

Minnesota.—Dawson v. Mayall, 45 Minn. 408, 48 N. W. 12 (1891).

Mississippi.—Spears v. Burton, 31 Miss. 547 (1856); Henderson v. Car-gill, 31 Miss. 367 (1856).

New Jersey.—Westfield v. Warren, 8 N. J. Law 249 (1826).

New York.—Eisenlord v. Clum, 126

fact of marriage itself be properly stated by any competent observer as part of the life history of a given member of the family, but the extrajudicial declarations of a deceased member of the family, including the husband² and wife³ in the alleged marriage will be received on the point. The opinion of a witness as to whether certain persons were married will not, however, be admitted.⁴

Nor where the question for determination is whether a marriage existed or not, will the declarations of one of the parties to the alleged marriage, who has since deceased, to the effect that no marriage existed be received.⁵ A sufficient reason for this rule is found in the fact that the declarant is presented to the court as unrelated to the family,⁶ hence, according to the proponent's own view, he lacked an important qualification necessary to make his statements admissible under the pedigree exception.⁷ Other facts, dependent upon or closely connected with marriage itself, as whether there has or has not been a failure of issue⁸ born of the marriage may be stated by a qualified declarant as being a fact of pedigree.

N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836 (1891); *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877); *Alexander v. Chamberlin*, 1 Thomps. & C. 600 (1873).

Pennsylvania.—*American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875).

Texas.—*Summerhill v. Darrow*, 94 Tex. 71, 57 S. W. 942 (1900).

United States.—*Jewell v. Jewell*, 1 How. 219, 11 L. ed. 108 (1843).

England.—*Doe v. Davies*, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314 (1847).

Canada.—*Walker v. Murray*, 5 Ont. 638 (1884).

2. *Kansas* Pac. R. Co. v. *Miller*, 2 Colo. 442 (1874); *Robb v. Robb*, 20 Ont. 591 (1891).

3. *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877); *Walker v. Murray*, 5 Ont. 638 (1884).

Cohabitation need not first be shown to admit declarations establishing a marriage. *Copes v. Pearce*, 7 Gill (Md.) 247, 263 (1848).

4. *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894).

5. *California*.—*Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008 (1899).

Minnesota.—*Hulett v. Cary*, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419 (1896).

New Jersey.—*Hubatka v. Maierhoffer*, 81 N. J. Law 410, 79 Atl. 346 (1911).

Pennsylvania.—*Hill v. Hill's Adm'r*, 32 Pa. St. 511 (1859).

Wisconsin.—*Thompson v. Nims*, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847 (1892).

6. *Estate of James*, 124 Cal. 553, 57 Pac. 578, 1008 (1899).

7. §§ 2911, 2916.

8. *Thomas v. Frederick County School*, 7 Gill & J. (Md.) 369 (1835); *Washington v. New York Sav. Bank*, 171 N. Y. 166, 63 N. E. 831, 89 Am. St. Rep. 800 (1902); *People v. Fulton F. Ins. Co.*, 25 Wend. (N. Y.) 205 (1840); *Roscommon's Claim*, 6 Cl. & F. 97, 7 Eng. Reprint 634 (1828).

Legitimacy.—Various facts connected with parentage may form the subject of a pedigree declaration.⁹ Chief, perhaps, among these facts is that of legitimacy. A husband may properly declare regarding the legitimacy of his wife.¹⁰ Of any particular child it may be asserted, by any qualified declarant that he was born in wedlock and, consequently, is legitimate.¹¹

Illegitimacy stands in a somewhat different administrative position. While the matter is a perfectly proper one as the subject of a pedigree declaration,¹² it can scarcely be regarded as one which

9. *Elder v. State*, 124 Ala. 69, 27 So. 305 (1899); *Rowland v. Ladiga*, 21 Ala. 9 (1852); *Chilvers v. Race*, 196 Ill. 71, 63 N. E. 701 (1902).

10. *Vowles v. Young*, 13 Ves. 140 (1806).

11. *California.*—*Pearson v. Pearson*, 46 Cal. 609 (1873).

Kentucky.—*Dannelli v. Dannelli*, 4 Bush. 51 (1868).

Maine.—*Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615 (1884).

New York.—*Caujolle v. Ferrie*, 26 Barb. 177, *affirmed* 23 N. Y. 90 (1857).

North Carolina.—*Rollins v. Wicker*, 154 N. C. 559, 70 S. E. 934 (1911).

Rhode Island.—*Viall v. Smith*, 6 R. I. 417 (1860).

England.—*In re Turner*, 29 Ch. D. 985, 53 L. T. Rep. (N. S.) 528 (1885); *Vowles v. Young*, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247 (1806).

12. *Maine.*—*Northrop v. Hale*, 76 Me. 306, 45 Am. Rep. 615 (1884).

Maryland.—*Barnum v. Barnum*, 42 Md. 251 (1875); *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323 (1860).

Massachusetts.—*Haddock v. Boston, etc., R. Co.*, 3 Allen 298, 81 Am. Dec. 656 (1862).

Rhode Island.—*Viall v. Smith*, 6 R. I. 417 (1860).

Texas.—*Nunn v. Mayes*, 9 Tex. Civ. App. 366, 30 S. W. 479 (1895).

Wisconsin.—*Smith v. Smith*, 140 Wis. 599, 123 N. W. 146 (1909).

England.—*Re Perton*, 53 L. T. Rep.

(N. S.) 707 (1885); *Murray v. Milner*, 12 Ch. D. 845, 48 L. J. Ch. 775, 41 L. T. Rep. (N. S.) 213, 27 Wkly. Rep. 881 (1879); *Vowles v. Young*, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247 (1806).

The declarations of a deceased wife are admissible to prove the birth of a natural brother. *Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052 n. (1907).

Own illegitimacy.—The statement of a deceased member of the family that he is himself illegitimate is regarded as competent. *Re Perton*, 53 L. T. Rep. (N. S.) 707 (1885).

Wife's family.—A pedigree statement may properly relate to the illegitimacy of a member of his wife's family. The declarations of the deceased husband of a legitimate daughter that the mother of the daughter had an illegitimate child, born before her marriage are competent to prove the relation of parent and child. *Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052 n. (1907).

The declaration of a deceased husband that the father and mother of his wife were never married is competent on an issue of genealogy. "He does not appear to have named the person from whom he derived his information, nor to have stated that his knowledge was derived from the general understanding and reputation in his wife's family. But the knowledge of events of this description

is sure to be the topic for free and general discussion among members of the family.¹³ As is intimated elsewhere,¹⁴ the probative force of hearsay declarations regarding pedigree is largely dependent upon this primary discussion. Whether in any particular instance these and similar considerations reduce the evidentiary power of a pedigree declaration below the point at which the jury would be justified in acting in accordance with it, presents a question of administration. Under appropriate circumstances, the declarations have therefore been rejected.¹⁵ The decisions treating of the admission of pedigree declarations in which the element of illegitimate relationship appears in some form have caused some confusion, due principally to a failure to discriminate between the various states of facts;¹⁶ but it is clear that, where a relationship is acknowledged and only its legitimacy is questioned, declarations of members of the family tending to show the nature of the relationship, whether legitimate or illegitimate, are admissible.¹⁷

Statements by parents.—In the majority of cases the declarations of the putative father as to the illegitimacy of his child are received,¹⁸ while no dispute exists that those of the mother¹⁹ re-

most generally exists in every family, and hence the declarations of one of its members is admissible, although he does not mention the source from which he derived his information; and such declarations are equally admissible whether his connection with the family is by blood or marriage." *Jewell v. Jewell*, 1 Howard (U. S.) 219, 231 (1843), per Taney, C. J.

13. The *esprit de corps*, the common interest that only persons entitled to belong to the family should share in its traditions, its privileges and responsibilities, form, as is generally recognized, an important guaranty for truth in this connection. It is felt that in case of an illegitimate birth in the family, much of this guaranty is lost, feelings of delicacy and family pride uniting to suppress discussion of the topic.

14. § 2915.

15. *Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.)

1052 n. (1907); *Orthwein v. Thomas* (Ill. 1887) 13 N. E. 564; *Crispin v. Doglioni*, 32 L. J. P. & M. 109, 8 L. T. Rep. (N. S.) 91, 3 Swab. & Tr. 44, 11 Wkly. Rep. 500 (1863); *Doe v. Barton*, 2 M. & Rob. 28 (1837); *Goodright v. Moss*, 2 Cowp. 591 (1777).

The technical objection that, under the common law position of the bastard, he is not a member of his father's family has sufficed to exclude the pedigree declaration on the subject by the members of that family. *Crispin v. Doglioni*, 3 Sw. & Tr. 44 (1863).

16. See § 2911.

17. *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323 (1860); *State v. McDonald*, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444 (1910); *Murray v. Milner*, L. R. 12 Ch. D. 849, 48 L. J. Ch. 775, 41 L. T. 213, 27 W. R. (1879). See, also, *Flora v. Anderson*, 75 Fed. 217 (1896).

18. *Alston v. Alston*, 114 Iowa 29,

garding the illegitimacy of the alleged bastard are competent, except where the child was born in lawful wedlock.²⁰

§ 2933. (*Scope of Rule; Facts Directly Asserted*); Relationship.—The steps or links constituting the family relationship in any given case may properly be stated in the extrajudicial pedigree declaration of any competent declarant.¹ The general relationship of A. to the other members of his family² may be stated in this way.³ The assertion of a specific relation to the family is

86 N. W. 55 (1901); *Watson v. Richardson*, 110 Iowa 673, 80 N. W. 416, 80 Am. St. Rep. 331 (1899); *Niles v. Sprague*, 13 Iowa 198 (1862); *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894).

19. *Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052 n. (1907); *Niles v. Sprague*, 13 Iowa 198 (1862); *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894); *Barnum v. Barnum*, 42 Md. 251 (1875); *Haddock v. R. Co.*, 3 Allen (Mass.) 298, 81 Am. Dec. 656 (1862).

20. *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 322 (1860); *Watts v. Owens*, 62 Wis. 512, 22 N. W. 720 (1885); *Goodright v. Moss*, 2 Cowp. 591 (1777).

§ 2933-1. *Maryland*.—*Copes v. Pearce*, 7 Gill 247 (1848).

Minnesota.—*Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12 (1891).

New York.—*Matter of Fails*, 107 N. Y. Suppl. 224, 56 Misc. 217 (1907); *Arents v. Long Island R. Co.*, 156 N. Y. 1, 50 N. E. 422 (1898).

Texas.—*Kirby v. Hayden*, 44 Tex. Civ. App. 207, 99 S. W. 746 (1907); *Gorham v. Settegast*, 42 Tex. Civ. App. 254, 98 S. W. 665 (1906); *Wren v. Howland*, 33 Tex. Civ. App. 87, 75 S. W. 894 (1903).

United States.—*Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1886).

2. *Wiess v. Hall*, (Tex. Civ. App. 1911) 135 S. W. 384.

Legitimate relationship presumed.—

A declaration concerning relationship is presumed to refer to a legitimate relationship in the absence of anything to indicate the contrary. *Smith v. Tebbitt*, L. R. 1 P. & D. 354 (1867).

3. *Arkansas*.—*Kelly v. McGuire*, 15 Ark. 555 (1855).

California.—*In re Heaton*, 135 Cal. 385, 67 Pac. 321 (1902); *Woolsey v. Williams*, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 67 (1900).

Connecticut.—*Chapman v. Chapman*, 2 Conn. 347, 7 Am. Dec. 277 (1817).

District of Columbia.—*Jennings v. Webb*, 8 App. Cas. 43 (1896).

Iowa.—*Alston v. Alston*, 114 Iowa 29, 86 N. W. 55 (1901).

Kansas.—*Smith v. Brown*, 8 Kan. 608 (1871).

Maryland.—*Barnum v. Barnum*, 42 Md. 251 (1875); *Jones v. Jones*, 36 Md. 447, 11 Am. Rep. 505 (1872).

Massachusetts.—*Butrick v. Tilton*, 155 Mass. 461, 29 N. E. 1088 (1892).

Minnesota.—*Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12 (1891).

New York.—*Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877).

Pennsylvania.—*Sitler v. Gehr*, 105 Pa. St. 577, 51 Am. Rep. 207 (1884).

Texas.—*Louder v. Schluter*, 78 Tex. 103, 14 S. W. 205, 207 (1890).

United States.—*Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1886); *Blackburn v. Crawford*, 3 Wall. 175, 18 L. ed. 126 (1860).

as admissible as one of a more general nature. No limitation is imposed that the statement of relationship should be made concerning the particular branch of the family to which the declarant belongs. The assertion may cover any branch, direct or collateral, of the entire family to which the declarant is related, either by blood or marriage. Thus, where it is sought to prove relationship between A. and B., it is not necessary to show that the declarant was related to both. It is sufficient to show that he was related to either.⁴ The soundness of this rule has been questioned in cases involving a claim to property. It has been intimated rather strongly in such cases that relationship of the declarant to the claimant is insufficient; but that relationship of the declarant to the person whose property is claimed or to the latter's family must be shown.⁵ That is to say that, while it is never necessary to show that the declarant was related to both parties, relationship to that family to which the person from whom the property descends belonged is absolutely essential. Furthermore, the case of *Blackburn v. Crawford*,⁶ decided by the United States Supreme Court, seems to hold this clearly. In that case, it was decided that the declarations of an aunt of the claimants were inadmissible to prove a marriage of the claimants' mother with a member of the family to which the person whose property was in question belonged; but

England.—*Gee v. Ward*, 7 E. & B. 509, 3 Jur. N. S. 692, 5 Wkly. Rep. 579, 90 E. C. L. 509 (1856).

Canada.—*Walker v. Murray*, 5 Ont. 638 (1884).

4. In *re Hartman's Estate*, 157 Cal. 206, 107 Pac. 105, 36 L. R. A. (N. S.) 530 n. (1910); *Gehr v. Fisher*, 143 Pa. St. 311, 22 Atl. 859 (1891); *Sitler v. Gehr*, 105 Pa. St. 577, 51 Am. Rep. 207 (1884); *Overby v. Johnston*, 42 Tex. Civ. App. 348, 94 S. W. 131 (1906); *Monkton v. Atty.-Gen.*, 2 Russ & M. 147, 11 Eng. Ch. 147, 39 Eng. Reprint 350 (1831). See, also, *Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26 (1906).

A petitioner for distribution of the estate of an intestate may testify concerning declarations of her deceased father to the effect that the

intestate was his sister, without extrinsic preliminary proof of the relationship of such declarant to the intestate. In *re Clark's Est.*, 13 Cal. App. 786, 110 Pac. 828 (1910).

5. *District of Columbia.*—See *Welch v. Lynch*, 30 App. Cas. 122 (1907).

Mississippi.—*Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381 (1882).

New York.—*Layton v. Kraft*, 111 App. Div. 842, 98 N. Y. Suppl. 72, 18 N. Y. Am. Cas. 228 (1906); *Young v. Shulenberg*, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730 (1901).

United States.—*Fulkerson v. Holmes*, 117 U. S. 389, 29 L. ed. 915 (1886).

Canada.—*Doe v. Servos*, 5 U. C. Q. B. (O. S.) 284, 289 (1849).

6. 3 Wall. (U. S.) 175, 18 L. ed. 186 (1865).

it should be noticed that the fact of the relationship between the declarant and the claimants was not mentioned and, apparently, not considered, counsel for the claimants relying on the fact that the declarant was the sister of the alleged wife. In harmony with this decision is a recent New York case,⁷ holding that declarations concerning the relationship of the declarant, who was the deceased mother of the claimant, to a person who died leaving the property in question were improperly admitted, as no proof *aliunde* the declarations had been given concerning such relationship. The clear weight of reason and authority, however, favors the rule as laid down. It must be conceded under the general rule concerning pedigree declarations⁸ that if X. and Y. are related, and X., in the presence of Y., makes statements concerning their relationship with Z., Y. may testify as to those statements after the death of X. This being the case, to exclude testimony of that character because Z. happens to be an important and prominent member of the family with perhaps wealth and a title, seems highly unreasonable. Furthermore, if the relationship of the declarant to both the claimant and the person from whom the property descends is established by proof outside the declarations, there remains no need for introducing the declarations, as the relationship sought to be shown is already made out.

§ 2934. (Scope of Rule; Facts Directly Asserted; Relationship); Direct Ascending.—The relationship covered by the extrajudicial pedigree statement may be one in the direct ascending line, either by blood or marriage. It may, as related by blood, be that of father¹ or mother,² grandfather³ or grandmother. Relationships by marriage may also cover that of father-in-law⁴ or mother-in-law.⁵

7. *Aalholm v. People*, (N. Y. App. Div. 1913) 142 N. Y. Suppl. 926.

8. § 2911.

§ 2934-1. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882 (1879); *Wiess v. Hall*, (Tex. Civ. App. 1911) 135 S. W. 384; *Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. 71 (1893); *Derby v. Salem*, 30 Vt. 722 (1858); *Walker v. Murray*, 5 Ont. 638 (1884).

2. *Wren v. Howland*, 33 Tex. Civ.

App. 87, 75 S. W. 894 (1903); *Doe v. Davies*, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314 (1847); *Walker v. Murray*, 5 Ont. 638 (1884).

3. *South Hampton v. Fowler*, 54 N. H. 197 (1874); *Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. 71 (1893).

4. *Jewell v. Jewell*, 1 How. (U. S.) 219, 11 L. ed. 108 (1843).

5. *Jewell v. Jewell*, 1 How. (U. S.) 219, 11 L. ed. 108 (1843).

§ 2935. (*Scope of Rule; Facts Directly Asserted; Relationship*); Direct Descending.—The pedigree declaration may, on the other hand, cover a relationship properly designated as direct descending. Among such connections may be that of child¹ or grandchild.²

§ 2936. (*Scope of Rule; Facts Directly Asserted; Relationship*); Collateral Descending.—The designated relationship covered by the extrajudicial pedigree statement may be a collateral one. It may be collateral ascending or collateral descending. In the ascending collateral relationships, are those of uncle¹ or aunt.

§ 2935-1. *Alabama*.—Elder v. State, 124 Ala. 69, 27 So. 305 (1899).

California.—In re Heaton, 135 Cal. 385, 67 Pac. 321 (1902); Pearson v. Pearson, 46 Cal. 609 (1873).

District of Columbia.—Green v. Normant, 5 Mackey 80 (1886).

Georgia.—Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535 (1874).

Illinois.—Chilvers v. Race, 196 Ill. 71, 63 N. E. 701 (1879).

Indiana.—Collins v. Grantham, 12 Ind. 440 (1859).

Kentucky.—Dannelli v. Dannelli, 4 Bush. 51 (1868); Woodard v. Spiller, 1 Dana 179, 25 Am. Dec. 139 (1833).

Louisiana.—David v. Sittig, 1 Mart. (N. S.) 147, 14 Am. Dec. 179 (1823).

Maine.—Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615 (1884).

Maryland.—Barnum v. Barnum, 42 Md. 251 (1875); Raborg v. Hammond, 2 Harr. & G. 42 (1827).

Massachusetts.—Haddock v. Boston, etc., R. Co., 3 Allen 298, 81 Am. Dec. 656 (1862).

Michigan.—Hunt v. Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855 (1887).

New York.—Arents v. Long Island R. Co., 156 N. Y. 1, 50 N. E. 422 (1898); Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836 (1891); Caujolle v. Ferrie, 26 Barb. 177, affirmed 23 N. Y. 90 (1857).

Pennsylvania.—Sitler v. Gehr, 105

Pa. St. 557, 51 Am. Rep. 207 (1884); Watson v. Brewster, 1 Pa. St. 381 (1845).

Rhode Island.—Viall v. Smith, 6 R. I. 417 (1860).

Texas.—Wren v. Howland, 33 Tex. Civ. App. 87, 75 S. W. 894 (1903).

United States.—U. S. v. Sanders, 27 Fed. Cas. No. 16,220, Hempt. 483 (1806).

England.—In re Thompson, 12 P. D. 100, 56 L. J. P. & Adm. 46, 57 L. T. Rep. (N. S.) 373, 35 Wkly. Rep. 384 (1887); In re Turner, 29 Ch. D. 985, 53 L. T. Rep. (N. S.) 528 (1885); Murray v. Millner, 12 Ch. D. 845, 48 L. J. Ch. 775, 41 L. T. Rep. (N. S.) 213, 27 Wkly. Rep. 881 (1879); Goodright v. Moss, 2 Cowp. 591 (1777).

Canada.—Walker v. Murray, 5 Ont. 638 (1884); Wallbridge v. Jones, 33 U. C. Q. B. 613 (1873).

2. *District of Columbia*.—Green v. Normant, 5 Mackey 80 (1886).

Maryland.—Barnum v. Barnum, 42 Md. 251, 304 (1875).

United States.—Branch v. Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92 (1893).

England.—Gee v. Ward, 7 E. & B. 509, 3 Jur. (N. S.) 692, 5 Wkly. Rep. 579, 90 E. C. L. 509 (1856).

Canada.—Wallbridge v. Jones, 33 U. C. Q. B. 613 (1873).

§ 2936-1. Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882 (1879).

Among collaterally descending relationships connected with the speaker are those of nephew² or niece.³

§ 2937. (*Scope of Rule; Facts Directly Asserted; Relationship*); Relationship of Declarant.—While the fact of membership in a given family cannot be satisfactorily proved by the unaided extrajudicial statement of the person in question,¹ but must,

2. California.—Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351 (1909) (statute).

Maine.—Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615 (1884).

New York.—*In re Fail's Will*, 107 N. Y. Suppl. 224, 56 Misc. Rep. 217 (1907).

North Carolina.—Moffit v. Witherspoon, 32 N. C. 185 (1849).

England.—Jamieson v. Mill, 1 Jur. 790 (1837).

3. Malone v. Adams, 113 Ga. 791, 39 S. E. 507, 84 Am. St. Rep. 259 (1901); **Moffit v. Witherspoon**, 32 N. C. 185 (1849).

§ 2937-1. California.—Woolsey v. Williams, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 67 (1900).

District of Columbia.—Jennings v. Webb, 8 App. Cas. 43 (1896); **Green v. Norment**, 5 Mackey (16 D. C.) 80 (1886); **Anderson v. Smith**, 2 Mackey (13 D. C.) 275 (1883).

Georgia.—Green v. Almand, 111 Ga. 735, 36 S. E. 957 (1900).

Illinois.—Cuddy v. Brown, 78 Ill. 415 (1875).

Kentucky.—Dupouster v. Gagani, 84 Ky. 403, 1 S. W. 652, 8 Ky. Law Rep. 392 (1886).

Maryland.—Jackson v. Jackson, 80 Md. 176, 30 Atl. 752 (1894).

Michigan.—Lamoreaux v. Att.-Gen., 89 Mich. 146, 50 N. W. 812 (1891).

Mississippi.—Wise v. Wynn, 59 Miss. 588, 42 Am. Rep. 381 (1882).

Missouri.—Vantine v. Butler, 240 Mo. 521, 144 S. W. 807, 39 L. R. A. (N. S.) 1177 (1912).

New Hampshire.—Emerson v. White, 29 N. H. 482 (1854).

Oregon.—Thompson v. Woolf, 8 Ore. 454 (1880).

Texas.—Wallace v. Howard, (Civ. App. 1895) 30 S. W. 711; **Nunn v. Mayes**, 9 Tex. Civ. App. 366, 30 S. W. 479 (1895).

United States.—Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1886); **Blackburn v. Crawfords**, 3 Wall. 175, 18 L. ed. 186 (1865).

England.—Smith v. Tebbitt, L. R. 1 P. 354, 36 L. J. P. & M. 35, 15 L. T. Rep. (N. S.) 594, 15 Wkly. Rep. 562 (1867); **Doe v. Davies**, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314 (1847); **Davies v. Lowndes**, 12 L. J. Exch. 506, 6 M. & G. 471, 7 Scott N. R. 141, 188, 46 E. C. L. 471 (1843).

Canada.—Doe v. Servos, 5 U. C. Q. B. (O. S.) 284 (1849).

"This evidence is primarily addressed to the presiding justice, who, before admitting the declarations, must be satisfied that a *prima facie* case of the requisite relationship has been made out. . . . And the facts shown, the birth, place of birth, the bringing up and the name of the appellant, are ample *prima facie* evidence of relationship to warrant the admission of the declaration mentioned." **Northrop v. Hale**, 76 Me. 306, 309, 49 Am. Rep. 615 (1884), per Virgin, J..

"Otherwise evidence to support a case of this kind might be got up on the declaration of the merest stranger, first receiving his declaration to establish the supposed relationship, which alone would make his declaration of any weight, and then

on the contrary, be established, in the absence of an admission,² by some evidence, either direct³ or circumstantial,⁴ to the satisfaction of the presiding judge⁵ outside the declaration itself,⁶ the

receiving his declaration as to the principal fact." *Doe d. Dunlap v. Servos*, 5 U. C. Q. B. (O. S.) 284, 289 (1849), per Robinson, C. J.

2. In *re Clark's Estate*, 13 Cal. App. 786, 110 Pac. 828 (1910); *Wren v. Howland*, 33 Tex. Civ. App. 87, 75 S. W. 894 (1903).

3. *Pierce v. Jacobs*, 7 Mackey, (18 D. C.) 489 (1887); *Backdahl v. Grand Lodge A. O. U. W.*, 46 Minn. 61, 48 N. W. 454 (1891); *Wallbridge v. Jones*, 33 U. C. Q. B. 613 (1873). A witness so qualified may testify as to his own relation to the family in question. *Pierce v. Jacobs*, 7 Mackey, (18 D. C.) 498 (1887); *Backdahl v. Grand Lodge A. O. U. W.*, 46 Minn. 61, 48 N. W. 454 (1891); *Smith v. Kenny*, (Tex. Civ. App. 1899) 54 S. W. 801.

4. *California*.—*Williams' Estate*, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 67 (1900).

District of Columbia.—*Green v. Norment*, 5 Mackey, 80 (1886).

Maine.—*Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615 (1884).

Texas.—*Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. 71 (1893); *De Leon v. McMurray*, 5 Tex. Civ. App. 280, 23 S. W. 1038 (1893).

England.—*Hubbard v. Lees*, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694 (1866).

Canada.—*Wallbridge v. Jones*, 33 U. C. Q. B. 613 (1873).

Identity of name.—It may be proved, for example, that the declarant bears the family name. *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615 (1884); *Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. 71 (1893); *Wallbridge v. Jones*, U. C. Q. B. 613 (1873). The fact that the person

in question has the same name as one shown by oral or documentary evidence to be connected with the family may be equally significant. *Williams Estate*, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 67 (1900). Identity in name in connection with certificates or other written evidence, whether of an official or private nature, relating to births, deaths, marriages and the like, must often be relied on in connection with this class of inquiry. *Hubbard v. Lees*, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. (N. S.) 435, 35 L. J. Exch. 169, 14 L. T. Rep. (N. S.) 442, 14 Wkly. Rep. 694 (1866).

Knowledge.—Membership in the family is frequently inferred from the fact that the declarant apparently possesses knowledge shared only by members of it. *Wallbridge v. Jones*, 33 U. C. Q. B. 613 (1873).

Recognition.—Even the circumstance that the declarant has been recognized by other members as one of the family has been deemed relevant in this connection. *Green v. Norment*, 5 Mackey (D. C.) 80 (1886). Thus, it may be shown that the person in question has been mentioned in family conveyances of property as being one interested in the matter. *Williams Estate*, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 67 (1900); *De Leon v. McMurray*, 5 Tex. Civ. App. 280, 23 S. W. 1038 (1893).

5. *Maine*.—*Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615 (1884).

Maryland.—*State v. Greenwell*, 4 Gill & J. 407 (1832).

Pennsylvania.—*Sitler v. Gehr*, 105 Pa. St. 577, 51 Am. Rep. 207 (1884).

Texas.—*Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. 71 (1893).

England.—*Hitchins v. Eardley*, L.

latter may, upon being thus shown to be that of a member of the family, be used to prove the relationship of the declarant to any particular member of it.⁷

§ 2938. (*Scope of Rule; Facts Directly Asserted*); Relationship); Other Relationships.—The declaration regarding pedigree naturally covers, moreover, other intimate relationships existing between members of the immediate family, such as husband¹ or wife,² brother³ or sister.⁴ Finally, the declarant may

R. 2 P. 248, 40 L. J. P. & Adm. 70, 25 L. T. Rep. (N. S.) 163 (1871).

Prima facie qualification sufficient.—A *prima facie* showing of a relationship by blood or marriage is regarded as sufficient. *Williams' Estate*, 128 Cal. 552, 61 Pac. 370, 79 Am. St. Rep. 67 (1900); *Gehr v. Fisher*, 143 Pa. St. 311, 22 Atl. 859 (1891). It is only necessary that a *prima facie* case of relationship to the family should be established by other evidence than the declarations, and slight proof will suffice where there is identity of names, great lapse of time and other corroborating circumstances. *Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. 71 (1893). Indeed, it has even been held that "slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy." *Fulkerson v. Holmes*, 117 U. S. 389, 397, 6 Sup. Ct. 780, 29 L. ed. 915 (1886), per Woods, J.

6. *Welch v. Lynch*, 30 App. D. C. 122 (1907); *State v. McDonald*, 55 Oreg. 419, 104 Pac. 967 (1909) rehearing denied, 106 Pac. 444 (1910).

7. The rule requiring evidence of relationship *aliunde* does not demand that the declaration and the evidence *dehors* the declaration should come to the tribunal by separate witnesses. So where a certain witness was relied on to sustain the whole weight of the proof, the court held it sufficient. "Here the witness bore the

same name as the ancestor, lived in the neighborhood with the other sons of his grandfather, knew the names of the family, and seemed acquainted with the farms which they owned, and other minute facts concerning them, besides the circumstance of being requested as heir-at-law to join his uncle in the mortgage referred to." *Wallbridge v. Jones*, 33 U. C. Q. B. 613, 618 (1873), per Richards, C. J.

§ 2938-1. District of Columbia.—*Green v. Norment*, 5 Mackey 80 (1886).

Mississippi.—*Spears v. Burton*, 31 Miss. 547 (1856).

New York.—*Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877).

Pennsylvania.—*Watson v. Brewster*, 1 Pa. St. 381 (1845).

Canada.—*Walker v. Murray*, 5 Ont. 638 (1884).

2. *California.*—*Pearson v. Pearson*, 46 Cal. 609 (1873).

Kansas.—*Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587 (1895).

Maryland.—*Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323 (1860).

New York.—*Matter of Fox*, 9 Misc. 661, 30 N. Y. Suppl. 835 (1894).

United States.—*Blackburn v. Crawford*, 3 Wall. 175, 18 L. ed. 186 (1865).

England.—*Vowles v. Young*, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247 (1806).

3. *In re Hartman's Estate*, 157 Cal. 206, 107 Pac. 105, 36 L. R. A. (N.

state his own relation to the family,⁵ or to any designated member of it. Relationship may well be indirectly established. Thus, to connect A. with C. may first be shown by evidence competent for that purpose that B., a deceased person, was a member of the family of A. Evidence is then admissible, in the form of an unsworn statement by B., that he was related to C., as a member of his (C.'s) family.⁶

§ 2939. (Scope of Rule); Facts Incidentally Asserted.—An extrajudicial statement relating to pedigree may furnish evidence not only of facts directly asserted but as to those collaterally involved in the statement¹ or of those which may reasonably be implied or inferred from it.² Thus, the dates³ at which or the

S.) 530n. (1910); *In re Fail's Will*, 107 N. Y. Suppl. 224, 56 Misc. Rep. 217 (1907); *Kirby v. Hayden*, 44 Tex. Civ. App. 207, 99 S. W. 746 (1907).

4. *California*.—*In re Clark's Estate*, 13 Cal. App. 786, 110 Pac. 828 (1910).

Maine.—*Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615 (1884).

Maryland.—*Raborg's Adm'x v. Hammond*, 2 Harr. & G. 42 (1827).

Mississippi.—*Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381 (1882).

Texas.—*Lord v. New York L. Ins. Co.*, 27 Tex. Civ. App. 139, 65 S. W. 699 (1901).

England.—*Crispin v. Doglioni*, 32 L. J. P. & M. 109, 8 L. T. Rep. (N. S.) 91, 3 Swab. & Tr. 44, 11 Wkly. Rep. 500 (1863).

5. *Russell v. Langford*, 135 Cal. 356, 67 Pac. 331 (1902); *Fowler v. Simpson*, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370 (1891); *Re Per-ton*, 53 L. T. Rep. (N. S.) 707 (1885).

6. *Gehr v. Fisher*, 143 Pa. St. 311, 22 Atl. 859 (1891); *Monkton v. Atty.-Gen.*, 2 Russ. & M. 147, 11 Eng. Ch. 147 (1831).

§ 2939-1. *Kelly v. McGuire*, 15 Ark. 555 (1855); *Morrill v. Foster*, 33 N. H. 379 (1855); *Clements v. Hunt*, 46 N. C. 400 (1854).

2. *Wood v. Sawyer*, 61 N. C. 251

(1867); *Viall v. Smith*, 6 R. I. 417 (1860).

Facts not strictly those of pedigree may be so connected with pedigree facts as to be provable in the same way. *Wall v. Lubbock*, (Tex. Civ. App. 1909) 118 S. W. 886.

3. *Arkansas*.—*Kelly v. McGuire*, 15 Ark. 555 (1855).

Maine.—*Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615 (1884).

Maryland.—*Copes v. Pearce*, 7 Gill. 247 (1848).

Michigan.—*Van Sickle v. Gibson*, 40 Mich. 170 (1879).

New Hampshire.—*Morrill v. Foster*, 33 N. H. 379 (1856).

North Carolina.—*Clements v. Hunt*, 46 N. C. 400 (1854).

Tennessee.—*Swink v. French*, 11 Lea 78, 47 Am. Rep. 277 (1883); *Saunders v. Fuller*, 4 Humphr. 516 (1844).

Texas.—*Kirby v. Hayden*, 44 Tex. Civ. App. 207, 99 S. W. 746 (1907); *Lord v. New York L. Ins. Co.*, 27 Tex. Civ. App. 139, 65 S. W. 699 (1901); *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760 (1895); *De Leon v. McMurray*, 5 Tex. Civ. App. 280, 23 S. W. 1038 (1893).

Vermont.—*Webb v. Richardson*, 42 Vt. 465 (1869).

United States.—*Lewis v. Marshall*,

places⁴ where facts of genealogical importance occurred may be included in an extrajudicial statement relating to pedigree. There is, however, a lack of uniformity in the decisions on the question whether the place of birth, death, etc., can be shown under the pedigree exception, although the weight of reason and authority

15 Fed. Cas. No. 8,327, 1 McLean 16, *modified* 5 Pet. 470, 8 L. ed. 195 (1831).

England.—*In re Turner*, 29 Ch. D. 985, 53 L. T. Rep. N. S. 528 (1885); *Haines v. Guthrie*, 13 Q. B. D. 818, 48 J. P. 756, 53 L. J. Q. B. 521, 51 L. T. Rep. N. S. 645, 33 Wkly. Rep. 99 (1884); *Shields v. Boucher*, 1 De G. & Sm. 40 (1846); *Vulliamy v. Huskisson*, 2 Jur. 656, 3 Y. & Coll. 80 (1838); *Goodright v. Moss*, 2 Cowp. 591 (1777).

4. *Jackson v. Boneham*, 15 John. (N. Y.) 227 (1818); *Hammond v. Noble*, 57 Vt. 193, 203 (1884); *Rish-ton v. Nesbitt*, 2 M. & Rob. 554 (1844); *Doe v. Griffin*, 15 East 293 (1812). See also *Monkton v. Attorney-General*, 2 Russ. & M. 147 (1831).

"This ruling of the learned judge was based upon the dicta of many authorities to the effect, that while in questions of pedigree the hearsay declarations of a deceased member of a family are receivable in evidence, as to all matters of birth, death, age, marriage, and the like, declarations as to place are not. The later and better considered cases, however, repudiate this distinction between declarations as to place and those touching other family matters, where the inquiry is strictly one of pedigree, and the declarations as to place are not relied on as giving any right by reason of the place, but proof as to place is made merely by way of identification of the person or family. Thus, in a question of settlement under the poor laws, where the right of settlement is dependent upon the place of present or former residence, hearsay declarations as to

place are inadmissible; but where the question is purely one of pedigree, and the effort is to identify the particular person or family about whom the declarant was speaking, declarations as to place stand upon the same footing as any others relative to matters of family history." *Wise v. Wynn*, 59 Miss. 588, 591, 42 Am. Rep. 381 (1882), per Chalmers, J.

"I own myself not convinced that the reasons and grounds (so far as I can collect and understand them) upon which births and times of births, marriages, deaths, legitimacy, illegitimacy, consanguinity generally, and particular degrees of consanguinity and of affinity, are allowed to be proved by hearsay (from proper quarters) in a controversy merely genealogical, are not as applicable to interrogatories like those that have been rejected in a case like the present. . . . Who generally is more likely to know whence a man or a family came than the man or the family? Does the emigrant, living or dying, forget his native soil? Is a woman less likely to state her country than her age with accuracy? . . . Nor are there, perhaps, any recollections or traditions of the old more readily communicated, or more acceptable to an auditory of descendants, than the original seat of the family, its former residences and possessions, its migrations, its local and other distinctions of the past, its advancement or its decay. If such topics are not strictly genealogical they are at least intimately connected with genealogy." *Shields v. Boucher*, 1 De G. & Sm. 40, 52 (1847), per Knight Bruce, V. C.

doubtless favors the rule as stated. The contrary view was apparently first taken in an early English case involving the settlement of a pauper.⁵ This decision was followed in pauper settlement cases in America;⁶ and has been applied rather arbitrarily in a few instances without regard, apparently, to the nature of the issue involved,⁷ the reason upon which the original decision purports to rest, that the issue was not one of genealogy⁸ but of locality merely, having been overlooked. Attention has been called to this misinterpretation in England.⁹ The statement does not necessarily become evidence of any fact disconnected with pedigree, which the declarant sees fit to add to the legitimate effect of his declaration.¹⁰ A very considerable range of other incidental facts has been permitted to the proponent. Thus, general facts relating to a particular branch of the family¹¹ as that they owned property¹² may be given in evidence under the rule. So the names,¹³ nationality¹⁴ and residences¹⁵ of particular members of the family, their number¹⁶ as well as relationship to each other¹⁷ and similar facts¹⁸ may be stated in such an extrajudicial declaration.

5. *Rex v. Erith*, 8 East 539 (1807).

6. *Union v. Plainfield*, 39 Conn. 563 (1873); *Greenfield v. Camden*, 74 Me. 56 (1882); *Wilmington v. Burlington*, 4 Pick. (Mass.) 174 (1826); *Independence v. Pompton*, 4 Halst. (N. J.) 209, 212 (1827).

7. *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545, 550 (1821); *Tyler v. Flanders*, 57 N. H. 618, 624 (1876). See also *Carter v. Montgomery*, 2 Tenn. Ch. 216, 229 (1875); *Currie v. Stairs*, 25 N. Brunsw. 4 (1885).

8. § 2922.

9. *Shields v. Boucher*, 1 De G. & Sm. 40 (1847).

10. *State v. Watters*, 25 N. C. 455 (1843) (color of a child's father); *Sargent v. Lawrence*, 16 Tex. Civ. App. 540, 40 S. W. 1075 (1897) (army service); *Watts v. Owens*, 62 Wis. 512, 22 N. W. 720 (1885) (non-access of husband); *Davis v. Wood*, 1 Wheat. (U. S.) 6, 4 L. ed. 22 (1816) (freedom). Compare *U. S. v. Sanders*, 27 Fed. Cas. No. 16,220, Hempst. 483 (1847).

11. *Shrewsbury Peerage Case*, 7 H.

L. Cas. I, 11 Eng. Reprint I (1858); *Peerage Case*, 2 H. L. Cas. 534, 9 Eng. Reprint 1196 (1848).

12. *Maslin v. Thomas*, 8 Gill (Md.) 18 (1849); *Pancoast's Lessee v. Addison*, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520 (1802).

13. *McClaskey v. Barr*, 47 Fed. 154; reversed 70 Fed. 529, 530, 17 C. C. A. 251 (1891).

14. *Currie v. Stairs*, 25 N. Brunsw. 4 (1890).

15. *Illinois*.—*Stumpf v. Osterhage*, 111 Ill. 82 (1884).

Mississippi.—*Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381 (1882).

Texas.—*Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 1060 (1895).

England.—*Rishton v. Nesbitt*, 2 M. & Rob. 554 (1844).

Canada.—*Currie v. Stairs*, 25 N. Brunsw. 4 (1890).

16. *De Leon v. McMurray*, 5 Tex. Civ. App. 280, 23 S. W. 1038 (1893).

17. *Monkton v. Atty.-Gen.*, 2 Russ. & M. 147, 156, 11 Eng. Ch. 147 (1831), per Brougham, Ch.

18. *Alabama*.—*Locklayer v. Lock-*

It is impossible to harmonize all the decisions so as to frame a comprehensive rule which shall set definite limits as to what facts are properly admissible under the pedigree exception. The decisions in general indicate a liberal attitude on the part of the courts toward broadening the rule to promote substantial justice, although in many instances they have shown great hesitancy in departing from the letter of fixed precedents. A sound administrative policy seems clearly to demand that a declaration presented to the court under such circumstances that all the requirements of the pedigree exception are complied with, should not be excluded on the ground that the particular fact declared is one never before admitted.

§ 2940. Form of Statement.—An unsworn statement regarding pedigree may present itself to the tribunal in any one of a variety of forms. So far as such declarations constitute an exception to the hearsay rule, they rest, in main, upon the credit of the declarant. They are, therefore, personal evidence. As submitted to the court, the pedigree declarations may be oral or in writing,¹ formal² or informal. No superior admissibility attaches to written statements above those which are oral;³ nor is the official entry in the absence of statute, received as proof of a higher grade.

layer, 139 Ala. 354, 35 So. 1008 (1904) (that deceased was a negro).

California.—Woolsey v. Williams, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 67 (1900) (that one of two brothers enlisted and was believed by the family to have been killed).

Maryland.—Walkup v. Pratt, 5 Harr. & J. 51 (1820) (sale of a slave admitted to identify original ancestor).

Michigan.—Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882 (1879) (that two brothers, and only two, came from Michigan).

Oregon.—Young v. State, 36 Ore. 417, 59 Pac. 812, 60 Pac. 711, 47 L. R. A. 548 (1900) (for identification, declarations that deceased had changed his name, had enlisted and deserted were admitted).

Tennessee.—Story v. Saunders, 8 Humph. 663, 667 (1848) *obiter* (that

Story had died in the revolutionary army).

Texas.—Byers v. Wallace, 87 Tex. 503, 28 S. W. 1056 (1894) (went to the Mexican war and was killed).

England.—Attorney-General v. Kohler, 9 H. L. C. 654, 686 (1861) (events of early life shown for purpose of identification); Rishton v. Nesbitt, 2 M. & Rob. 554 (1844) (declaration of deceased that "he was going to visit his relatives at Blackburn" admitted to show that the family had relatives living at that place).

§ 2940-1. Wolf v. Wilhelm, (Tex. Civ. App. 1912) 146 S. W. 216.

2. *In re Peterson's Estate*, (N. D. 1912) 134 N. W. 751 (entries in family Bible); Wolf v. Wilhelm, (Tex. Civ. App. 1912) 146 S. W. 216 (affidavit).

3. "The existence of a family register does not exclude proof of declara-

Declarations may be also classified as *composite*, i. e., proceeding from an indeterminate number of persons in a general statement where the individual voices of the declarants have been lost; and *individual*, i. e., the statements of identified persons.

While the two classes of statements just mentioned, strictly speaking, may be held to include every form of pedigree proof admissible under the exception to the hearsay rule, the fact must not be overlooked that the exigencies of proof in connection with the establishment of genealogical facts have demanded the admission of a class of declarations which stand on a different basis from that of ordinary declarations, deriving their trustworthiness not from the assumed knowledge and truthfulness of the declarant, but from circumstances, and which may well be treated as a form of circumstantial evidence. These present some analogy to true declarations concerning pedigree and have frequently been confused with them. Of this nature are the inscriptions upon mural tablets, mottoes or mourning rings and the like. Here the actual declarant is unknown and the really significant fact is the action of the family, or some of its members, in acquiescing in the truth of the statement. This use of circumstantial evidence in connection with genealogical facts is treated in a subsequent portion of the present chapter.⁴

§ 2941. (*Form of Statement*); Composite; A futile Distinction.—Preliminary difficulty, somewhat previously considered,¹ presents itself in dealing with reputation and tradition, the principal recognized forms of composite statement. Is reputation or tradition properly to be regarded as a form of hearsay in which the individual voices are lost? Are they, on the contrary, facts relevant, in and of themselves presumably true, as having survived correction and discussion forcing down or drowning out all dissentient utterances? To resolve, so far as may be, such a question, brings us back to familiar ground. In attempting to distinguish, as the hearsay rule does, between statements and other facts, it seeks to create an artificial distinction, one where none exists. Any effort to distinguish between the evidence furnished

tions of deceased members of the family." *Swing v. French*, 11 Lea. (Tenn.) 78, 80, 47 Am. Rep. 277 (1883), per Cooper, J.

4. § 2952 et seq.
§ 2941-1. §§ 2738, 2753.

by reputation or tradition considered as a fact or regarded as a collection of statements is, of necessity, a futile one. In truth, there is no such distinction. Any fact leads to a belief in the existence of another by reason of an inference, based on experience, that the existence of one fact renders probable, in a greater or less degree, that of the other. A statement, sworn or unsworn, leads to a belief in precisely the same way, of the truth of the fact asserted, viz., by an inference based upon experience that, in view of the objective and subjective circumstances which attend its making, the statement would not have been made had it not been true. In other words, it is, in reality, the mere existence of the declaration which, under these conditions, is probative as to that of the fact which it alleges. It follows that any reputation or tradition, whether viewed as hearsay or as fact, operates to induce belief in the truth of statements made in one and the same way, viz., because in the nature of things, their bare persistence affords a legitimate inference from experience that this would only have happened in case of a true statement or expression of fact.

§ 2942. (Form of Statement; Composite); Reputation.—The evidence of reputation in the family, i. e., among persons whose declarations would be competent is receivable¹ for the purpose of establishing, in connection with a member of any branch of the

§ 2942-1. Arkansas.—*Kelly v. McGuire*, 15 Ark. 555, 605 (1855).

California.—*In re Heaton*, 135 Cal. 385, 67 Pac. 321 (1902).

Georgia.—*Lamar v. Allen*, 108 Ga. 158, 33 S. E. 958 (1899).

Illinois.—*Harland v. Eastman*, 107 Ill. 535 (1883).

Kentucky.—*Lindsey's Devisee v. Smith*, 131 Ky. 176, 114 S. W. 779 (1908); *Dupoyster v. Gagani*, 84 Ky. 403, 1 S. W. 652, 8 Ky. Law Rep. 392 (1886); *Chancellor v. Milly*, 9 Dana 23, 33 Am. Dec. 521 (1839); *Ewing v. Savary*, 3 Bibb. 235 (1813).

Maryland.—*Barnum v. Barnum*, 42 Md. 251 (1875); *Copes v. Pearce*, 7 Gill. 247 (1848).

Massachusetts.—*Butrick v. Tilton*, 155 Mass. 461, 29 N. E. 1088 (1892).

Michigan.—*Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882 (1879).

Mississippi.—*Henderson v. Cargill*, 31 Miss. 367, 409 (1856).

New Hampshire.—*Eastman v. Martin*, 19 N. H. 152 (1848).

New York.—*Clark v. Owens*, 18 N. Y. 434 (1858); *McCarty v. Hodges*, 2 Edm. Sel. Cas. 433 (1846); *People v. Fulton F. Ins. Co.*, 25 Wend. 205 (1840); *Jackson v. King*, 5 Cow. 237, 15 Am. Dec. 468 (1825).

North Carolina.—*Morgan v. Purnell*, 11 N. C. 95 (1825).

Rhode Island.—*Viall v. Smith*, 6 R. I. 417 (1860).

Tennessee.—*Morris v. Swaney*, 7 Heisk. 591 (1872); *Ewell v. State*, 6 Yerg. 364, 27 Am. Dec. 480 (1834).

Vermont.—*Webb v. Richardson*, 42 Vt. 465 (1869).

England.—*Rosecommon's Claim*, 6 Cl. & F. 97, 7 Eng. Reprint 634 (1828).

family,² an appropriate fact of pedigree. This rule has sometimes been extended to include a general reputation in the community.³ Facts covered may be both those directly asserted and those whose existence is incidentally or collaterally declared.⁴ Such reputation, in fine, may relate to any of the ordinary facts of pedigree.⁵

History in the family may fairly be deemed practically equivalent to reputation.⁶

§ 2943. (Form of Statement; Composite; Reputation); Necessity.—No necessity for receiving reputation in the family need be shown, as a preliminary, to admitting the evidence. In case of composite hearsay, the evidence is treated as primary, it not being required that the declarants be shown to be dead.¹

Canada.—*Doe v. Auldjo*, 5 U. C. Q. B. 171 (1848).

Compare *Rogers v. De Bardeleben Coal etc., Co.*, 97 Ala. 154, 12 So. 81 (1893) (age).

In a case in Michigan the court say: "The inquiry related to family connection and membership and to the decease, and times of decease of members, and whether they had been or were married; and the answers returned, although in part based on the course of speech and understanding in the family instead of direct personal knowledge, would seem to have been proper in view of the nature of the subject." *Van Sickle v. Gibson*, 40 Mich. 170, 173 (1879), per Graves, J.

"The term pedigree includes not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened. These facts may be established by general repute in the family, proved by a surviving member of it, in all cases where they occur incidentally and in relation to pedigree." *American Life I. & T. Co. v. Rosenagle*, 77 Pa. St. 507, 516 (1875), per Woodward, J.

2. *Butrick v. Tilton*, 155 Mass. 461,

29 N. E. 1088 (1892) (grandfather's cousin); *Webb v. Richardson*, 42 Vt. 465 (1869) (grandfather); *Cox v. Brice*, 159 Fed. 378, 86 C. C. A. 378 (1908).

3. *Wall v. Lubbock*, 52 Tex. Civ. App. 405, 118 S. W. 886 (1909).

4. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882 (1879) (residence); *American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875) (dates); *Swink v. French*, 11 Lea. (Tenn.) 78, 47 Am. Rep. 277 (1883) (dates); *Webb v. Richardson*, 42 Vt. 465 (1869) (dates).

5. The location of a land certificate is not a fact of pedigree in this connection. *Odom v. Woodward*, 74 Tex. 41, 11 S. W. 925 (1889).

6. *Cook v. Carroll Land, etc., Co.*, (Tex. Civ. App. 1897) 39 S. W. 1006; *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760 (1895); *In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895); *Doe v. Griffin*, 15 East 293, 13 Rev. Rep. 474 (1812).

§ 2943-1. *Smith v. Kenney*, (Tex. Civ. App. 1899) 54 S. W. 801. But see *Rogers v. De Bardeleben Coal, etc., Co.*, 97 Ala. 154, 12 So. 81 (1893).

§ 2944. (Form of Statement; Composite; Reputation); Subjective Relevancy.—With objective relevancy, it will not be necessary to concern ourselves. The quality is one essential to all admissible evidence. To the elements of subjective relevancy, adequate knowledge¹ and absence of a controlling motive to misrepresent,² being those insisted on by judicial administration in case of hearsay assertions, more consideration should properly be given.

§ 2945. (Form of Statement; Composite; Reputation; Subjective Relevancy); Adequate Knowledge.—In case of reputation in the family as in that of direct assertions, it is required that the declarant be related to the family by blood or marriage.¹ Not only must the reputation arise among members of the family who may be assumed to have satisfactory knowledge on the subject,² but the reporting witness is also required to be a member of the family,³ thus presenting a double guaranty of trustworthiness. In certain instances, reputation in the community has been received

§ 2944-1. § 2915.

2. § 2918.

§ 2945-1. See, however, *Bannert v. Day*, 2 Fed. Cas. No. 836, 3 Wash. C. C. 243 (1814).

2. Alabama.—*Elder v. State*, 123 Ala. 35, 26 So. 213 (1898).

California.—*In re Heaton*, 135 Cal. 385, 67 Pac. 321 (1902).

Illinois.—*Metheny v. Bohn*, 160 Ill. 263, 43 N. E. 380 (1896). See also *Greenwood v. Spiller*, 3 Ill. 502 (1840).

Iowa.—*Watson v. Richardson*, 110 Iowa 673, 80 N. W. 407 (1899); *Ross v. Loomis*, 64 Iowa, 432, 20 N. W. 749 (1884).

Vermont.—*In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

3. Kentucky.—*Dupoyster v. Gagani*, 84 Ky. 403, 1 S. W. 652, 8 Ky. Law Rep. 392 (1886); *Brooks v. Clay*, 3 A. K. Marsh. 545 (1821).

Maryland.—*Barnum v. Barnum*, 42 Md. 251 (1875).

Massachusetts.—*Butrick v. Tilton*, 155 Mass. 461, 29 N. E. 1088 (1892).

Mississippi.—*Henderson v. Cargill*, 31 Miss. 367 (1856).

North Carolina.—*Morgan v. Purnell*, 11 N. C. 95 (1825).

Pennsylvania.—*Wolf v. Borngresser*, 8 Pa. Dist. 411, 7 Del. Co. 338 (1899); *American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875).

Texas.—*Smith v. Kenney*, (Civ. App. 1899) 54 S. W. 801; *Cook v. Carroll Land, etc., Co.*, (Civ. App. 1897) 39 S. W. 1006.

Vermont.—*In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

One whose only information came from "talks with the family" and "reports from his relations," neither the dates of such talks and reports, the decease of the informants, nor the degree of the relationship of the informants to the person whose pedigree was in controversy being shown, is not competent to testify. *Wallace v. Howard*, (Tex.) 30 S. W. 711 (1895).

This requirement has been modified by statute. *State v. McDonald*, 55 Oreg. 419, 105 Pac. 444 (1910).

in case of a fact of pedigree,⁴ especially where it is sought to prove a marriage.⁵ Such, however, is not the general practise,⁶ reputation in case of pedigree being confined to members of the family.⁷ Reputation existing among neighbors,⁸ *a fortiori*, in the community at large,⁹ is not receivable for the purpose.

Own evidence.— This necessary relationship to the family may be established by the testimony of the witness himself.¹⁰

§ 2946. (Form of Statement; Composite; Reputation; Subjective Relevancy); Absence of Controlling Motive to Misrepresent.— Not only must reputation regarding pedigree be shown to have arisen among persons possessed of adequate knowledge on the subject; it should also further appear that it took its origin among disinterested persons, those whose minds are not distracted by self-interest or partisanship to any extent which could rationally be regarded as controlling. The rule in this respect is the same concerning family reputation as with regard to direct hearsay assertions.¹ In the absence of cross-examination, no attempt is

4. See § 2947.

5. *Kentucky*.— *Dunn v. Garnett*, 129 Ky. 728, 112 S. W. 841 (1908).

Maryland.— *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894); *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466 (1877); *Jones v. Jones*, 45 Md. 144 (1876); *Barnum v. Barnum*, 42 Md. 251 (1875); *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713 (1868).

New York.— *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877).

Pennsylvania.— *In re Pickins*, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477 (1894).

Wisconsin.— *Eaton v. Tallmadge*, 24 Wis. 217 (1869).

England.— *Goodman v. Goodman*, 4 Jur. (N. S.) 1220 (1858); *Evans v. Morgan*, 2 Cromp. & J. 453, 2 Tyrw. 396 (1832); *Doe v. Fleming*, 4 Bing. 266, 5 L. J. C. P. (O. S.) 169, 12 Moore C. P. 500, 29 Rev. Rep. 562, 13 E. C. L. 497 (1827).

Compare *Henderson v. Cargill*, 31 Miss. 367, 409 (1856).

6. "Cases are few where it has been held that pedigree may be established

by common reputation in the neighborhood." *In re Heaton*, 135 Cal. 385, 388, 67 Pac. 321 (1902), per Garoutte, J. See also *Henderson v. Cargill*, 31 Miss. 367, 419 (1856).

7. "It is the general repute, the common reputation in the family, and not the common reputation in the community, that is a material element of evidence going to establish pedigree. To hold otherwise would countenance a rule which could easily be turned to the accomplishment of great wrong and injustice." *In re Heaton*, 135 Cal. 385, 388, 67 Pac. 321 (1902), per Garoutte, J.

8. *Elder v. State*, 123 Ala. 35, 26 So. 213 (1898); *Henderson v. Cargill*, 31 Miss. 367 (1856).

9. *Elder v. State*, 123 Ala. 35, 26 So. 213 (1898); *Lamar v. Allen*, 108 Ga. 158, 33 S. E. 958 (1899); *Blaisdell v. Bickum*, 139 Mass. 250, 1 N. E. 281 (1885).

10. *Smith v. Henney*, (Tex. Civ. App. 1899) 54 S. W. 801 (1899).

§ 2946-1. § 2918.

made to ascertain the actual mental state of the declarant. An arbitrary objective test is applied to this branch of subjective relevancy. To be admissible, the reputation among the family must have arisen *ante litem motam*,² i. e., before any controversy has started regarding its subject matter.³

§ 2947. (Form of Statement; Composite; Reputation); Birth, Marriage, Death, etc.—Among facts of pedigree which may be established by reputation in the family are those of age,¹ birth,² death,³ marriage,⁴ or its absence,⁵ and the dates at which

2. § 2919.

3. *Morgan v. Purnell*, 11 N. C. 95 (1825).

§ 2947-1. *Watson v. Brewster*, 1 Pa. St. 381 (1845). *Contra* *Rogers v. De Bardeleben Coal, etc., Co.*, 97 Ala. 154, 12 So. 81 (1893); *White v. Strother*, 11 Ala. 720 (1847).

2. *Kentucky*.—*Chancellor v. Milly*, 9 Dana 23, 33 Am. Dec. 521 (1839).

Maryland.—*Pancoast v. Addison*, 1 Harr. & J. 350, 2 Am. Dec. 520 (1802).

Pennsylvania.—*American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875).

Tennessee.—*Swink v. French*, 11 Lea 78, 47 Am. Rep. 277 (1883); *Morris v. Swaney*, 7 Heisk. 591 (1872); *Flowers v. Haralson*, 6 Yerg. 494 (1834).

Vermont.—*In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

General reputation in the neighborhood is admissible on the question whether a child was born dead or alive. *Wiess v. Hall*, (Tex. Civ. App. 1911) 135 S. W. 384.

3. *Indiana*.—*Metropolitan Life Ins. Co. v. Lyons*, (App. 1912) 98 N. E. 824.

Kentucky.—*Ewing v. Savary*, 3 Bibb. 235 (1813).

Maryland.—*Pancoast v. Addison*, 1 Harr. & J. 350, 2 Am. Dec. 520 (1802).

New York.—*Clark v. Owens*, 18 N. Y. 434 (1858).

Pennsylvania.—*American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875).

Tennessee.—*Flowers v. Haralson*, 6 Yerg. 494 (1834).

Vermont.—*In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895); *Webb v. Richardson*, 42 Vt. 465 (1869).

England.—*Roscommon's Claim*, 6 Cl. & F. 97, 7 Eng. Reprint 634 (1828); *Doe v. Griffin*, 15 East 293, 13 Rev. Rep. 474 (1812).

Canada.—*Doe v. Auldjo*, 5 U. C. Q. B. 174 (1848).

"It is well settled that upon all questions of genealogy, and generally upon questions relating to births, marriages and deaths, in the absence of higher evidence, resort may be had to what is commonly said and understood to be true among the immediate relatives and family connections of the party to whom the inquiry relates." *Clark v. Owens*, 18 N. Y. 434, 442 (1858), per *Selden, J.*

General reputation in a community, not shown to have been accepted by, or known to, the family, is incompetent to show the fact and manner of death of a person. *Blaisdell v. Bickum*, 139 Mass. 250, 1 N. E. 281 (1885).

General reputation in a family, not founded upon statements of deceased members of the family, has been held inadmissible to prove the fact of the death of a son who had disappeared.

these respective events occurred.⁶ Reputation which is admissible to establish the fact of marriage may be either general reputation⁷ or reputation in the family.⁸

It has been frequently said in judicial opinions that the rule admitting reputation to prove the fact of marriage is subject to an exception in cases of adultery,⁹ bigamy,¹⁰ criminal conversation¹¹

In re Hurlburt's Estate, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

4. *Kentucky*.—*Lindsey v. Smith*, 131 Ky. 176, 114 S. W. 779 (1908).

Maryland.—*Barnum v. Barnum*, 42 Md. 251 (1875).

North Carolina.—*Morgan v. Purnell*, 11 N. C. 95 (1825).

Pennsylvania.—*In re Pickens*, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477 (1894); *American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875).

Vermont.—*In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895).

England.—*Doe v. Griffin*, 15 East 293, 13 Rev. Rep. 474 (1812).

5. *Jacobs v. Fowler*, 119 N. Y. Suppl. 647, 135 App. Div. 713 (1909).

6. *Metropolitan Life Ins. Co. v. Lyons*, (Ind. App. 1912) 98 N. E. 824.

7. *Maryland*.—*Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894); *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466 (1877); *Jones v. Jones*, 45 Md. 144 (1876); *Barnum v. Barnum*, 42 Md. 251 (1875); *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713 (1868).

New York.—*Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877).

Pennsylvania.—*In re Pickens*, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477 (1894).

Wisconsin.—*Eaton v. Tallmadge*, 24 Wis. 217 (1869).

England.—*Goodman v. Goodman*, 4 Jur. (N. S.) 1220 (1858); *Evans v. Morgan*, 2 Crompt. & J. 453, 2 Tyrw. 396 (1832); *Doe v. Fleming*, 4 Bing. 266, 5 L. J. C. P. (O. S.) 169, 12 Moore C. P. 500, 29 Rev. Rep. 562, 13 E. C. L. 497 (1827).

Compare Henderson v. Cargill, 31 Miss. 367, 409 (1856).

Limiting evidence of reputation of marriage to that which is common in the neighborhood has been held proper. *Davis v. Orme*, 36 Ala. 540 (1860).

Proof of declarations that two slaves were reputed, among those who knew them, to be husband and wife, has been held sufficient to establish their marriage after a lapse of fifty years. *Dunn v. Garnett*, 129 Ky. 728, 112 S. W. 841 (1908).

8. *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466 (1877); *Barnum v. Barnum*, 42 Md. 251 (1875); *Henderson v. Cargill*, 31 Miss. 367, 409 (1856); *Clark v. Owens*, 18 N. Y. 434 (1858).

Where reputation is relied on to prove a marriage, it must be founded on general and not divided and singular opinion. *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894). Existence of such reputation must be shown by one who personally knows it and not by one who knows of its existence only through information given by another person. *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713 (1868).

9. *Buchanan v. State*, 55 Ala. 154 (1876).

10. *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894); *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713 (1868); *Henderson v. Cargill*, 31 Miss. 367 (1894); *Archer v. Haithcock*, 51 N. C. (6 Jones Law) 421 (1859).

11. *Jackson v. Jackson*, 80 Md. 176, 195, 30 Atl. 752 (1894); *Henderson v.*

and seduction.¹² Such statements must, however, be regarded as inaccurate. They probably had their origin in a misunderstanding of the language of the early English cases on the question. There is excellent authority for stating the rule to be that reputation is admissible in all such cases to prove the fact of a marriage; but of itself alone, it is not *sufficient*.¹³ Reputation is generally introduced in such cases for the purpose of corroboration.

An exception exists in regard to proving age by reputation, it being held that age cannot be proved by reputation in actions for statutory rape.¹⁴

§ 2948. (*Form of Statement; Composite; Reputation*); Relationship and Minor Circumstances.—Facts of parentage¹ or of relationship in general² may be proved in the same way.

Cargill, 31 Miss. 367 (1856); Archer v. Haithcock, 51 N. C. (6 Jones Law) 421 (1859); Weaver v. Cryer, 12 N. C. (1 Dev. Law) 337 (1827); Northfield v. Vershire, 33 Vt. 110 (1860).

12. Barnum v. Barnum, 42 Md. 251 (1875).

13. *California*.—People v. Hartman, 130 Cal. 487, 62 Pac. 823 (1900) (bigamy). See also People v. Beevers, 99 Cal. 289, 33 Pac. 844 (1895) (bigamy).

Indiana.—See Bowers v. Van Winkle, 41 Ind. 432 (1872) (crim. con.).

Kentucky.—See Taylor v. Shemwell, 43 Ky. (4 B. Mon.) 575 (1844) (crim. con.).

Michigan.—See Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164 (1875) (crim. con.).

New York.—People v. Wentworth, 4 N. Y. Cr. Rep. 207 (1885) (bigamy); Clayton v. Wardell, 4 N. Y. 230 (1850) (bigamy).

Pennsylvania.—Durning v. Hastings, 183 Pa. St. 210, 38 Atl. 627 (1887) (crim. con.).

Texas.—Dumas v. State, 14 Tex. App. 464, 46 Am. Rep. 241 (1883) (bigamy).

England.—Morris v. Miller, 4 Burr. 2057 (1767) (crim. con.). See also

Birt v. Barlow, 1 Dougl. 170 (1779) (crim. con.).

14. People v. Mayne, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256 (1897) (excluded because the issue in the case was not one of pedigree); Cowden v. State, (Tex. Cr. App. 1912) 150 S. W. 779; Tate v. State, (Tex. Cr. App. 1912) 150 S. W. 781; Sims v. State, (Tex. Cr. App. 1902) 70 S. W. 90.

§ 2948-1. State v. McDonald, 55 Oreg. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444 (1910).

2. Lamar v. Allen, 108 Ga. 158, 33 S. E. 958 (1899); Lindsey's Devisee v. Smith, 131 Ky. 176, 114 S. W. 779 (1908); Ford v. Ford, 7 Humpr. 92 (1846); Flowers v. Haralson, 6 Yerg. 494 (1834); Ewell v. State, 6 Yerg. 364, 27 Am. Dec. 480 (1834).

Descent is a proper subject to be established by reputation in the family. Eastman v. Martin, 19 N. H. 152 (1848).

Godson.—Reputation in the family may be used to establish the fact that a given legatee was a godson of the testator. *Re Gregory*, 34 Beav. 600 (1865).

Failure of issue may be shown in the same way. Flowers v. Haralson, 6 Yerg. (Tenn.) 494 (1834); Ros-

§ 2949. (*Form of Statement; Composite*); Tradition.—A further form of composite statement is tradition in the family.¹ Like reputation,² a tradition is a form of family history³ and may be shown by the testimony of any member of the family⁴ in proof of the same familiar genealogical facts,⁵ e. g., death,⁶ marriage⁷ or relationship.⁸ Certain minor details relating to tradition as proof of pedigree may be mentioned. The requirement has been

common's Claim, 6 Cl. & F. 97, 7 Eng. Reprint 634 (1828); Doe v. Griffin, 15 East 293, 13 Rev. Rep. 474 (1812).

§ 2949-1. "It will be observed that some of the authorities speak of repute, reputation and tradition, as convertible terms when applied to cases of pedigree. Now tradition is knowledge, belief or practices, transmitted orally from father to son, or from ancestors to posterity. When these authorities speak of repute, reputation or tradition in matters of pedigree, we think they mean such declarations and statements respecting the pedigree as have come down from generation to generation from deceased relatives in such a way that even though it cannot be said or determined which of the deceased relatives originally made them, or was personally cognizant of the facts therein stated, yet it appears that such declarations and statements were made as family history, *ante litem motam*, by a deceased person connected by blood or marriage with the person whose pedigree is to be established." *In re Hurlburt's Estate*, 68 Vt. 366, 377, 35 Atl. 77, 35 L. R. A. 794 (1895), per Thompson, J.

The tradition is admissible only when coming from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they spoke the truth and could not have been mistaken. Northern Pac. Ry. Co. v. King, (Wash. 1910) 181 Fed. 913; Whitelocke v. Baker, 13 Ves. 514 (1807).

2. *Pancoast's Lessee v. Addison*, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520 (1802); *Carter v. Montgomery*, 2 Tenn. Ch. 216 (1875); *In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794 (1895); *Johnson v. Todd*, 5 Beav. 597 (1843).

3. *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836 (1891); *Eaton v. Tallmadge*, 24 Wis. 217 (1869); *Johnson v. Todd*, 5 Beav. 597 (1843).

4. *Doe v. Griffin*, 15 East 293 (1812).

5. *Jackson v. King*, 5 Cow. 237, 15 Am. Dec. 468 (1825); *Jackson v. Browner*, 18 Johns. 37 (1820); *Jackson v. Cooley*, 8 Johns. 128 (1811); *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1886); *Davis v. Wood*, 1 Wheat. (U. S.) 6, 4 L. ed. 22 (1816). See also *Grand Lodge A. O. U. W. v. Bartes*, 69 Neb. 636, 98 N. W. 715, 111 Am. St. Rep. 577 (1904), overruling on rehearing 69 Neb. 631, 96 N. W. 186 (1903); *Goodright v. Moss*, 2 Cowp. 591 (1777).

6. *Anderson v. Parker*, 6 Cal. 197 (1856); *Pancoast's Lessee v. Addison*, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520 (1802); *Van Sickel v. Gibson*, 40 Mich. 170 (1879); *Fosgate v. Herkimer, Mfg., etc., Co.* 12 Barb. (N. Y.) 352; *affirmed*, 12 N. Y. 580 (1852).

7. *Van Sickel v. Gibson*, 40 Mich. 170 (1879).

8. *Van Sickel v. Gibson*, 40 Mich. 170 (1879).

made that the members of the family among whom the tradition existed should be shown to be dead.⁹ The fact, however, that the declarant appears to have had but slight personal knowledge furnishes no ground for rejecting the testimony.¹⁰ Nor is entire accuracy in the statement insisted on, it being received for what it is worth, notwithstanding some admitted discrepancy.¹¹ To the relevancy, however, of the evidence it is essential that the tradition should be shown to have arisen among those possessed of adequate knowledge and without controlling motive to misrepresent.¹²

§ 2950. (*Form of Statement*); Individual.—The extrajudicial declaration may be not only composite, as in case of reputation¹ or tradition,² but individual,³ as where the speaker is identified. Individual statements may be oral⁴ or written.⁵ The oral statement is as competent as the most solemn written assertion, on the same point,⁶ even one contained in a family Bible.⁷

§ 2951. (*Form of Statement; Individual*); Written.—Pedigree declarations are frequently submitted to the court in written form.¹ No conclusiveness in effect, however, attaches to them on

9. *Fosgate v. Herkimer Mfg., etc.*, Co., 12 Barb. (N. Y.) 352, *affirmed*, 12 N. Y. 580 (1852).

10. *Lovat Peerage Case*, 10 App. Cas. 763 (1885).

11. *Johnson v. Todd*, 5 Beav. 597 (1843).

12. *Whitelocke v. Baker*, 13 Ves. Jr. 511, 9 Rev. Rep. 216, 33 Eng. Reprint 385 (1807).

§ 2950-1. § 2942.

2. § 2949.

3. No special proving power attaches to composite statements. Declarations of a father, for example, denying his marriage to his child's mother have been held to outweigh reputation as evidence of marriage. *Murray v. Milner*, 12 Ch. D. 845, 48 L. J. Ch. 775, 41 L. T. Rep. N. S. 213, 27 Wkly. Rep. 881 (1879).

4. *Maryland*.—*Copes v. Pearce*, 7 Gill. 247, 264 (1848).

New Hampshire.—*Morrill v. Foster*, 33 N. H. 379 (1856).

Texas.—*Wren v. Howland*, 33 Tex. Civ. App. 87, 75 S. W. 894 (1903).

Vermont.—*Mason v. Fuller*, 45 Vt. 29 (1872).

Canada.—*Walker v. Murray*, 5 Ont. 638 (1884).

5. See § 2951.

6. *Clements v. Hunt*, 46 N. C. 400 (1854); *Swink v. French*, 11 Lea (Tenn.) 78, 47 Am. Rep. 277 (1883); *Currie v. Stairs*, 25 N. Brunsw. 4 (1885). But see *Webb v. Haycock*, 19 Beav. 342 (1864).

7. *Currie v. Stairs*, 25 N. Brunsw. 4 (1885).

§ 2951-1. *Mason v. Fuller*, 45 Vt. 29 (1872); *Hill v. Hibbitt*, 19 Wkly. Rep. 250 (1871); *Jamieson v. Mill*, 1 Jur. 790 (1837). See also, *Smith v. State*, (Tex. Cr. App. 1903) 73 S. W. 401.

No requirement is made that the declaration should be spontaneous. It is, therefore, not absolutely essential that the written statement

that account.² Nor is there any limitation as to the specific form of document to be employed in the transmission of a pedigree statement. This may range from solemn constituent instruments, such as deeds³ or wills⁴ to more ephemeral productions such as memoranda⁵ or letters.⁶ It may be a record relating to the family,⁷

should be contemporaneous with the event which it purports to record. *Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 535 (1874).

2. *Walker v. Wingfield*, 18 Ves. Jr. 443, 11 Rev. Rep. 232, 34 Eng. Reprint 384 (1812).

3. *Kentucky*.—*Mann v. Kavanaugh*, 110 Ky. 776, 62 S. W. 854, 23 Ky. Law Rep. 238 (1901).

Maine.—*Little v. Palister*, 4 Greenl. 209 (1826).

Maryland.—*Barnum v. Barnum*, 42 Md. 251 (1875).

Minnesota.—*Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12 (1891).

New Jersey.—*Rollins v. Atlantic City R. Co.*, 73 N. J. L. 64, 62 Atl. 929 (1905).

New York.—*Jackson v. Colley*, 8 Johns. 128 (1811).

Pennsylvania.—*Carter v. Tinicum Fishing Co.*, 77 Pa. St. 310 (1875).

Texas.—*Wren v. Howland*, 33 Tex. Civ. App. 87, 75 S. W. 894 (1903).

United States.—*Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. St. 780, 29 L. ed. 915 (1886); *Stokes v. Dawes*, 23 Fed. Cas. No. 13,477, 4 Mason 268 (1826).

4. *California*.—*Russell v. Langford*, 135 Cal. 356, 67 Pac. 331 (1902); *Pearson v. Pearson*, 46 Cal. 609 (1873).

District of Columbia.—*Jennings v. Webb*, 8 App. Cas. 43 (1896).

Texas.—*Summerhill v. Darrow*, 94 Tex. 71, 57 S. W. 942 (1900).

United States.—*McClaskey v. Barr*, 47 Fed. 154, reversed 70 Fed. 529, 530, 17 C. C. A. 251 (1891); *Gaines v. New Orleans*, 6 Wall. (U. S.) 642, 18 L. ed. 950 (1867); *Blackburn v. Crawford, Lessee*, 3 Wall. (U. S.) 175, 18 L. ed. 186 (1865).

England.—*In re Lambert*, 56 L. J. Ch. 122, 56 L. T. Rep. (N. S.) 15 (1886); *Vulliamy v. Huskisson*, 2 Jur. 656, 3 Y. & Coll. 80 (1838); *Doe v. Pembroke*, 11 East 504, 11 Rev. Rep. 260 (1809).

5. *Barnum v. Barnum*, 42 Md. 251 (1875); *Hunt v. Supreme Council O. of C. F.*, 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855 (1887).

6. *Colorado*.—*Kansas Pac. R. Co. v. Miller*, 2 Colo. 442 (1874).

District of Columbia.—*Green v. Norment*, 5 Mackey 80 (1886).

South Dakota.—*In re McClellan's Estate*, 20 S. D. 498, 107 N. W. 681 (1906).

Texas.—*Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760 (1895).

West Virginia.—*Butcher v. Sommerville*, 67 W. Va. 261, 67 S. E. 726 (1910).

United States.—*Elliott v. Peirsol*, 1 Pet. 328, 7 L. ed. 164 (1828).

England.—*In re Turner*, 29 Ch. D. 985, 53 L. T. Rep. (N. S.) 528 (1885); *Hubbard v. Lees*, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. (N. S.) 435, 35 L. J. Exch. 169, 14 L. T. Rep. (N. S.) 442, 14 Wkly. Rep. 694 (1866).

7. *Arkansas*.—*Kelly v. McGuire*, 15 Ark. 555 (1855).

Indiana.—*Collins v. Grantham*, 12 Ind. 440 (1859) (hymn-book).

Kentucky.—*Woodward v. Spiller*, 1 Dana 179, 25 Am. Dec. 139 (1833) (register of births).

Maryland.—*Jones v. Jones*, 45 Md. 144 (1876) (testament).

Massachusetts.—*Whitcher v. McLaughlin*, 115 Mass. 167 (1874); *North Brookfield v. Warren*, 16 Gray 171 (1860).

e. g., an entry in a family Bible⁸ or on a genealogical table,⁹ or it may have no such connection. The statement may be made in the course of legal proceedings, as when part of an affidavit,¹⁰ deposition¹¹ or pleading.¹² It may also be official as when made in a town clerk's¹³ or other public record,¹⁴ or it may be *quasi*-official as a marriage certificate¹⁵ or church record¹⁶ or be entirely

Missouri.—Beckham v. Nacke, 56 Mo. 546 (1874).

New Hampshire.—Eastman v. Martin, 19 N. H. 152 (1848).

8. *Arkansas*.—Kelly v. McGuire, 15 Ark. 555 (1855).

Georgia.—Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535 (1874).

Iowa.—Greenleaf v. Dubuque, etc., R. Co., 30 Iowa 301 (1878).

Maryland.—Jones v. Jones, 45 Md. 144 (1876).

New York.—Chamberlain v. Chamberlain, 71 N. Y. 423 (1877); Hunt v. Johnson, 19 N. Y. 279 (1859).

Texas.—Wren v. Howland, 33 Tex. Civ. App. 87, 75 S. W. 894 (1903).

United States.—Lewis v. Marshall, 5 Pet. 470, 8 L. ed. 195 (1831).

England.—Hubbard v. Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. (N. S.) 435, 35 L. J. Exch. 169, 14 L. T. Rep. (N. S.) 442, 14 Wkly. Rep. 694 (1866).

"The entry of a deceased parent, or other relative, made in a Bible, family missal, or any other book, or document, or paper, stating the fact and date of the birth, marriage, or death, of a child or relative, is regarded as the declaration of such parent or relative in a matter of pedigree." Kelly v. McGuire, 15 Ark. 555, 604 (1855), per Hempstead, J.

9. North Brookfield v. Warren, 16 Gray (Mass.) 171 (1860); Eastman v. Martin, 19 N. H. 152 (1848); Wood v. Sawyer, 61 N. C. (Phillips Law Rep.) 251 (1867); Doe v. Davies, 10 Q. B. 314, 11 Jur. 607, 16 L. J. Q. B. 218, 59 E. C. L. 314 (1847); Monkton v. Atty.-Gen., 2 Russ. & M. 147, 11 Eng. Ch. 147 (1831).

A mural inscription, giving a historical account of a family, placed in a chancel where members of the family had been buried and which chancel formed part of a church of the parish where members of the family had for a long time resided, is admissible on a question of pedigree, and, after its effacement, its contents may be proved by copies made while the inscription was entire. Slaney v. Wade, 1 Myl. & C. 338, 13 Eng. Ch. 338, 40 Eng. Reprint 404 (1836).

10. Winder v. Little, 1 Yeates (Pa.) 152 (1792); Cox v. Brice, 159 Fed. 378, 86 C. C. A. 378 (1908); Hurst v. Jones, 12 Fed. Cas. No. 6,934, 1 Wall. Jr. appendix iii (1801); Hill v. Hibbit, 19 Wkly. Rep. 250 (1871); Jamieson v. Mill, 1 Jur. 790 (1837).

11. Davis v. Forrest, 7 Fed. Cas. No. 3,634, 2 Cranch. C. C. 23 (1811); Gee v. Ward, 7 E. & B. 509, 3 Jur. (N. S.) 692, 5 Wkly. Rep. 579, 90 E. C. L. 509 (1856).

12. Wren v. Howland, 33 Tex. Civ. App. 87, 75 S. W. 894 (1903); Goodright v. Moss, 2 Cowp. 591 (1777).

13. Derby v. Salem, 30 Vt. 722 (1858).

14. State v. McDonald, 55 Oreg. 419, 104 Pac. 967 (1909).

15. Gaines v. Green Pond Iron Min. Co., 32 N. J. Eq. 86, *modified* 33 N. J. Eq. 603 (1880).

16. Hartshorn v. Metropolitan Life Ins. Co., 55 App. Div. 471, 67 N. Y. Suppl. 13 (1900).

The records of baptisms and marriages of a church corporation, produced from the custody of the clerk of said corporation, are admissible in evidence on a question of pedigree

of private origin. It may be in the form of an inscription on a tombstone¹⁷ or other mortuary monument.

§ 2952. Circumstantial Proof of Pedigree.—In our discussion of the questions relating to pedigree declarations it will be observed that, as yet, no attempt has been made to classify the decisions cited in respect to whether they pass upon the admissibility of what may be termed true pedigree declarations, i. e., statements, individual and composite, made by members of the family and admissible on that basis or of an analogous class of pedigree statements made by unknown authors and admissible because of circumstances which vouch for their reliability. Though such a distinction may be regarded as of little practical value, it has been deemed advisable to devote some consideration to a closer examination of those statements of pedigree facts which, though ordinarily said to be admitted in evidence under the pedigree exception to the hearsay rule, might well be classed as independently relevant, because their probative force depends upon circumstances; and, also, to include in the discussion the use as evidence of circumstantially relevant facts bearing upon pedigree, including family history, whether associated with statements or otherwise.

The same considerations, relating to the difficulty of proof, which have assisted to establish the exception to the rule against hearsay, have influenced the courts to admit a variety of evidence whose probative value is circumstantial rather than assertive, and whose bearing upon the issue often seems remote. As in other cases of proof by circumstantial evidence, the existence of the aggregate is the really probative fact. A wide range of evidence is permitted, probative force being practically the sole requirement of admissibility,¹ facts liable to mislead or confuse the jury being subject to administrative exclusion when not necessary to proof of the proponent's case.

without proof of the authorship of the entries. *Layton v. Kraft*, 98 N. Y. Suppl. 72, 111 App. Div. 842, 18 N. Y. Ann. Cas. 228 (1906).

A sworn copy of a church record of baptisms and marriages is admissible on the question of pedigree. *Jacobi v. Order of Germania*, 73 Hun

602, 26 N. Y. Suppl. 318, 56 N. Y. St. Rep. 142 (1893); *Jackson v. King*, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468 (1825).

17. *North Brookfield v. Warren*, 15 Gray (Mass.) 171 (1860); *McClaskey v. Barr*, 54 Fed. 781 (1893).

§ 2952-1. "Correspondence of de-

§ 2953. Hearsay as Circumstantial Evidence in Case of Pedigree.—Hearsay evidence, so called, in its broadest sense, including every statement not made in accordance with the formalities of judicial requirement, frequently shows characteristics that belong to circumstantial rather than to direct evidence. For example, the fact that an oral statement was made at a certain time and under certain conditions may be a circumstance which is very convincing. The same is even more apparent in the case of written statements, especially entries in books used for permanent records of any nature. Further, if a statement is made in the presence of those who would have been likely to dispute it if it had been untrue, the circumstance that it was allowed to stand in its original form appeals to the reason as strongly probative of the truth of the fact asserted. This phase of the subject is treated later under the head of acquiescence.¹

§ 2954. Records as Circumstantial Evidence in Case of Pedigree.—Facts of family history may fairly be expected to be, in certain particulars, matters of record, to be found in family archives or on the files or books of public officers. Let it be assumed that a contention regarding a point in family history is of such a nature that, if correct, certain entries would, very probably, be found in a particular record. Finding them there will be received as a fact circumstantially relevant.¹ *Per contra*, the failure, upon inquiry, to find such entries may be a relevant fact, occasionally of considerable probative force, tending to disprove the truth of the contention itself.²

ceased members of the family, recitals in family deeds, descriptions in wills, and other solemn acts, are original evidence, where the oral declarations of the parties are admissible. Inscriptions on tombstones, and other funeral monuments, engravings on rings, inscriptions on family portraits, charts of pedigree, and the like, are also admissible, as original evidence of the same facts." *Kelly v. McGuire*, 15 Ark. 555, 604 (1855), per Hempstead, J.

§ 2953-1. § 2955 *et seq.*

§ 2954-1. *Jackson v. King*, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468 (1825).

2. *Crouch v. Hooper*, 16 Beav. 182, 1 Wkly. Rep. 10 (1852).

The fact that no certificate of marriage is produced from the office of the clerk of the county, where the marriage was alleged to have been performed in a state whose law required the person performing a marriage to file such a certificate, is a circumstance throwing great doubt on the probability that the marriage ever took place and is competent evidence on that question. *Barnum v. Barnum*, 42 Md. 251, 299 (1875).

Circumstances may furnish a guarantee of the truthfulness of a record or document of sufficient weight to warrant its reception in evidence.³

§ 2955. Proof by Acquiescence in Case of Pedigree.— That a statement of a fact of pedigree should be allowed to go uncontradicted and unaltered, when brought to the attention of persons who should be interested in having the truth alone stated, has a strong tendency to convince and satisfy reasonable minds that the statement is true. This conclusion of logic is of great assistance in many instances where proof of a genealogical fact is sought to be established. While it is true, as has been intimated elsewhere,¹ that the probative force of acquiescence in a pedigree statement is brought to bear upon the question in issue indirectly through the medium of the declaration itself which is deemed worthy of consideration by the court because of such implied assent, it is convenient to treat acquiescence in this connection simply as one form of circumstantial evidence, ignoring, as far as possible, the manner of its presentation to the court and having more regard to the details to be considered by the presiding justice in determining whether the acquiescence, as a circumstance, is sufficient to warrant the admission of a declaration.

Where the necessity is shown,² the court will permit a proponent to prove a statement of a relevant pedigree fact by whomsoever made or whatever may be its form, provided it be shown or can fairly be inferred that it came to the knowledge of some member of the family, connected either by blood, or marriage, who had or may reasonably be taken to have had adequate knowledge as to the truth of the matter: *provided further*, that the latter is shown or can fairly be assumed to have assented to or acquiesced in the accuracy of the declaration.³ The probative element in this proof is the failure to make any corrections in the statement. It is thus

3. Documents purporting to be transcripts of official records, found in the baggage of a railway passenger who had been killed in an accident, are competent evidence to show the passenger's marriage. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442 (1874).

§ 2955-1. § 2915.

2. § 2959.

3. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896); *Jones v. Jones*, 45 Md. 144 (1876); *Eastman v. Martin*, 19 N. H. 152 (1848); *Slaney v. Wade*, 1 Myl. & C. 338, 13 Eng. Ch. 338, 40 Eng. Reprint 404 (1836); *Goodright v. Moss*, 2 Cowp. 591 (1777).

analogous to the so called "admissions by silence,"⁴ and many administrative considerations applicable to the one may well be applied to the other.

In certain respects, however, special administrative precautions against error are employed in case of the pedigree declaration thus impliedly adopted. For example, where the statement shown or assumed to have been known by members of the family was, at the time of such implied assent, in a particular physical form, the trial judge will generally require that some proof of authenticity *dehors*, outside of, the instrument be furnished.⁵ This evidence may consist of proof of recognition in the family, of a document or the like, as genuine.⁶ Similarly, sufficient proof of authenticity may be furnished where the document is shown to come from a custody which the court recognizes as proper and such as to inspire reasonable confidence that it is genuine.⁷ Where this extrinsic corroboration of genuineness can be furnished, its production will be insisted upon even in the case of the most solemn or formal document. Not even what appears in a family Bible will be admitted without proof of authenticity,⁸ but a record kept in a family Bible is admissible without proof that the entries were made by a parent or a relative.⁹

4. §§ 1401 *et seq.*

5. Supreme Council G. S. F. v. Conklin, 60 N. J. L. 555, 38 Atl. 659, 41 L. R. A. 449 (1897); Viall v. Smith, 6 R. I. 417 (1860).

A genealogical table, certified under the seal of a foreign public officer, is not admissible in evidence. Banert v. Day, 2 Fed. Cas. No. 836, 3 Wash. 243 (1814).

6. *Maryland*.—Jones v. Jones, 45 Md. 144 (1876).

Massachusetts.—North Brookfield v. Warren, 16 Gray 171 (1860).

New Hampshire.—Eastman v. Martin, 19 N. H. 152 (1848).

North Carolina.—Wood v. Sawyer, 61 N. C. (Philips L. R.) 251 (1867).

United States.—McClaskey v. Barr, 54 Fed. 781 (1893).

England.—Slaney v. Wade, 1 Myl. & C. 338, 13 Eng. Ch. 338, 40 Eng. Reprint 404 (1835); Doe v. Pem-

broke, 11 East 504, 11 Rev. Rep. 260 (1809).

7. Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535 (1874); Union Cent. L. Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896); Douglass v. Sanderson, 2 Dall. (U. S.) 116, 1 L. ed. 317 (1791); Hubbard v. Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694 (1866).

8. Supreme Council G. S. F. v. Conklin, 60 N. J. L. 565, 38 Atl. 659, 41 L. R. A. 449 (1897).

9. People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896); Weaver v. Leiman, 52 Md. 708 (1879); Union Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896); Hubbard v. Lees, L. R. 1 Exch. 255, 258, 4 H. & C. 418, 12 Jur.

Any disagreement in the family on the subject of authenticity merely affects the probative force to be accorded the evidence.¹⁰

§ 2956. (Proof by Acquiescence in Case of Pedigree); Subjective Relevancy; Adequate Knowledge.— In proving facts of family history by showing acquiescence, on the part of members of the family in question, in relevant statements brought to their attention, it is not essential that the declarant should be shown to have had any knowledge of the truth of the facts asserted by him.¹ Nor is it necessary to show the authorship of the declarations.² The probative effect of the evidence lies, as is obvious, in a different direction. The material fact is the conduct of those who know or may be assumed to know the truth as to a subject of interest to them in view of the assertion which has been made with regard to it.³ The adequate knowledge required, in this

(N. S.) 435, 35 L. J. Exch. 169, 14 L. T. Rep. (N. S.) 442, 14 Wkly. Rep. 694 (1866).

10. *Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 535 (1874).

§ 2956-1. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896); *Jones v. Jones*, 45 Md. 144 (1876); *Eastman v. Martin*, 19 N. H. 152 (1848).

2. *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896); *Monkton v. Atty.-Gen.*, 2 Russ. & M. 147, 11 Eng. Ch. 147, 39 Eng. Reprint 350 (1831).

Where a book is shown to be the family Bible, entries therein are admissible in evidence on questions of marriages, births and deaths without proof of the handwriting or authorship of the entries. *Bertram v. Witherspoon*, 138 Ky. 116, 127 S. W. 533, 22 Am. & Eng. Ann. Cas. 1217 (1910); *Jones v. Jones*, 45 Md. 144 (1876); *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896). "To require evidence of the handwriting or authorship of the entries is to mistake the distinctive character of the evidence, for it de-

rives its weight, not from the fact that the entries are made by any particular person, but that, being in that place, they are to be taken as assented to by those in whose custody the book has been." *Hubbard v. Lees*, L. R. 1 Exch. 255, 258, 4 H. & C. 418, 12 Jur. (N. S.) 435, 35 L. J. Exch. 169, 14 L. T. Rep. (N. S.) 442, 14 Wkly. Rep. 694 (1866), per *Martin*, B.

3. "The admissibility of an entry in a family Bible does not depend upon the handwriting or authorship of the entry, but upon the fact that it is the family Bible. It is of the nature of a record, and, being produced from the proper custody, is itself evidence. The reason why it is admissible, although the handwriting be unknown or made by others than the family, is simply because the Bible being in the family, where all have access to it, the presumption is that the entry would not be permitted to remain if the whole family did not adopt it, and thereby give authenticity to it." *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896).

situation, as a condition of subjective relevancy, is that of the acquiescing members of the family. As in case of other hearsay statements,⁴ possession of such knowledge, where reasonable opportunities for acquiring it are shown, will be assumed. The accessibility of a record to members of the family is properly considered as bearing upon its probative force.⁵

§ 2957. (*Proof by Acquiescence in Case of Pedigree; Subjective Relevancy*); Absence of Controlling Motive to Misrepresent.—In connection with the proof of pedigree facts by showing that particular statements regarding them were brought to the attention of certain members of the family and assented to or not denied by them, the material fact is the conduct of such persons. It is of the utmost importance that subjective conditions of relevancy be present on the part of those whose acquiescence is deemed relevant. Thus, in an action against a benefit association where the defence was that the deceased member had misstated his age when applying for membership, it was improper to admit in evidence the coffin plate, used on the coffin of the deceased, which purported to state his age.¹ It is apparent in such a case that the acquiescence of the members of the family in allowing a certain age to be stated on the coffin plate may have been induced by motives of self-interest. To guard against the possibility of relying on the acquiescence in a pedigree statement of persons who were influenced by a motive to misrepresent the truth, only such declarations are received as can be shown to have been made *ante litem motam*.²

§ 2958. (*Proof by Acquiescence in Case of Pedigree*); Form of Statement.—A member of a family or the husband or wife of such member may be shown to have acquiesced in a statement made by any person.¹ The form presented may be that of a docu-

Documents, asserting facts of genealogy, shown to have been hung on the wall of an apartment of a relative, said apartment being the relative's general reception room, have been received. *Perth Peerage Case*, 2 H. L. C. 865, 876 (1848).

4. § 2915.

5. *Weaver v. Leiman*, 52 Md. 708 (1879).

§ 2957-1. *Dinan v. Supreme Coun-*

cil Catholic Mut. Ben. Assoc., 201 Pa. St. 363, 50 Atl. 999 (1902).

2. § 2919.

§ 2958-1. *Jones v. Jones*, 45 Md. 144 (1876); *Eastman v. Martin*, 19 N. H. 152 (1848); *Monkton v. Atty.-Gen.*, 2 Russ. & M. 147, 11 Eng. Ch. 147, 39 Eng. Reprint 350 (1831); *Goodright v. Moss*, 2 Cowp. 591 (1771).

ment as in the familiar instance of an entry in the family Bible² or on a family record of other description.³ It may be in form of an inscription on a tombstone or monument,⁴ wall of a church⁵ or a mourning ring.⁶ Letters from one member of the family to another, when produced from the custody of the recipient of the letters, have also been held admissible.⁷ A will is likewise another form in which the evidence may be produced.⁸

§ 2959. (*Proof by Acquiescence in Case of Pedigree*); Administrative Details.—Where the proponent seeks to raise the inference that a genealogical fact is as stated in a particular oral or written form because it was presumably brought to the attention of certain members of the family and assented to by them, certain requirements will be made as a matter of administration. An adequate general or special necessity, as above referred to,¹ must be shown for admitting the evidence. The implied statement of members of the family must be exhibited as both objectively and

2. California.—*People v. Slater*, 119 Cal. 620, 51 Pac. 957 (1898); *People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896).

Georgia.—*Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 535 (1874).

Maryland.—*Weaver v. Leiman*, 52 Md. 708 (1879); *Jones v. Jones*, 45 Md. 144 (1876).

North Carolina.—*Wiseman v. Cornish*, 53 N. C. 218 (1860).

Virginia.—*Union Ins. Co. v. Poliard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896).

United States.—*Douglass v. Sanderson*, 2 Dall. 116, 1 L. ed. 317 (1791).

England.—*Hubbard v. Lees*, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. (N. S.) 442, 14 Wkly. Rep. 694 (1886).

3. North Brookfield v. Warren, 16 Gray (Mass.) 171 (1860); *Beckham v. Nacke*, 56 Mo. 546 (1874); *Wood v. Sawyer*, 61 N. C. (Phillips Law Rep.) 251 (1867); *Perth Peerage Case*, 2 H. L. C. 865, 876 (1848).

4. Alabama.—*Boyett v. State*, 130

Ala. 77, 30 So. 475, 89 Am. St. Rep. 19 (1900).

Massachusetts.—*North Brookfield v. Warren*, 16 Gray 171 (1860).

Missouri.—*Smith v. Patterson*, 95 Mo. 525, 8 S. W. 567 (1888).

New Hampshire.—*Eastman v. Martin*, 19 N. H. 152 (1848).

United States.—*McClaskey v. Barr*, 54 Fed. 781 (1893).

England.—*Whitelocke v. Baker*, 13 Ves. Jr. 511, 9 Rev. Rep. 216, 33 Eng. Reprint 385 (1807).

5. Slaney v. Wade, 1 Myl. & C. 338, 13 Eng. Ch. 338, 40 Eng. Reprint 404 (1836).

6. Vowles v. Young, 13 Ves. Jr. 140, 144, 9 Rev. Rep. 154, 33 Eng. Reprint 247 (1806).

7. Kansas Pac. R. Co. v. Miller, 2 Colo. 442 (1874); *Hubbard v. Lees*, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. (N. S.) 435, 35 L. J. Exch. 169, 14 L. T. Rep. (N. S.) 442, 14 Wkly. Rep. 694 (1866).

8. Doe v. Pembroke, 11 East 504, 11 Rev. Rep. 260 (1809).

§ 2959-1. §§ 2912, 2913.

subjectively relevant, i. e., based upon adequate knowledge and made without controlling motive to misrepresent. Objective relevancy in the evidence offered in this connection must, as a matter of course, be established to the satisfaction of the court. That is, it should be shown that the statement alleged to have received the assent of the family, or of certain members of it, is relevant in some degree to the subject matter of the inquiry.²

§ 2960. (*Proof by Acquiescence in Case of Pedigree*); Ancient Facts.—A well-established principle of judicial administration provides that less stringency of proof is required in case of ancient than of modern facts. In connection with pedigree statements it has been suggested that they should be received only in case of ancient facts.¹ Without conceding so broad a rule, administrative indulgence becomes marked in case of facts remote in point of time,² from that of the inquiry, canons of relaxation replacing those of requirement.³ The circumstance that a statement has stood unchallenged for many years is regarded by the courts as tending strongly to give it credit and probative force.⁴

2. A mere similarity of names is not necessarily sufficient to satisfy the conscience of the court in an important connection. *Gehr v. Fisher*, 143 Pa. St. 311, 22 Atl. 859 (1891).

§ 2960-1. *Birney v. Hann*, 3 A. K. Marsh. (Ky.) 322, 13 Am. Dec. 167 (1821); *Covert v. Hertzog*, 4 Pa. St. 145 (1846).

2. *North Brookfield v. Warren*, 15 Gray (Mass.) 171 (1860); *Layton v. Kraft*, 98 N. Y. Suppl. 72, 111 App. Div. 842, 18 N. Y. Ann. Cas. 228 (1906); *Howard v. Russell*, 75 Tex. 171, 12 S. W. 525 (1889).

3. *Kentucky*.—*Lindsey v. Smith*, 131 Ky. 176, 114 S. W. 779 (1908); *Dunn v. Garnett*, 129 Ky. 728, 112 S. W. 841 (1908).

Missouri.—*Shaw v. Tracy*, 95 Mo. 531, 8 S. W. 434 (1888).

New Jersey.—*Rollins v. Atlantic City R. Co.*, 73 N. J. L. 64, 62 Atl. 929 (1905).

New York.—*Young v. Shulenberg*, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730 (1910).

South Carolina.—*In re Robb's Estate*, 37 S. C. 19, 16 S. E. 241 (1891).

Texas.—*Howard v. Russell*, 75 Tex. 171, 12 S. W. 525 (1889).

4. "But after a long series of years, as in the present case, where no other persons appear ever to have claimed the land in question, as heirs of the original proprietor, and thus denied or rendered improbable the truth of the recital, and where the defendant has offered no proof tending to destroy or weaken the presumption; in such cases a jury may be permitted to presume the pedigree, as stated in deeds of conveyance, unless facts control the presumption." *Little v. Palister*, 4 Greenl. (Me.) 209 (1826).

"Another circumstance of weight is that Samuel C. Young, having assumed, as the son and sole heir of Samuel Young, to convey the landed estate of the latter, and his grantees having for more than sixty years claimed title under his conveyance, the right of Samuel C. Young to

§ 2961. (*Proof by Acquiescence in Case of Pedigree; Ancient Facts*); Family History.—Facts of family history, such as marriage, death and the like which are perhaps not, strictly speaking, genealogical facts, are accorded the same administrative indulgence when it is shown that they occurred many years ago, proof of the same to the satisfaction of the court being attained by slight evidence.¹ Thus the death of person who executed a written instrument has been presumed after a lapse of eighty years,² and a marriage alleged to have occurred over fifty years previous to the time of inquiry, has been proved by declarations of those who knew the parties, although not related.³ The legitimacy of a person is also another fact to the proof of which the principle applies.⁴

§ 2962. (*Proof by Acquiescence in Case of Pedigree*); Conduct in Family.—Not only are the declarations of deceased members of the family admissible in case of family history as secondary evidence of the facts asserted,¹ but circumstantial evidence of any relevant nature, including the action of members of the family in connection with relevant claims or assertions and the general conduct of one member of a family toward another in the ordinary course of daily life, may be received for the same purpose.² Thus, the fact that certain children

make the conveyance has never, so far as appears, been questioned or challenged by any other person claiming under Samuel Young." *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1885).

Similarity of names.—After a great lapse of time even the circumstance of similarity of names is entitled to weight on the question of relationship. *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1885).

§ 2961-1. See *Fosgate v. Herkimer*, etc., Co., 12 Barb. (N. Y.) 352, 358; *affirmed*, 12 N. Y. 580 (1852).

2. *Mann v. Cavanaugh*, 110 Ky. 776, 23 Ky. L. Rep. 238, 62 S. W. 854 (1901).

3. *Dunn v. Garnett*, 129 Ky. 728, 112 S. W. 841 (1908).

4. After a long lapse of time, where the parties are dead and where it appears that a person has been recognized and treated as the legitimate child of a certain man and woman, not only by the father and mother, but also by various members of the families of both father and mother, legitimacy may be presumed. *In re Robb's Estate*, 37 S. C. 19, 16 S. E. 241 (1891).

§ 2962-1. *Flores v. Hovel*, (Tex. Civ. App. 1910) 125 S. W. 606.

2. *Alabama*.—*White v. Strother*, 11 Ala. 720 (1847).

Arkansas.—*Kelly v. McGuire*, 15 Ark. 555 (1855).

District of Columbia.—*Green v. Norment*, 5 Mackey (16 D. C.) 80 (1886).

had been heard to call a certain woman "mamma" is relevant on the question of relationship;³ as is likewise the fact that two men recognized each other as brothers, living together at one time in the same house and then in adjoining houses.⁴ That a man and woman are husband and wife may be inferred from the fact that they traveled together on a railway train with young children toward whom they conducted themselves as parents customarily do.⁵ The rule allows a child to testify concerning his parentage.⁶ The legitimacy⁷ or illegitimacy⁸ of a child may also be established circum-

Indiana.—*De Haven v. De Haven*, 77 Ind. 236 (1881).

Maryland.—*Jones v. Jones*, 45 Md. 144 (1876).

Minnesota.—*Backdahl v. Grand Lodge A. O. U. W.*, 46 Minn. 61, 48 N. W. 454 (1891).

Mississippi.—*Henderson v. Cargill*, 31 Miss. 367, 409 (1856).

Nebraska.—*Comstock v. State*, 14 Nebr. 205, 15 N. W. 355 (1883).

New Jersey.—*Gaines v. Green Pond Iron Min. Co.*, 32 N. J. Eq. 86 modified, 33 N. J. Eq. 603 (1880).

New York.—*Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877); *McCarty v. Hodges*, 2 Edm. Sel. Cas. 433 (N. Y.) (1846).

Oregon.—*State v. McDonald*, 55 Oreg. 419, 104 Pac. 967 (1909).

Rhode Island.—*Viall v. Smith*, 6 R. I. 417 (1860).

West Virginia.—*Butcher v. Sommerville*, 67 W. Va. 261, 67 S. E. 726 (1910).

Wisconsin.—*Eaton v. Tallmadge*, 24 Wis. 217 (1869).

England.—*Hubbard v. Lees*, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. (N. S.) 435, 35 L. J. Exch. 169, 14 L. T. Rep. (N. S.) 442, 14 Wkly. Rep. 694 (1866); *In re Berkeley*, 4 Campb. 401, 416 (1811).

3. *White v. Strother*, 11 Ala. 720 (1847).

4. *Green v. Norment*, 5 Mackey (Dist. of Columbia) 80 (1886).

5. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442 (1874).

6. "It is certainly competent for

one who, from his earliest recollection, has been a member of one's family, given his name, and reared in the belief, and in all ways given to understand that he is a son in the household, to testify to his parentage. His testimony may not be satisfactory or conclusive of the fact, but it is at least admissible for what it is worth in the minds of the jury, and clearly sufficient to make a *prima facie* case, thus throwing the burden or overcoming it upon him who controverts it. To so rear a child, is in the nature of an admission of parentage, and should be so regarded." *Comstock v. State*, 14 Nebr. 205, 15 N. W. 355 (1883).

7. "If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate." *Berkeley Peerage Case*, 4 Campb. 401, 416 (1811), per Lord Mansfield.

8. The circumstance that a father applied to the legislature for an act legitimizing a son may properly be shown on the question of legitimacy. *Barnum v. Barnum*, 42 Md. 251, 305 (1875).

"Was not the violent grief of David, the king, upon the death of the child, some corroboration that he, and not Uriah, was its father?" *Woodward v. Blue*, 107 N. C. 407, 410, 12 S. E. 453, 10 L. R. A. 662, 22 Am. St. Rep. 897 (1890), per Clark, J.

stantially under this rule. Recognition in a deed⁹ or will¹⁰ of one as a legitimate member of the family may likewise be good circumstantial evidence to that effect.¹¹ Even a statement in a letter may be relevant in this connection.¹² In the question of pedigree family conduct, as shown by the letters of deceased members of the family,¹³ or by a recognition, on the part of those shown to be members, of particular persons as belonging to it,¹⁴ has been received in evidence.

Declarations or acts of the putative mother are admissible to prove the illegitimacy of a child.¹⁵ The fact of relationship to members of a certain family may be shown, in part, by the conduct of those claiming relationship in sending letters and funeral notices to those whom they assert to be members of their family.¹⁶

Acquiescence in declarations whether oral or written by members of a family is a phase of family conduct which may be a circumstance of great probative force aside from its bearing upon the probability of the truthfulness of such declarations. That an untruthful statement, concerning a fact of family history, whether an oral declaration, an entry in a family record, an inscription on a gravestone, monument, memorial window or tablet or other form of written declaration, should be allowed to stand uncorrected when, if untrue, its falsity must clearly have been brought to the attention of members of the family who knew the facts and who would naturally be interested in correcting such an error, seems unreasonable; and the conduct of such members of the family in allowing such declaration to stand furnishes circumstantial proof that the declaration is true. The effect of the circumstance is that of corroborating the declaration; however, since there is usually great difficulty in showing affirmatively such acquiescence, it cus-

See also *Goodright v. Moss*, 2 Cowp. 591 (1777).

9. *Jackson v. Cooley*, 8 Johns. (N. Y.) 128 (1811); *Carter v. Tinicum Fishing Co.*, 77 Pa. St. 310 (1875).

10. *Gaines v. New Orleans*, 6 Wall. (U. S.) 642, 18 L. ed. 950 (1867).

11. A recital in a deed by a mother is not admissible to prove that her husband had not had access to her, and that consequently the child was illegitimate, the child having been born in lawful wedlock. *Watts v.*

Owens, 62 Wis. 512, 22 N. W. 720 (1885).

12. *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760 (1895).

13. *Butcher v. Sommerville*, 67 W. Va. 261, 67 S. E. 726 (1910).

14. *Butcher v. Sommerville*, 67 W. Va. 261, 67 S. E. 726 (1910).

15. *State v. McDonald*, 55 Or. 419, 104 Pac. 967 (1909), rehearing denied, 106 Pac. 444 (1910).

16. *Fearnley v. Fearnley*, 44 Colo. 417, 98 Pac. 819 (1908).

tomarily goes only to the extent of rendering the declaration admissible.¹⁷

§ 2963. (*Proof by Acquiescence in Case of Pedigree*); Possession.—Possession of a writing or of property of any description whether real or personal may be an important circumstance in assisting to establish a fact of pedigree.¹ Thus, where deeds containing recitals of pedigree facts were offered in evidence on the question of pedigree, it was held that the fact that the property conveyed by the deeds had been in the undisputed possession of those claiming thereunder for eighty years, together with the fact that the deeds had been on record for the same time made the pedigree recitals competent evidence of the facts asserted.² Likewise finding among the effects of an intestate some gold nuggets and other small articles of property which were known to have been habitually carried by the person with whom it was attempted to identify the deceased, furnished convincing proof of such identity.³

§ 2964. (*Proof by Acquiescence in Case of Pedigree; Possession*); Corroboration.—Possession of documents or other articles of personal property or the occupation and possession of real property may be of value in proving a genealogical fact, because of its tendency to corroborate other evidence.¹

17. § 2955.

§ 2963-1. See *Doe v. Auldjo*, 5 U. C. Q. B. 171 (1848).

The circumstance that the deceased, a railway passenger who had been killed in an accident, had in his possession what purported to be transcripts of certain official records, renders those papers admissible as proof of the facts asserted therein regarding his marriage. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442 (1874).

"If evidence had been given that possession had followed and accompanied the pedigree; if, between 1747 and 1793, a possession had been shown passing from parent to child

under the entail created in 1732; — that enjoyment would have been a strong circumstance to prove that the persons named in the pedigree did, in fact, fill the characters, which it was in 1793 alleged that they did fill." *Fort v. Clark*, 1 Russ. 601, 604 (1826), per Lord Gifford.

2. *Rollins v. Atlantic City R. Co.*, 73 N. J. L. 64, 62 Atl. 929 (1905).

3. *In re Clark's Est.*, 13 Cal. App. 786, 110 Pac. 828 (1910).

§ 2964-1. *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1885); *Fort v. Clarke*, 1 Russ. 601 (1826); *Wallbridge v. Jones*, 33 U. C. Q. B. 613 (1873).

§ 2965. (*Proof by Acquiescence in Case of Pedigree; Possession*); Proprietary Records and Papers.—The possession of the records of a deceased proprietor or owner of real or personal property or of deeds¹ showing a conveyance to him of certain property may be of value upon the question of pedigree in connection with other evidence tending to establish the pedigree fact asserted. So upon the issue as to whether A. is the son of B., it has been spoken of as a significant circumstance that A. had in his possession a deed to B. as tending to show some sort of connection or relationship between them.² And the United States Supreme Court has said that the fact that a person representing himself to be the son and heir of a certain other person has in his rightful possession the title papers of the latter to a valuable estate is a fact tending to prove the truth of his asserted relationship.³

§ 2966. Animal Pedigree.—Evidence of reputation as to the pedigree of an animal may be properly received.¹ Thus, in an action to recover damages for injuries caused to an animal by reason of the negligence of a carrier, proof of reputation as to the pedigree of the animal was held to be admissible.² Pedigree books may also be admitted where they are recognized as a standard

§ 2965-1. Wallbridge v. Jones, 33 U. C. Q. B. 613 (1873).

2. Wiess v. Hall, (Tex. Civ. App. 1911) 135 S. W. 385.

3. Fulkerson v. Holmes, 117 U. S. 389, 398, 6 Sup. Ct. 780, 29 L. ed. 915 (1885).

§ 2966-1. Jones v. Memphis & A. C. P. Co., (Miss. 1902) 31 So. 201; Citizens' Rapid Tr. Co. v. Dew, 100 Tenn. 317, 324, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 318 (1897).

"The question of pedigree and ancestry is a matter of common or general reputation, whether the question concerns horses, cattle, dogs, or men. The matter, from the very nature of things, depends upon reputation or common repute." Citizens, Rapid Tr. Co. v. Dew, 100 Tenn. 317, 324, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 318 (1897), per Wilkes, J.

"We hold that if such reputation is not competent evidence of the fact as reputed, still it is of itself an element of market value, and as such was admissible." Ohio & M. Ry. Co. v. Stribling, 38 Ill. App. 17, 24 (1889), per Pleasants, P. J.

2. Jones v. Memphis, etc., Packet Co., (Miss. 1902) 31 So. 201. See also Ohio & M. Ry. Co. v. Stribling, 38 Ill. App. 17 (1889).

On the contrary, it has been held, in another jurisdiction, in a similar action, that it was an error to allow witnesses to testify as to what they had heard the pedigree of the animal to be. N. N. & M. V. R. Co. v. Simcoe, 14 Ky. Law Rep. 526 (1893). This decision was based on the ground that the issue was not one of genealogy. The proof evidently was offered for the purpose of showing the value of the animal in both cases.

authority among dealers or breeders of the particular class of animals referred to by such a book.³

§ 2967. Scope of Circumstantial Evidence in Case of Pedigree; Age.—Should the necessity be satisfactorily shown by the proponent,¹ he may establish the fact of age by resorting to declarations which owe their probative force to circumstances and which are admissible under the pedigree exception for like reason.² For instance, entries in a family record³ may be introduced without

3. *Kuhns v. Chicago M. & S. P. Ry. Co.*, 65 Iowa 528, 22 N. W. 661 (1885) ("herd book" shown to be a standard authority among cattle breeders admitted under code); *Louisville & N. R. R. Co. v. Frazee*, 24 Ky. L. Rep. 1273, 71 S. W. 437 (1903) (holding books of pedigree to be admissible under the statute); *Louisville & N. R. Co. v. Kice*, 109 Ky. 786, 60 S. W. 705 (1901) (holding American stud books are admissible on question of pedigree where carefully compiled and universally accepted as conclusive by persons dealing in such animals).

"It is shown that certain books are kept, and in them there is a registration of pedigrees kept up for the information of the public, not only as to horses, but also as to cattle and dogs. These are shown to be received as satisfactory evidence of pedigree in the same manner and upon the same idea as entries in family records of births, deaths, and marriages are received with regard to the human family. It is true that in family records the entries in the books are usually made by the relatives and friends of the person, but inasmuch as dogs have no relatives competent to make entries for them, it is allowable for such entries to be made by the owners, friends, and admirers of the dog." *Citizens' Rapid Tr. Co. v. Dew*, 100 Tenn. 317, 324, 45 S. W. 790, 66 Am. St. Rep. 754,

40 L. R. A. 318 (1897), per Wilkes, J.

Mere private publications are not admissible. *Louisville & N. R. R. Co. v. Frazee*, 24 Ky. L. Rep. 1273, 71 S. W. 437 (1903).

A certificate of a breeders' association under the hand of its secretary and its seal is admissible to show the pedigree of a sow as a basis to show its valuation. *Warrick v. Reinhardt*, 136 Iowa 27, 111 N. W. 983 (1907).

§ 2967-1. *People v. Mayne*, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256 (1897); *Hunt v. Supreme Council O. of C. F.*, 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855 (1887); *Leggett v. Boyd*, 3 Wend. (N. Y.) 376 (1829); *Campbell v. Wilson*, 23 Tex. 253, 76 Am. Dec. 67 (1859).

2. *California*.—*People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896).

Georgia.—*Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 535 (1874).

North Carolina.—*Wiseman v. Cornish*, 53 N. C. 218 (1860).

Pennsylvania.—*Carskadden v. Poorman*, 10 Watts 82, 36 Am. Dec. 145 (1840).

Tennessee.—*Pearce v. Kyzer*, 16 Lea 521, 57 Am. Rep. 240 (1886).

3. *Bertram v. Witherspoon*, 138 Ky. 116, 127 S. W. 533 (1910); *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617 (1905); *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896).

proving the handwriting or the authorship of the entries,⁴ the confidence of the court in the truthfulness of the entries and their probative weight depending upon the circumstance of acquiescence by the members of the family.⁵

Corroboration.—A record of entries made in a family Bible may under some circumstances be received in evidence in corroboration of the testimony of a witness.⁶ It would seem, however, that where the entries were made by a parent who is testifying or who is alive and within reach of process of the court this course would not be permissible.⁷

§ 2968. (*Scope of Circumstantial Evidence in Case of Pedigree; Age*); Administrative Relaxation.—Among facts in proof of which administrative indulgence is conceded is that of age,¹ including incidental facts concerning birth.²

Should it seem unnecessary for the purposes of proof to rely upon secondary evidence, sound administration may insist upon production of the primary. Thus, it may be proper, to reject testimony as to age if based upon hearsay should the mother of the person in question be available as a witness.³ Declarations of a deceased party have been received in proof of his age.⁴

4. *Bertram v. Witherspoon*, 138 Ky. 116, 127 S. W. 533 (1910); *Jones v. Jones*, 45 Md. 144 (1876); *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (1896).

5. § 2955.

6. Where a mother testified as to the age of her children, a record of the entries of their births made in the family Bible under her dictation by a person since deceased was admitted to corroborate the testimony of the mother. *Wiseman v. Cornish*, 53 N. C. 218 (8 Jones Law) (1860).

7. *Bigliben v. State*, (Tex. Cr. App. 1912) 151 S. W. 1044; *Rowan v. State*, 57 Tex. Cr. Rep. 625, 124 S. W. 668 (1910); *Campbell v. Wilson*, 23 Tex. 252, 76 Am. Dec. 67 (1859).

§ 2968-1. *Travelers' Ins. Co. v. Henderson Cotton Mills*, 120 Ky. 218, 85

S. W. 1090, 27 Ky. Law Rep. 653, 117 Am. St. Rep. 585 (1905); *Hunt v. Supreme Council O. of C. F.*, 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855 (1887); *Watson v. Brewster*, 1 Pa. St. 381 (1845).

The husband is presumed to know the age of his wife after thirty years of married life and may testify to it. *Adler v. Royal Neighbors of America*, 90 Neb. 56, 132 N. W. 716 (1911).

2. *Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12 (1891); *Derby v. Salem*, 30 Vt. 722 (1858).

3. *Bigliben v. State*, (Tex. Cr. App. 1912) 151 S. W. 1044; *Rowan v. State*, 57 Tex. Cr. Rep. 625, 124 S. W. 668 (1910); *Johnson v. State*, 42 Tex. Cr. Rep. 298, 59 S. W. 898 (1900).

4. *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570 (1910).

§ 2969. (*Scope of Circumstantial Evidence in Case of Pedigree; Age*); Hearsay.—In connection with age, hearsay is receivable from the nature of the case.¹ The person whose age is involved may testify regarding it;² though his information is necessarily based upon family tradition or reputation,³ or even, as has been said upon individual hearsay, in whole or in part.⁴ Seldom, however, is circumstantial corroboration lacking.⁵ Approximate age may thus come fairly within facts of personal knowledge.⁶ High ground has even been taken in favor of evidence of this kind, it being held to be of the highest value.⁷

Age of another.—While a witness may, partly in view of the

§ 2969-1. *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541 (1892). See *Knowles v. State*, 44 Tex. Cr. App. 322, 72 S. W. 398 (1903).

2. *Alabama.*—*Cherry v. State*, 68 Ala. 29 (1880); *Bain v. State*, 61 Ala. 75 (1878).

Arkansas.—*Edgar v. State*, 37 Ark. 219 (1881).

California.—*People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896); *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. 580 (1884).

Georgia.—*McCollum v. State*, 119 Ga. 308, 46 S. E. 413, 100 Am. St. Rep. 171 (1903); *Central R. Co. v. Coggin*, 73 Ga. 689 (1884).

Kansas.—*State v. McClain*, 49 Kan. 730, 31 Pac. 790 (1892).

Maine.—*Greenfield v. Camden*, 74 Me. 56 (1882).

Massachusetts.—*Com. v. Phillips*, 162 Mass. 504, 39 N. E. 109 (1895); *Hill v. Eldridge*, 126 Mass. 234 (1879); *Com. v. Stevenson*, 142 Mass. 466, 8 N. E. 341 (1866).

Michigan.—*Morrison v. Emsley*, 53 Mich. 564, 19 N. W. 187 (1884); *Cheever v. Congdon*, 34 Mich. 296 (1876).

Minnesota.—*Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541 (1892).

Missouri.—*State v. Marshall*, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63 (1897).

Montana.—*State v. Bowser*, 21 Mont. 133, 53 Pac. 179 (1898).

New York.—*Koester v. Rochester Candy Works*, 194 N. Y. 92, 87 N. E. 77, 19 L. R. A. (N. S.) 783 (1909); *Stevenson v. Kaiser*, 29 N. Y. Suppl. 1122, 59 N. Y. St. Rep. 515 (1894); *State v. Best*, 108 N. C. 747, 12 S. E. 907 (1891).

Tennessee.—*Pearce v. Kyzer*, 16 Lea 521, 57 Am. Rep. 240 (1886).

Texas.—*Reed v. State*, (Cr. App. 1895) 29 S. W. 1074; *Mut. L. Ins. Co. of New York v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286 (1894).

West Virginia.—*State v. Cain*, 9 W. Va. 559 (1876).

Compare Doe v. Ford, 3 U. C. Q. B. 352 (1847).

3. *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541 (1892).

4. This may be true though the parents of the declarant are available as witnesses. *Bain v. State*, 61 Ala. 75 (1878); *Pearce v. Kyzer*, 16 Lea (Tenn.) 521, 57 Am. Rep. 240 (1886).

5. It is competent to show, on the question of a girl's age, that, before the controversy arose, the girl had a birthday party and, on that occasion, there was a birthday cake having her age in figures upon it. *Parkhurst v. Krellinger*, 69 Vt. 375, 38 Atl. 67 (1897).

6. *State v. Bowser*, 21 Mont. 133, 53 Pac. 179 (1898).

7. *Morrison v. Emsley*, 53 Mich. 564, 19 N. W. 187 (1884).

corroborative facts known to him, testify as to his own age from hearsay, he may not be permitted to testify to the age of another person upon the basis of hearsay⁸ or of reputation.⁹

§ 2969a. (*Scope of Circumstantial Evidence in Case of Pedigree*); Birth.—It has been said that hearsay cannot be used to prove the place of a person's birth.¹ This, however, may well be doubted,² for hearsay declarations or reputation in the family³ regarding the fact, place⁴ or time of birth may be as competent as is the circumstantial proof⁵ by which these facts are established.

§ 2970. (*Scope of Circumstantial Evidence in Case of Pedigree*); Death.—Should a suitable forensic necessity for receiving it be presented,¹ not only may secondary evidence of extrajudicial statements be received in proof of the fact of death, whether such declarations be in individual² or composite³ form,

8. *People v. Mayne*, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256 (1897); *Dinan v. Supreme Council Catholic Mut. Ben. Assoc.*, 201 Pa. St. 363, 50 Atl. 999 (1902); *Connecticut Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294 (1876).

9. *Sims v. State*, (Tex. Cr. App. 1902) 70 S. W. 90; *Colclough v. Smyth*, 15 Ir. Ch. 347, 10 L. T. Rep. (N. S.) 918 (1863).

§ 2969a-1. *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545 (1821); *Adams v. Swansea*, 116 Mass. 591 (1875); *Tyler v. Flanders*, 57 N. H. 618 (1876); *Currie v. Stairs*, 25 New Bruns. 4 (1885).

A witness will not be permitted to testify, entirely from the hearsay statements of others, as to the place of his birth. *McCarthy v. Deming*, 4 Lans. (N. Y.) 440 (1871); *Jackson v. Etz*, 5 Cow. (N. Y.) 314, 320 (1826); *Mima Queen v. Hepburn*, 7 Cranch (U. S.) 290, 3 L. ed. 348 (1813); *Rex v. Erith*, 8 East 539, 542 (1807).

2. See discussion § 2939.

3. *Clark v. Owens*, 18 N. Y. 434 (1858). See also *Grand Lodge A. O. U. W. v. Bartes*, 69 Neb. 631, 96 N.

W. 186, 98 N. W. 715, 111 Am. St. Rep. 577 (1904).

4. *Shearer v. Clay*, 1 Litt. (Ky.) 260 (1822); *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545 (1821); *Wilmington v. Burlington*, 4 Pick. (Mass.) 174 (1826); *McCarty v. Terry*, 7 Lans. (N. Y.) 236 (1872).

5. *Weaver v. Leiman*, 52 Md. 708 (1879); *Jones v. Jones*, 45 Md. 144 (1876); *Beckham v. Nacke*, 56 Mo. 546 (1874); *Smith v. State*, (Tex. Cr. App. 1903) 73 S. W. 401. See also *Currie v. Stairs*, 25 N. Bruns. 4 (1885).

§ 2970-1. Unless the fact be an ancient one, it may properly be assumed, in the absence of affirmative proof on the subject, that primary, i. e., more original, evidence can be procured on the subject, all forms of secondary proof being provisionally rejected. *Stouvenel v. Stephens*, 26 How. Pr. (N. Y.) 244 (1863). See also *Fosgate v. Herkimer Mfg., etc., Co.*, 12 Barb. (N. Y.) 352; *affirmed*, 12 N. Y. 580 (1852).

2. *Stouvenel v. Stephens*, 26 How. Pr. (N. Y.) 244 (1863); *Fosgate v. Herkimer Mfg., etc., Co.*, 12 Barb. (N. Y.) 352, *affirmed*, 12 N. Y. 580

but facts circumstantially relevant are equally available for the purpose.⁴ In addition to direct testimony on the subject⁵ any circumstantially relevant evidence involving an assertion of the fact or date of death shown to have been brought to the attention of deceased members of the family, possessing adequate knowledge on the subject, will be received, the circumstance that no objection has been made to the assertion, directly or impliedly, being regarded as tending to prove that the same is true. Thus it may be competent to show inscriptions on monuments and gravestones,⁶ a record in the family Bible⁷ or a record on a framed parchment kept in the family;⁸ but proof must be given identifying the person in question as the person whose name appears in such documents, etc., mere identity of name being insufficient to render the evidence admissible.⁹ The same facts may be shown by family reputation.¹⁰

(1852); *Jackson v. Boneham*, 15 Johns. (N. Y.) 226 (1818); *Primm v. Stewart*, 7 Tex. 178 (1851); *Scott v. Ratliffe*, 5 Pet. (U. S.) 81, 8 L. ed. 54 (1831).

3 *Ewing v. Savary*, 3 Bibb. (Ky.) 235 (1813).

Reputation may be the only available evidence. *Ringhouse v. Keever*, 49 Ill. 470 (1869); *Houston City St. R. Co. v. Richart*, (Tex. Civ. App. 1894) 27 S. W. 920; *Primm v. Stewart*, 7 Tex. 178 (1851).

On the other hand it has been held that death cannot be proved by reputation. *Prout v. McNab*, 6 Dem. Surr. (N. Y.) 152 (1887).

The extrajudicial statements of members of the family may not be obtainable for the purposes of proof. *Ringhouse v. Keever*, 49 Ill. 470 (1869).

4. **Mortality tables** if of recognized authority, are receivable as part of the common knowledge of the community and may be examined by the judge as tending to establish the facts asserted. *Mississippi, etc., R. Co. v. Ayres*, 16 Lea (Tenn.) 725 (1886); *Galveston, etc., R. Co. v. Arispe*, 81 Tex. 517, 17 S. W. 47 (1891); *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298 (1887); *Vicksburg, etc.,*

R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. ed. 257 (1886).

5. A daughter may properly testify that her father is dead. *Hubatka v. Meyerhofer*, 79 N. J. Law 264, 75 Atl. 454 (1910).

6. *North Brookfield v. Warren*, 16 Gray (Mass.) 171 (1860); *Smith v. Patterson*, 95 Mo. 525, 8 S. W. 567 (1888).

7. *Wiseman v. Cornish*, 53 N. C. 218 (8 Jones Law) 186; *In re Berkeley*, 4 Campb. 401 (1811).

8. *North Brookfield v. Warren*, 16 Gray (Mass.) 171 (1860).

9. *Gehr v. Fisher*, 143 Pa. St. 311, 22 Atl. 859 (1891); *Sitler v. Gehr*, 105 Pa. St. 577, 51 Am. Rep. 207 (1884).

10. *American L. Ins., etc., Co. v. Rosenagle*, 77 Pa. St. 507 (1875); *Palmer v. Palmer*, 18 L. R. Ir. 192 (1885).

Where proof of death is attempted by relying on the presumption arising from seven years' absence, a statement of any person, calculated to rebut the presumption, may be admissible. *Flynn v. Coffee*, 12 Allen (Mass.) 133 (1866); *Jackson v. Boneham*, 15 Johns. (N. Y.) 226 (1818); *Dowd v. Watson*, 105 N. C. 476, 11 S. E. 589, 18 Am. St. Rep. 920

§ 2971. (*Scope of Circumstantial Evidence in Case of Pedigree; Death*); Hearsay.—To prove the fact and date of death, the so-called hearsay statement is often employed in what might be termed an independently relevant capacity, the probative force arising from the conduct of the family or other persons interested in acting upon or acquiescing in the truth of statements brought to their attention.¹ Details of such circumstantial proof may be numerous and even, at times, individually insignificant.² Information received from members of the family may be used as circumstantial evidence to establish the death of one of its members.³

(1890); *Moore v. Parker*, 34 N. C. (12 Iredell's Law) 123 (1857). However, bare hearsay such as a letter purporting to have been written at the request of a person presumed to be dead by reason of such absence is incompetent to rebut such presumption. *Chelf v. Isaacs*, 6 Ky. L. Rep. (abstract) 739 (1885); *People v. Miller*, 30 Misc. (N. Y.) 355, 63 N. Y. Suppl. 949, 14 N. Y. Cr. Rep. 407 (1900).

§ 2971-1. *North Brookfield v. Warren*, 16 Gray (Mass.) 171 (1860); *Hunt v. Johnson*, 19 N. Y. 279 (1859); *McClaskey v. Barr*, 47 Fed. 154, *reversed*, 70 Fed. 529, 530, 17 C. C. A. 251 (1893); *Lewis v. Marshall*, 30 U. S. (5 Pet.) 469, 8 L. ed. 195 (1831).

2. On the settlement of a pauper, the question of the legitimacy of his father, through whom the settlement was claimed, being essential, a witness testified that she had seen his father alive during the life time of Susanna Blair, who died the year before the father's parents were married; to prove the date of the death of Susanna Blair, "The defendants then offered, as evidence that Susanna died on the 12th of December, 1803, a large ornamented sheet of parchment, bearing the inscription 'family record,' on which were entered the dates of the birth and marriage of Susanna Blair's parents, the dates

of the birth and death of Susanna, and of the births, marriages and deaths of two sons born subsequently of the same parents. One of these sons, forty-seven years old, testified that, ever since his earliest recollection, his father had kept this parchment framed and hanging in a conspicuous place in his dwelling-house, and had handed it down to him; that during all this time the same entries had been on it; and that his father and mother were dead. And there was evidence that the entries of the births and deaths upon the parchment were made, all at one time, by direction of Susanna's father, more than forty years before the trial; that the record of the marriages of his children had been added, from time to time, as they occurred; and that he and his son kept and exhibited the parchment as a true statement of the events recorded on it. The defendants also offered to prove that an ancient gravestone in the burial-ground of the Blair family bore the name Susanna, and had inscribed on it Dec. 12th, 1803, as the date of her death." Both declarations were held admissible. *North Brookfield v. Warren*, 16 Gray (Mass.) 171, 172 (1860).

3. *Anderson v. Parker*, 6 Cal. 197 (1856); *Mason v. Fuller*, 45 Vt. 29 (1872); *Du Pont v. Davis*, 30 Wis. 170 (1872).

§ 2972. (*Scope of Circumstantial Evidence in Case of Pedigree; Death; Hearsay*); Reputation.—The fact of death may be established by reputation¹ which need not necessarily be family reputation. Where the deceased has left no kindred, general reputation in the community is competent.² However, it has been held that, in order to make the latter admissible to prove the fact of death, it must appear that the family of the alleged deceased had knowledge of such reputation.³

§ 2973. (*Scope of Circumstantial Evidence in Case of Pedigree; Death; Hearsay*); Reports.—For a report to be competent proof of the fact or date of death under the pedigree exception, it must be in the form of a declaration by a deceased member of the family, and, in order to introduce such a report in evidence, the usual administrative requirements¹ must be complied with.² This, of course, does not refer to what is occasionally termed a general report which simply signifies a general reputation.

§ 2974. (*Scope of Circumstantial Evidence in Case of Pedigree*); Marriage.—The fact of marriage may be proved circumstantially by cohabitation,¹ by the fact that the persons in question had children whom they acknowledged and to whom they gave the family name,² by the alleged husband's support of the alleged wife and children,³ or by any acts or conduct of the parties probatively relevant.⁴ The non-performance of an act required by law at the time a marriage takes place is a relevant circumstance on the question of marriage.⁵ A will disposing of property to collateral rela-

§ 2972-1. *Pancoast v. Addison*, 1 Har. & J. (Md.) 350, 2 Am. Dec. 520 (1802); *Jackson v. King*, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468 (1825); *Flowers' Lessee v. Haralson*, 14 Tenn. (6 Yerg.) 494 (1834).

2. *Ringhouse v. Keever*, 49 Ill. 470 (1869); *Flowers' Lessee v. Haralson*, 6 Yerg. (Tenn.) 496 (1834).

3. *Welch v. R. Co.*, 182 Mass. 84, 64 N. E. 695 (1902); *Blaisdell v. Bickum*, 139 Mass. 250, 1 N. E. 281 (1885).

§ 2973-1. § 2912.

2. *Wallace v. Howard*, (Tex. Civ. App. 1895) 30 S. W. 711.

§ 2974-1. *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894); *Jones*

v. Jones, 45 Md. 144 (1876); *Copes v. Pearce*, 7 Gill. (Md.) 247 (1848); *Henderson v. Cargill*, 31 Miss. 367 (1894); *Thompson v. Nims*, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847 (1892).

2. *Henderson v. Cargill*, 31 Miss. 367 (1894).

3. *Vincent's Appeal*, 60 Pa. St. 228 (1869).

4. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442 (1874); *Jennings v. Webb*, 8 D. C. App. 43, 56 (1896); *Thompson v. Nims*, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847 (1892).

5. Where the law of a State where a marriage is alleged to have been celebrated required the person per-

tives and not mentioning wife or children is admissible in proof of the fact that the testator, at the time of making the will, was unmarried.⁶ The fact that a father applied to the legislature to have an act passed making legitimate one of his children may also be shown on the question of non-marriage of the father and the mother of the child.⁷

§ 2975. (*Scope of Circumstantial Evidence in Case of Pedigree; Marriage*); Hearsay.— Extrajudicial statements probative and regarded as trustworthy by reason of their bare existence may be employed to establish the fact of marriage or its resultance of legitimacy or its absence. Thus, the statement of a proposed testator, a father, speaking of his daughter, “that unless he made a will Louisa could get nothing by law,” is competent on the question of her legitimacy.¹ Likewise an entry in a family record may be introduced in evidence to prove a marriage,² although the authorship of the entry is unknown, the circumstance that the record remained in the family and was not changed being a guarantee of its accuracy.

§ 2976. (*Scope of Circumstantial Evidence in Case of Pedigree; Marriage; Hearsay*); Reputation.—An exceedingly broad scope is given to the admissibility of reputation to prove the fact of marriage. This may be the result, to some extent, of the fact that formerly common-law marriages were legal and somewhat common, and the necessary requisites of such a marriage being essentially that a man and woman should live together as husband and wife, a reputation of probative value quickly arose in the community in which the person in question resided. Reputation to prove a marriage may be general reputation in the community¹ as well as reputation in the family.²

forming the ceremony to make a certificate of the marriage and return it to the clerk of the proper county, the fact that no such certificate is produced is a strong circumstance tending to show that the alleged marriage never took place. *Barnum v. Barnum*, 42 Md. 251, 299 (1875).

6. *Hungate v. Gascoigne*, 10 Jur. 625, 15 L. J. Ch. 382, 2 Phil. 25, 22 Eng. Ch. 25, 41 Eng. Reprint 850 (1846).

7. *Barnum v. Barnum*, 42 Md. 251, 305 (1875).

§ 2975-1. *Viall v. Smith*, 6 R. I. 417 (1860).

2. *Jones v. Jones*, 45 Md. 144 (1876).

§ 2976-1. *Arkansas*.—*Kelly v. McGuire*, 15 Ark. 555 (1855).

Maryland.—*Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894); *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466 (1877); *Barnum v. Barnum*, 42 Md.

§ 2977. (*Scope of Circumstantial Evidence in Case of Pedigree; Marriage; Hearsay; Reputation*); Criminal Cases.—It has been judicially said that, in criminal cases and cases of a criminal nature, reputation is not admissible to prove a marriage, the particular classes of cases specified being cases of adultery,¹ bigamy,² criminal conversation³ and seduction.⁴ Such language is evidently inexact. The true rule clearly is that reputation is admissible in all such cases to prove a marriage; but that it is *insufficient* for such purpose when standing alone.⁵

§ 2978. (*Scope of Circumstantial Evidence in Case of Pedigree*); Names.—The name of an individual or family may be proved by reputation,¹ the fact that a reputation exists rendering it worthy of consideration.

251 (1875); *Broome v. Purnell*, 28 Md. 607, 92 Am. Dec. 713 (1868).

New York.—*Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877).

Pennsylvania.—*In re Pickens*, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477 (1894).

Wisconsin.—*Eaton v. Tallmadge*, 24 Wis. 217 (1869).

England.—*Goodman v. Goodman*, 4 Jur. (N. S.) 1220 (1858); *Evans v. Morgan*, 2 Crompt. & J. 453, 2 Tyrw. 396 (1832); *Doe v. Fleming*, 4 Bing. 266, 5 L. J. C. P. (O. S.) 169, 12 Moore C. P. 500, 29 Rev. Rep. 562, 13 E. C. L. 497 (1827).

2. *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466 (1877); *Barnum v. Barnum*, 42 Md. 251 (1875); *Henderson v. Cargill*, 31 Miss. 367, 409 (1856); *Clark v. Owens*, 18 N. Y. 434 (1858).

§ 2977-1. *Buchanan v. State*, 55 Ala. 154 (1876).

2. *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894); *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713 (1868); *Henderson v. Cargill*, 31 Miss. 367 (1894); *Archer v. Haithcock*, 51 N. C. (6 Jones Law) 421 (1859).

3. *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752 (1894); *Henderson v. Cargill*, 31 Miss. 367 (1856); *Archer v. Haithcock*, 51 N. C. (6 Jones Law)

421 (1859); *Weaver v. Cryer*, 12 N. C. (1 Dev. Law.) 337 (1827); *Northfield v. Vershire*, 33 Vt. 110 (1860).

4. *Barnum v. Barnum*, 42 Md. 251 (1875).

5. *California*.—*People v. Hartman*, 130 Cal. 487, 62 Pac. 823 (1900) (bigamy). See also *People v. Beevers*, 99 Cal. 286, 33 Pac. 844 (1893) (bigamy).

Indiana.—See *Bowers v. Van Winkle*, 41 Ind. 432 (1872) (crim. con.).

Kentucky.—See *Taylor v. Shemwell*, 43 Ky. (4 B. Mon.) 575 (1844) (crim. con.).

Michigan.—See *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164 (1875) (crim. con.).

New York.—*People v. Wentworth*, 4 N. Y. Cr. Rev. 207 (1885) (bigamy); *Clayton v. Wardell*, 4 N. Y. 230 (1850) (bigamy).

Pennsylvania.—*Durning v. Hastings*, 183 Pa. St. 210, 38 Atl. 627 (1897) (crim. con.).

Texas.—*Dumas v. State*, 14 Tex. App. 464, 46 Am. Rep. 241 (1883) (bigamy).

England.—*Morris v. Miller*, 4 Burr. 2057 (1767) (crim. Con.). See also *Birt v. Barlow*, 1 Doug. 170 (1779) (crim. con.).

§ 2978-1. *U. S. v. Dodge*, 25 Fed. Cas. No. 14,974, Deady 126 (1866).

§ 2979. (*Scope of Circumstantial Evidence in Case of Pedigree*); Race.—Circumstances regarding the recognition and treatment of a person as a member of a particular race are competent on the question of race.¹ For example, at a time when negroes were not allowed by law to vote, the circumstance that a man was allowed to vote openly and without objection was regarded as pertinent in establishing that he was not a negro.² The race to which a person belongs may be proved by general reputation.³ This rule, however, is not universal.⁴ Declarations of a deceased person in regard to his race are properly received.⁵

§ 2980. (*Scope of Circumstantial Evidence*); Relationship.—Relationship may be proved not only by the declarations of deceased members of the family¹ but by evidence more circumstantial in its nature, e. g., the possession of property at one time belonging to an ancestor by one claiming to be his descendant² or the manner in which two persons conducted themselves in respect to each other.³ Acts of a deceased, tending to show his illegitimacy, are admissible on that point, as are also the acts of his mother.⁴ Likewise common reputation upon the subject of the parentage of the person whose pedigree is in dispute is admissible.⁵ Even similarity of names will be considered on the question of relationship in case of ancient facts.⁶

§ 2979-1. *Locklayer v. Locklayer*, 139 Ala. 354, 35 So. 1008 (1903).

2. *Gilliland v. Board of Education*, 141 N. C. 482, 54 S. E. 413 (1906).

3. *Arkansas*.—*Reed v. State*, 16 Ark. 499 (1855).

Georgia.—*White v. Clements*, 39 Ga. 232 (1869) (negro); *Bryan v. Walton*, 20 Ga. 480, 509 (1856).

Indiana.—*Nave's Adm'r v. Williams*, 22 Ind. 368 (1864).

Kentucky.—*Chancellor v. Milley*, 9 Dana 23 (1839).

North Carolina.—*Gilliland v. Board of Education*, 141 N. C. 482, 54 S. E. 413 (1906).

Oklahoma.—*George v. U. S.*, 1 Okl. Cr. 307, 97 Pac. 1052, 100 Pac. 46 (1908).

Tennessee.—*Vaughn v. Phebe, Mart. & Y.* 5, 17 Am. Dec. 770 (1827).

4. *Carter v. Montgomery*, 2 Tenn. Ch. 216 (1875).

5. *Locklayer v. Locklayer*, 139 Ala. 354, 35 So. 1008 (1904).

§ 2980-1. §§ 2933 *et seq.*

2. *Wiess v. Hall*, (Tex. Civ. App. 1911) 135 S. W. 384; *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 815 (1885).

3. *White v. Strother*, 11 Ala. 720 (1847).

4. *State v. McDonald*, 55 Ore. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444 (1910).

5. *State v. McDonald*, 55 Ore. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444 (1910).

6. *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. ed. 915 (1885).

On the question of the legitimacy of a child, evidence of his personal resemblance to his alleged father has been held inadmissible.⁷ On the other hand it has been held, in a prosecution for statutory rape, that it was proper for the jury to consider the resemblance between the baby of the prosecutrix and the defendant.⁸

An interesting phase of administrative relaxation where proof of pedigree is sought is that which permits a child to testify that a certain person is or was his father or mother.⁹ It is obvious that the child's knowledge must be based on hearsay and circumstances.

§ 2980a. (*Scope of Circumstantial Evidence*); Residence.— For the purpose of identifying a given person or establishing some other relevant fact, the question of place of residence may become closely involved with pedigree and treated in many respects as a pedigree fact.¹ However, it seems to be settled that residence cannot be established by reputation.²

§ 2981. (*Scope of Circumstantial Evidence in Case of Pedigree*); Status.— General reputation has been held admissible to

7. Jones v. Jones, 45 Md. 144 (1876).

8. Vaughn v. State, (Tex. Cr. App. 1911) 136 S. W. 476.

9. State v. Bowser, 21 Mont. 133, 53 Pac. 179 (1898); Comstock v. State, 14 Nebr. 205, 15 N. W. 355 (1883); Hubatka v. Meyerhofer, 79 N. J. Law 264, 75 Atl. 454 (1910).

§ 2980a-1. "The question is, were the statements as to independent facts, such as being a member of the army, presence in Texas, or the time and place of death, admissible under the rule? It is often stated that declarations of deceased members of a family are not admissible to prove the time nor place of birth, residence, or death. But this rule has been applied in the main to cases in which the poor-laws were being administered, and a right was being asserted based upon the residence or birth at a given place. Where the time or place of residence or death is introduced for the purpose of identifying

the person in question as a member of a particular family, it is admissible as being so closely related to, if not in fact part of, pedigree, that the same rules of law are applicable. Mr. Phillips, in his work on Evidence, volume I., p. 207 (fifth American edition) states the rule so tersely that we copy it as the best statement of the proposition that we have been able to find. He says: 'Locality may, however, be so involved in pedigree as to fall within the general rule and render hearsay evidence admissible on the subject; as where the object is to identify certain persons connected with a particular place as belonging to a family.' " Byers v. Wallace, 87 Tex. 503, 511, 28 S. W. 1056, 29 S. W. 760 (1895), per Brown, J.

2. R. Co. v. Thompson, 94 Ala. 636, 10 South. 280 (1891); Shearer v. Clay, 11 Ky. (1 Litt.) 260 (1822); Ferguson v. Wright, 113 N. C. 537, 18 S. E. 691 (1893); Londonderry v. Andover, 28 Vt. 416 (1856).

prove the status of a person, for example, that he was a free person¹ or that he was a noncitizen;² but this is contrary to the weight of authority.³ In criminal cases, where the fact of corporate existence is merely a collateral matter, such fact may be established by general reputation. This rule has been applied where the defendant was charged with embezzling the funds of a corporation,⁴ where he was charged with burglarizing the property of a corporation⁵ and where the indictment was for having possession of counterfeit bank notes.⁶ A contrary view has been taken where a statute points out a proper form of evidence.⁷ General reputation in the neighborhood is admissible on the question whether a child was born dead or alive.⁸

§ 2981-1. *Bryan v. Walton*, 20 Ga. 480, 509 (1856). See also *Shorter v. Boswell*, 2 Harr. & J. (Md.) 359 (1808).

2. *George v. U. S.*, 1 Okla. Cr. 307, 97 Pac. 1052, 100 Pac. 46 (1908).

3. *Walkup v. Pratt*, 5 Harr. & J. (Md.) 51 (1820); *Walls v. Hemsley*, 4 Harr. & J. (Md.) 243 (1817); *Charlton v. Unis*, 4 Gratt. (Va.) 58 (1847).

Even where the issue is strictly one of pedigree, it is improper to admit proof of a general reputation in the neighborhood that a grandmother of the plaintiff was entitled to her freedom. *Gregory v. Baugh*, 4 Rand. (Va.) 611 (1827).

"Hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. . . . If the circumstances that the eye witnesses of any fact be dead, should justify the introduction of testimony

to establish the fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained." *Mima Queen v. Hepburn*, 7 Cranch. (U. S.) 290, 3 L. ed. 348 (1813).

4. *Fleener v. State*, 58 Ark. 98, 23 S. W. 1 (1893).

5. *State v. Thompson*, 23 Kan. 338, 33 Am. Rep. 165 (1880).

6. *People v. Ah Sam*, 41 Cal. 645 (1871).

On the trial of an indictment for having possession of counterfeit bills purporting to have been issued by a banking corporation in another State, proof of the most general character of the existence of such corporation is sufficient. *People v. Davis*, 21 Wend. (N. Y.) 309 (1839). See also *Dennis v. People*, 1 Parker Cr. Rep. (N. Y.) 469 (1854).

7. *Trice v. State*, 2 Head (Tenn.) 591 (1859).

8. *Wiess v. Hall* (Tex. Civ. App. 1911) 135 S. W. 384.

CHAPTER XLIV.

HEARSAY AS PRIMARY EVIDENCE; SPONTANEITY.

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§ 2982. Hearsay as Primary Evidence.— Having thus considered, in the immediately preceding chapters, the hearsay statement as secondary evidence of the facts asserted, we are the better prepared to take a distinct step forward, to the consideration of the administrative principles and procedural rules under which the hearsay statement is received as *primary* proof of what it alleges. Although this species of evidence is essentially one of modern growth, it will be found necessary to follow certain confluent lines of historical development in order to understand in any satisfactory way the terminology in which procedural rules relating to either of the two great branches of hearsay as primary evidence have been formulated. To a certain extent, this has already been done;¹ the subject will be continued in the present chapter and also in connection with the Shop Book Rule,² so-called. Certain general administrative considerations of a preliminary nature seem, however, to demand a brief consideration. Little difficulty exists in recognizing the essential difference between hearsay statements viewed as secondary evidence and when constituting primary proof. The essential change will be found to consist in the admixture of a *new element of probative force*. In yielding to the belief-producing power of simple hearsay we are asked to place our sole reliance upon the knowledge and good faith of the declarant. So long as this continues to be the case, hearsay, assuming relevancy as a matter of course, cannot, as compared to the testimony of the declarant himself, rise above the probative grade of secondary evidence. The “exceptions” to the Hearsay Rule stand, as has been seen,³ in this juridical position. But hearsay statements, extrajudicial declarations, viewed as proof of the facts asserted, may present themselves to the tribunal in an entirely different aspect. The instinctive, unpremeditated utterance of the victim of a railroad accident, the book entry upon a regularly kept set of account books, the statements of an official public record are all within the apparent scope of the rule against hearsay. Where there is no special ground for exclusion, such declarations are nevertheless to be received. They are not secondary evidence. No forensic necessity need be shown by the proponent for receiving them. Their relevancy is beyond question. The evidence is primary, for the declaration, hearsay

§ 2982-1. §§ 2870 *et seq.*

3. §§ 2762 *et seq.*

2. §§ 3051 *et seq.*

though it be, produces upon the mind the cogency of conviction equal if not superior to that which could have come from the testimony of the declarant, though sanctioned by an oath and tested by cross-examination. What, then, is this new element of probative force which works such striking changes, placing hearsay declarations into the position of primary proof? Though its essential nature is much the same, it is most often derived from one of two closely related influences which are in certain minor points distinct. Upon principle, as intimated elsewhere,⁴ an extrajudicial statement should be received in proof of any proposition which it logically tends to establish. In other words, the addition of any degree of probative force, from whatever source derived, should have the effect of conferring admissibility, one grade or the other, i. e., as primary or secondary evidence, upon an extrajudicial statement used in its assertive capacity. Such is, however, by no means the present state of the law. Evolving toward that end, judicial administration recognizes mainly, if not exclusively, two influences upon the mind of the declarant in any given case which, in the absence of countervailing considerations, uniformly are deemed to confer admissibility upon his extrajudicial statements.⁵ These are, (1) the truth-compelling power of a spontaneous reaction to an overwhelming motor impulse; (2) a force of habit. The former, it has seemed convenient briefly to designate as the Relevancy of Spontaneity. The latter will be spoken of as the Relevancy of Regularity. The first of these will be considered in the present chapter. The second, already briefly mentioned,⁶ is further illustrated in connection with the Shop Book Rule.⁷

§ 2983. Relevancy of Spontaneity.—To judicial administration, the automatic is the true.¹ What a declarant asserts, not so

4. § 2580.

5. **Administrative conditions.** No allowance can properly be made in this or similar connections for the countervailing operation of particular administrative situations. It must be taken for granted that the normal operation of a rule is not offset or retarded by forces operating at the trial which tend to a different result. In other words, the requisite necessity of the proponent, § 473, a favor-

ing "state of the case," § 1742, absence of any obvious liability to mislead the jury, § 1745, and the like, must be assumed.

6. §§ 2870 *et seq.*

7. §§ 3051 *et seq.*

§ 2983-1. "When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically, it may be said, the act speaks through him and discloses

much of himself² as overborne and forced thereto by overwhelming emotion, the stress of sudden shock or intense pain, the law of evidence assumes to be the fact.³ That which judicial adminis-

its character." *Murray v. Boston & M. R. Co.*, 72 N. H. 32, 37, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903), per Walker, J.

2. Competency as a witness. So little is the declarant in an extrajudicial spontaneous utterance regarded as thinking his own thoughts that it is not even required for the admissibility of his statement that he should be competent as a witness. *Croomes v. State*, 40 Tex. Cr. App. 672, 51 S. W. 924, 53 S. W. 882 (1899).

3. Colorado.—*Herren v. People*, 28 Colo. 23, 62 Pac. 833 (1900); *T. & H. Pueblo Bldg. Co. v. Klein*, 5 Colo. App. 348, 38 Pac. 608 (1894); *Equitable Mut. Acc. Assoc. v. McCloskey*, 1 Colo. App. 473, 29 Pac. 383 (1892).

Georgia.—*Herrington v. State*, 130 Ga. 307, 60 S. E. 572 (1908); *Grant v. State*, 124 Ga. 757, 53 S. E. 334 (1906); *Cox v. State*, 64 Ga. 374, 37 Am. Rep. 76 (1879).

Idaho.—*People v. Dewey*, 2 Idaho (Hasb.) 83, 6 Pac. 103 (1885).

Illinois.—*Lander v. People*, 104 Ill. 248 (1882).

Indiana.—*Green v. State*, 154 Ind. 655, 57 N. E. 637 (1900).

Iowa.—*State v. Rutledge*, 135 Iowa 581, 113 N. W. 461 (1907).

Massachusetts.—*Lund v. Tyngsborough*, 9 Cush. 36 (1851).

Missouri.—*State v. Hudspeth*, 150 Mo. 12, 51 S. W. 483 (1899).

Nebraska.—*Lexington v. Fleharty*, 74 Neb. 626, 104 N. W. 1056 (1905).

New Hampshire.—*Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 38, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

New York.—*People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908).

North Carolina.—*State v. Spivey*, 151 N. C. 676, 65 S. E. 995 (1909).

Texas.—*Shumate v. State*, 38 Tex. Cr. App. 266, 42 S. W. 600 (1897).

Utah.—*Leach v. Oregon Shortline R. Co.*, 29 Utah 285, 81 Pac. 90, 110 Am. St. Rep. 708 (1905).

United States.—*Chicago Travelers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 439 (1869).

England.—*Rex v. Foster*, 6 C. & P. 325, 25 E. C. L. 455 (1834).

See also *State v. Kaiser*, 124 Mo. 651, 28 S. W. 182 (1894); *Jack v. Mutual Reserve Fund L. Assoc.*, 113 Fed. 49, 51 C. C. A. 36 (1902); *Chicago Travelers' Ins. Co. v. Moseley*, 8 Wall. (U. S.) 397, 19 L. ed. 439 (1869).

"What the law altogether distrusts is not after-speech but after-thought. . . . That they [the extrajudicial statements] shall be or appear to be spontaneous is indispensable, and it is for this reason alone that they are required to be speedy." *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 775, 776, 12 S. E. 18 (1890), per Bleckley, C. J.

"Declarations are admitted in evidence as part of the *res gestae*, only upon the presumption that they elucidate the facts with which they are connected, having been made without premeditation or artifice and without a view to the consequences. . . . It is reasonable to presume that he had premeditated his explanation of its cause when it was also shown that he was half a mile from the spot where the crime was alleged to have been committed and had sufficient time to determine upon the explanation he would give concerning the circumstance. The explanation was not of that impulsive character which distinguishes declarations at the time of the transaction." *Seaggs v. State*, 8 Sm. & M. (Miss.) 722, 726 (1847), per Thatcher, J.

tration, nervous, as it were, at being deprived of the test of cross-examination, the greatest guaranty for the discovery of truth which the English jurisprudence has as yet been able to devise,

"This view of the common experience of mankind shows that, if the declaration has that character [of spontaneity] it possesses an important element of reliability and significance which is foreign to narrative remarks made so long after the event as to derive directly no probative force from it, and that it should be admitted like any other material fact or evidentiary detail." Murray v. Boston, etc., R. Co., 72 N. H. 32, 38, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903), per Walker, J.

"Too great a time elapsed; the statement and acts of the son were not the natural utterances of a simple, truthful child prompted by the suffering endured at the time through the injury; there was too much calculation and method on the part of the father, who then had no reason to believe that the injury was more serious than boys often receive in the most innocent pastime, to make those things to which he testified *res gestae*. It was simply hearsay, with no feature to relieve it from the operation of the rule which excludes that class of declaration. The declarations made to the mother, by the child, were of a different character; he came home immediately after he had received the injury, crying, and smarting with the pain resulting from it, and childlike and naturally, made known to her how he had been hurt." Galveston v. Barbour, 62 Tex. 172, 176, 50 Am. Rep. 519 (1884), per Stayton, J.

"As the declaration was made between ten and thirty minutes after the accident, we may well conclude that it was made in sight of the wrecked train, and in presence of the injured parties, and whilst surrounded by excited passengers. . . . The modern doctrine has relaxed the

ancient rule, that declarations, to be admissible as part of the *res gestae*, must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it. . . . An accident happening to a railway train, by which a car is wrecked, would naturally lead to a great deal of excitement among the passengers on the train, and the character and cause of the accident would be the subject of explanation for a considerable time afterwards by persons connected with the train. The admissibility of a declaration, in connection with evidence of the principal fact, . . . must be determined by the judge according to the degree of its relation to that fact, and in the exercise of a sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description." Vicksburg R. Co. v. O'Brien, 119 U. S. 99, 107, 108, 7 Sup. Ct. 118, 30 L. ed. 299 (1886), per Field, J.

In case of alleged burglary, the impulsive utterances of a member of the family, in the presence of the accused and while he is in the act of committing the crime charged, are admissible as part of the *res gestae*. State v. Desroches, 48 La. Ann. 428, 19 So. 250 (1896).

The exclamations of a driver seeking to gain control of a runaway horse may fairly be assumed to have been spontaneously made. Trenton Pass. R. Co. v. Cooper, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637 (1897).

A modern tendency.—The tendency of modern decisions is said to be toward a legitimate extension of the

fears in connection with such statements is *reflection*,⁴ the opportunity for adjusting facts to self interest, consciously or unconsciously blending the true and false, coloring, distorting and preventing that which is real. In an instinctive automatic utterance, where the declarant speaks from his subjective or soul-mind rather than from the promptings of that which is habit, really conscious, this element of reflection is largely, if not wholly, absent. The speaker is not so much voluntarily declaring himself as instinctively reacting to an outside stimulus. More physically considered, it would rather seem that the transaction is speaking through the declarant than that the latter is consciously talking about the transaction. Extrajudicial statements of this kind have always been credited, so far as not overborne by opposing considerations, by judicial administrators. Judges, though not at all times perceiving whence their mental conviction has come or invariably assigning very satisfactory reasons for admitting the facts in which it has been embodied, have not failed to feel and appreciate the force of this element of proving power. No requirement is made that the declarant should sustain any particular relation to the litigation itself. The spontaneous utterance of the by-stander,⁵

present rule in the interests of the discovery of truth. "Its development has been promoted, in modern times, by an effort to afford the triers of fact all reasonable means of ascertaining the truth, instead of withholding from them all information possible by the rigid application of certain rules of exclusion. The question is not now, how little, but how much, logically competent proof is admissible." *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 34, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903), per Walker, J.

4. *Alabama*.—*Nelson v. State*, 130 Ala. 83, 30 So. 728 (1901).

Illinois.—*Pittsburgh, C. C. & St. L. R. Co. v. Chicago*, 144 Ill. App. 293, affirmed, 242 Ill. 178, 89 N. E. 1022 (1909); *Muren Coal & Ice Co. v. Howell*, 217 Ill. 190, 75 N. E. 469 (1905).

Indiana.—*Green v. State*, 154 Ind. 655, 57 N. E. 637 (1900).

Iowa.—*State v. Lewis*, 139 Iowa 405, 116 N. W. 606 (1908).

Maryland.—*Wright v. State*, 88 Md. 436, 41 Atl. 795 (1898).

Texas.—*Shumate v. State*, 38 Tex. Cr. App. 266, 42 S. W. 600 (1897).

Washington.—*Britton v. Washington Water Power Co.*, 59 Wash. 440, 110 Pac. 20, 33 L. R. A. (N. S.) 109n, 140 Am. St. Rep. 858 (1910).

Wyoming.—*Johnson v. State*, 8 Wyo. 494, 58 Pac. 761 (1899).

5. *District of Columbia*.—See *McUin v. United States*, 17 App. D. C. 323 (1900).

Georgia.—*Smith v. State*, 10 Ga. App. 36, 72 S. E. 527 (1911). See also *Knight v. State*, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17 (1901).

Missouri.—*State v. Kaiser*, 124 Mo. 651, 28 S. W. 182 (1894).

North Carolina.—*State v. McCourry*, 128 N. C. 594, 38 S. E. 883 (1901).

i. e., of one casually present at the happening of a *res gestae* or probative event, especially if such person is related to one of the parties,⁶ is as readily received as one made by a party, or by his

Tennessee.—See *Cooper v. State*, 123 Tenn. 37, 138 S. W. 826 (1911).

Texas.—*Pettis v. State*, (Cr. App. 1912), 150 S. W. 790; *Kinney v. State*, (Cr. App. 1912) 144 S. W. 257; *Missouri, etc., R. Co. v. Vance*, (Civ. App. 1897) 41 S. W. 167.

Compare State v. Bellard, 50 La. Ann. 594, 23 So. 504, 69 Am. St. Rep. 461 (1898).

In an action for injuries received by falling down an elevator shaft in a store, the door of which was alleged to have been left open, a declaration of a child of six years who was present, made immediately after the accident and when in a state of excitement that "a man pushed the door open and walked in" was admissible as a spontaneous statement. *Beal-Doyle Dry Goods Co. v. Carr*, 85 Ark. 479, 108 S. W. 1053, 14 Am. & Eng. Ann. Cas. 48 (1908).

In an action for the death of a boy killed by a train running along a street, the declaration of a witness to the accident, made to the engineer after the witness had walked the length of "a car or two" after seeing the accident was admissible as a spontaneous utterance. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 37 Utah 475, 109 Pac. 10, 24 Am. & Eng. Ann. Cas. 307 (1910). "I have no doubt . . . that the declaration was an instinctive and unmeditated utterance made while the impressions produced by the main event had full possession of the declarant's mind. A declaration made under such circumstances is, I think, admissible, whether made by an actor or participant or by one otherwise connected with the main event or transaction, or by a bystander or observer who witnesses or observes the happenings and occur-

rences of the transaction or event." *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 37 Utah 475, 109 Pac. 10, 18, 24 Am. & Eng. Ann. Cas. 307 (1910), per Straup, C. J. In an action against a street railway company for failing to stop its car long enough to allow a lady to get aboard, it was proper to show that as the car was starting up some one called to the conductor: "Stop the car! You have left a lady." *Citizens' Ry. Co. v. Farley*, (Tex. Civ. App. 1911) 136 S. W. 94.

Independent relevancy.—The extrajudicial declaration of a bystander may be independently relevant. *Knight v. State*, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17 (1901); *State v. Kaiser*, 124 Mo. 651, 28 S. W. 182 (1894); *State v. McCourry*, 128 N. C. 594, 38 S. E. 883 (1901).

6. *Grant v. State*, 124 Ga. 757, 53 S. E. 334 (1906) (child of woman murdered); *People v. McArron*, 121 Mich. 1, 79 N. W. 944 (1899) (mother of accused); *Redman v. State*, (Tex. Cr. App. 1912) 149 S. W. 670 (wife and child of murdered man).

A statement to the effect that the defendant shot the deceased and herself made by the mother of the deceased, who was mortally wounded at the time, a few minutes after the shooting was properly received. *State v. Williams*, 96 Minn. 351, 105 N. W. 265 (1905).

In the absence of the element of spontaneity, the statement, as evidence of the facts asserted, will be rejected as hearsay. *Louisville & N. R. Co. v. Moore*, 150 Ky. 692, 150 S. W. 849 (1912); *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.*, (Tex. Civ. App. 1912) 147 S. W. 717.

agent, employee or representative. The probative force of the assertion is inherent.

This relation of an automatic, instinctive utterance to the fact asserted by it is referred to in the present treatise as the Relevancy of Spontaneity.

§ 2984. **Declarations part of a Fact in the Res Gestae.**—Apparently, in current judicial parlance, a spontaneous extrajudicial statement is spoken of as being a declaration which is “*part of the res gestae*.”¹ Such unsworn statements are customarily received

§ 2984-1. *Alabama*.—Bessiere v. Alabama City, G. & A. R. Co., 60 So. 82 (1912); Lundsford v. State, 2 Ala. App. 38, 56 So. 89 (1911); Hollard v. State, 162 Ala. 5, 50 So. 215 (1909); Fleming v. State, 150 Ala. 19, 43 So. 219 (1907); Nelson v. State, 130 Ala. 83, 30 So. 728 (1901).

Arizona.—Soto v. Territory, 12 Ariz. 36, 94 Pac. 1104 (1908).

California.—People v. Vernon, 35 Cal. 49, 95 Am. Dec. 49 (1868). See also Rogers v. Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348 (1903).

Colorado.—Denver City Tramway Co. v. Brumley, 51 Colo. 251, 116 Pac. 1051 (1911); Equitable Mut. Acc. Assoc. v. McCluskey, 1 Colo. App. 473, 29 Pac. 383 (1892). See also Trumbull v. Donahue, 18 Colo. App. 460, 72 Pac. 684 (1903); Union Casualty, etc., Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677 (1903).

Connecticut.—Pinney v. Jones, 64 Conn. 545, 30 Atl. 762, 72 Am. St. Rep. 209 (1894).

Georgia.—Darby v. State, 9 Ga. App. 700, 72 S. E. 182 (1911); Grant v. State, 124 Ga. 757, 53 S. E. 334 (1906); Mitchum v. State, 11 Ga. 615, 622 (1852).

Illinois.—Pittsburgh C. C. & St. L. Ry. Co. v. Chicago, 144 Ill. App. 293 (1908); *affirmed*, 242 Ill. 178, 89 N. E. 1022 (1909); Chicago West Side Div. R. Co. v. Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144 (1889); Lander v. People, 104 Ill. 248 (1882).

Indiana.—Keyes v. State, 122 Ind. 527, 23 N. E. 1097 (1889); Wood v. State, 92 Ind. 269 (1883); Pittsburg, etc., R. Co. v. Wright, 80 Ind. 182 (1881).

Iowa.—State v. Lewis, 139 Iowa 405, 116 N. W. 606 (1908); Fish v. Illinois Cent. R. Co., 96 Iowa, 702, 65 N. W. 995 (1896); McMurrin v. Rigby, 80 Iowa 322, 45 N. W. 877 (1890); Stephens v. McCloy, 36 Iowa 659 (1873). See also Sutcliffe v. Iowa State Travelingmen's Assoc., 119 Iowa 220, 93 N. W. 90, 97 Am. St. Rep. 298 (1903).

Kentucky.—Louisville Ry. Co. v. Johnson's Adm'r, 131 Ky. 277, 115 S. W. 207, 20 L. R. A. (N. S.) 133 (1909).

Massachusetts.—Blake v. Damon, 103 Mass. 199 (1869); Lund v. Tyngsborough, 9 Cush. 36 (1851).

Michigan.—Feldman v. Detroit United Ry., 162 Mich. 486, 127 N. W. 687, 17 Detroit Leg. N. 707 (1910); People v. O'Brien, 92 Mich. 17, 52 N. W. 84 (1892); People v. Gage, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854 (1886); Lambert v. People, 29 Mich. 71 (1874). See also Styles v. Decatur, 131 Mich. 443, 91 N. W. 622 (1902).

Minnesota.—State v. Alton, 105 Minn. 410, 117 N. W. 617, 15 Am. & Eng. Ann. Cas. 806 (1908); Conlan v. Grace, 36 Minn. 276, 30 N. W. 880 (1886).

Mississippi.—Mayes v. State, 64

Miss. 329, 1 So. 733, 60 Am. Rep. 58 (1886).

Missouri.—Lemen v. Kansas City Southern Ry. Co., 151 Mo. App. 511, 132 S. W. 13 (1910); Shaefer v. Missouri Pacific R. Co., 98 Mo. App. 445, 72 S. W. 154 (1903); State v. Ryder, 95 Mo. 474, 8 S. W. 723 (1888).

Nebraska.—Union Pac. R. Co. v. Edmondson, 77 Neb. 682, 110 N. W. 650 (1906); Lexington v. Fleharty, 74 Neb. 626, 104 N. W. 1056 (1905); Pledger v. Chicago, etc., R. Co., 69 Neb. 456, 95 N. W. 1057 (1903).

New Hampshire.—Murray v. Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903); Sessions v. Little, 9 N. H. 271 (1838); Hadley v. Carter, 8 N. H. 40 (1835).

New Jersey.—State v. Kane, 77 N. J. L. 244, 72 Atl. 39 (1909); Estell v. State, 51 N. J. L. 182, 17 Atl. 118 (1889).

New York.—People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690 (1908); Sheir v. Quirin, 77 App. Div. 624, affirmed, 177 N. Y. 568, 69 N. E. 1130 (1904); Butler v. Manhattan R. Co., 143 N. Y. 417, 38 N. E. 454, 42 Am. St. Rep. 738, 26 L. R. A. 46 (1894); Martin v. New York, etc., R. Co., 103 N. Y. 626, 9 N. E. 505 (1886); Waldele v. New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41 (1884); Ahern v. Goodspeed, 72 N. Y. 108 (1878).

North Carolina.—State v. Spivey, 151 N. C. 676, 65 S. E. 995 (1909); Harrill v. South Carolina, etc., Extension R. Co., 132 N. C. 655, 44 S. E. 109 (1903).

Ohio.—Wade v. State, 25 Ohio Cir. Ct. Rep. 279 (1903); Lake Shoe, etc., R. Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052 (1892); Wetmore v. Mell, 1 Ohio St. 26, 59 Am. Dec. 607 (1852).

Oklahoma.—Price v. State, 1 Okl. Cr. App. 358, 98 Pac. 447 (1908).

Pennsylvania.—Com. v. Van Horn, 188 Pa. St. 143, 41 Atl. 469 (1898); Laudon v. Blythe, 16 Pa. St. 532, 55 Am. Dec. 727 (1851). See also Shan-

non v. Castner, 21 Pa. Super. Ct. 294 (1902); Haggart v. California Borough, 21 Pa. Super. Ct. 210 (1902).

Rhode Island.—State v. Epstein, 25 R. I. 131, 55 Atl. 204 (1903).

South Carolina.—Shelton v. Southern Ry. Co., 86 S. C. 98, 67 S. E. 899 (1910); State v. Way, 76 S. C. 91, 56 S. E. 653 (1907); Oliver v. Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307 (1902).

Tennessee.—Memphis St. R. Co. v. Shaw, 110 Tenn. 467, 75 S. W. 713 (1903).

Texas.—Griffin v. State, 40 Tex. Cr. App. 312, 50 S. W. 366, 76 Am. St. Rep. 718 (1899); Freeman v. State, 40 Tex. Cr. App. 545, 46 S. W. 641 (1898); Colquitt v. State, 34 Tex. 550 (1871). Compare Southern Kansas R. Co. v. Crump, (Civ. App. 1903) 74 S. W. 335.

Utah.—Cromeenes v. San Pedro, L. A. & S. L. R. Co., 37 Utah 475, 109 Pac. 10, 24 Am. & Eng. Ann. Cas. 307 (1910).

Vermont.—Worden v. Powers, 37 Vt. 619 (1865).

Virginia.—Scott v. Shelor, 28 Gratt. 891 (1877).

Washington.—Britton v. Washington Water Power Co., 59 Wash. 440, 110 Pac. 20, 33 L. R. A. (N. S.) 109n, 140 Am. St. Rep. 858 (1910); Dixon v. Northern Pac. Ry. Co., 37 Wash. 310, 79 Pac. 943, 68 L. R. A. 895, 107 Am. St. Rep. 810, 2 Am. & Eng. Ann. Cas. 620 (1905); Lambert v. La. Conner Trading, etc., Co., 30 Wash. 346, 70 Pac. 960 (1902); Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111 (1902).

Wisconsin.—Cohodes v. Menominee & Marinette Light & Traction Co., 149 Wis. 308, 135 N. W. 879 (1912); Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048 (1906); Christianson v. Pioneer Furniture Co., 92 Wis. 649, 66 N. W. 699 (1896).

England.—Milne v. Leisler, 7 H. & N. 786, 8 Jur. (N. S.) 121, 31 L. J. Exch. 257, 5 L. T. Rep. (N. S.) 802 (1862); Rouch v. Great Western R.

in civil cases or on criminal proceedings² in proof of the facts asserted. Indeed, wherever the element of spontaneity is present,

Co., 1 Q. B. 51, 4 P. & D. 686, 41 E. C. L. 432 (1841); Wright v. Doe, 7 A. & E. 313, 7 L. J. Exch. 340, 2 N. & P. 303, 34 E. C. L. 178 (1837); Rawson v. Haigh, 2 Bing. 99, 9 E. C. L. 499, 1 C. & P. 77, 12 E. C. L. 55, 9 Moore C. P. 217 (1824).

"The most dangerous exception ingrafted upon the rule is that which admits the declarations of a party, or an agent, uttered at the time of the principal transaction, and therefore taken to be a part of it, because it is supposed to be illustrative and evidence of the principal fact which is the subject of the inquiry. It probably had its origin in the trouble sometimes experienced in criminal cases to identify the perpetrator of a crime. The desire of the courts to prevent what would be an evident miscarriage of justice gradually led to the extension of the rule to civil controversies; and it is possibly as well settled as any of the rules of evidence that the declaration of a party, made at the time of an act which may be given in evidence, if it be calculated to explain, qualify, or characterize the act itself, and is so connected with it that it may be taken as a part of one and the same transaction, and is in no sense a narrative of something which has passed, may be proven as a part of the *res gestae*." Equitable Mut. Acc. Assoc. v. McCloskey, 1 Colo. App. 473, 477, 29 Pac. 383, 284 (1893), per Bissell, J.

"The idea of the *res gestae* presupposes a main fact." Mitchum v. State, 11 Ga. 615, 622 (1852), per Nisbet, J.

2. Confessions distinguished. — A spontaneous, practically forced, statement has by no means the administrative force and effect of a deliberate confession of guilt. Allen v. State, 60 Ala. 19 (1877); Head v. State, 44

Miss. 731 (1871). Rules characteristic of confessions are not deemed applicable to spontaneous assertions. The declarant, for example, need not have been warned that his statement will be taken as evidence against him. Miller v. State, 31 Tex. Cr. App. 609, 21 S. W. 925, 37 Am. St. Rep. 836 (1893).

Dying declarations compared.—Although a spontaneous declaration may be made while the declarant is dying it is not necessary to show the same sense of impending death which would be required by administration were the extrajudicial statement tendered as a dying declaration. Brownell v. Pacific R. Co., 47 Mo. 239 (1871). On the other hand, if the declaration is not spontaneous, it is not admissible in a civil suit because made under the solemn sanction of consciously approaching death. Waldele v. New York Cent., etc., R. Co., 19 Hun (N. Y.) 69 (1879).

Husband and wife.—No privilege attaches to a spontaneous statement by reason of the relation of husband and wife. State v. Middleham, 62 Iowa 150, 17 N. W. 446 (1883).

Opinions.—Spontaneous utterances may take the form of opinions. State v. Mace, 118 N. C. 1244, 24 S. E. 798 (1896); New York Mut. L. Ins. Co. v. Tillman, 84 Tex. 31, 19 S. W. 294 (1892). It is not conclusive against a spontaneous exclamation of an injured person that it involves the expression of opinion as to the legal or physical effect of his injury. State v. Mace, 118 N. C. 1244, 24 S. E. 798 (1896). Opinions or conclusions of competent physicians uttered while examining a patient are or may be admissible as part of the *res gestae*. New York Mut. L. Ins. Co. v. Tillman, 84 Tex. 31, 19 S. W. 294 (1892).

e. g., in connection with independently relevant extrajudicial statements,³ including, to use Greenleaf's phrase,⁴ "verbal acts," and the like, the presence of this element of proof tends to superimpose upon the constituent or probative relevancy of such statements a tendency to establish the truth in point of fact of that which has been asserted. For reasons which are in part stated elsewhere,⁵ the presence of spontaneity is not essential for this purpose of proving the fact asserted in an extrajudicial declaration. Wherever spontaneity is present, however, such is its probative effect. From this obvious circumstance, it is easy to detect in this practical confusion between spontaneous statements and those which are "part of the *res gestae*," one at least of the causes which have led the American courts under the potent leadership of Prof. Greenleaf,⁶ to swell the meaning of the term "*res gestae*" to the outermost bounds of relevancy and even of admissibility⁷ to the utter elimination of any distinctive meaning.

§ 2985. (*Declarations part of a Fact in the Res Gestae*);
Res Gestae a Term of Protean Meaning.— *Res gestae*, as is also briefly stated elsewhere,¹ is indeed, as employed by the American courts, a term of protean meaning.² Properly considered, and as,

3. §§ 2574 *et seq.*

4. 1 Glf. Ev. (15th ed.) § 108.

5. § 2580.

6. §§ 2998 *et seq.*

7. §§ 2583 *et seq.*

§ 2985-1. §§ 2581 *et seq.*

2. Cox v. State, 64 Ga. 374, 410, 37 Am. Rep. 76 (1879).

"Upon no branch of the law of evidence is there such confusion and seeming conflict as in the application of the rule admitting statements as part of the *res gestae*. As expressed by Chief Justice Blakely of Georgia [in Cox v. State, *supra*]: "The difficulty of formulating a description of the *res gestae* which will serve for all cases seems insurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a numerous family." State v. Territory, 12 Ariz. 36, 38, 94 Pac. 1104 (1908), per Sloan, J.

"The true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, or is merely a history or part of a history of a completed past affair. In the one case it is competent, in the other it is not. We are not to be understood as attempting to lay down any rule for the decision of what, under all circumstances, is the limit of the existence of the principal fact, which may be explained by contemporaneous declarations. In some cases the *res gestae* may extend over weeks or months, in others they are limited to hours, or to minutes, or to seconds." Mayes v. State, 64 Miss. 329, 333, 1 So. 733, 60 Am. Rep. 58 (1886), per Cooper, C. J.

The convenient obscurity of the phrase, as being its most valuable

in a majority of cases,³ represented in the English view,⁴ the term designates the actual series of world happenings out of which the right or liability asserted in the action arises so far as it arises at all. To extend the same phrase so as to include not only the probative facts which, when direct proof of the true *res gestae* is unavailable, are used to establish them, but to cover also all evidentiary or probative facts whatever, and even those which, though lacking in probative relevancy, the rules of procedure have made admissible, seems by no means ideal. Yet it needs but the simple assumption that because extrajudicial declarations in their assertive capacity may be made spontaneous statements by their incorporation in the *res gestae*, properly so called, therefore all spontaneous statements are necessarily part of the *res gestae*, for the courts to remove all intelligible meaning from the phrase. The assumption, indeed, is, from the standpoint of administration, entirely baseless. No necessary connection, in point of fact, exists between the spontaneous statement and one a part of the true *res gestae*. The proving power of a spontaneous utterance attends it regardless of the relation which the fact it states bears to the issue raised by the pleadings. Whether the relevancy of the controlling fact or that asserted be constituent as a fact properly part of the *res gestae* or probative, as in case of ordinary circumstantial evidence, the spontaneous utterance possesses the same evidentiary force. In other words, taking for granted that a spontaneous statement must be part of the *res gestae*, American courts find themselves practically compelled to speak of spontaneous extrajudicial utterances as part of the *res gestae*, although, according to what seems to be a proper classification of admissible facts, such statements have been made at an ante *Res Gestae*⁵ or a post *Res*

judicial attraction, has not failed to escape attention on many occasions.

"This is the principle, it is believed, that is involved in the somewhat obscure doctrine of *res gestae*, which is often resorted to, apparently, more on account of its convenient indefiniteness than for its scientific precision." *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 34, 54 Atl. 289, 101 Am. St. Rep. 660, 61 L. R. A. 495 (1903), per Walker, J. See also *Shannon v. Castner*, 21 Pa. Super. Ct. 294 (1902).

3. "One would not think it, from the tone adopted by the writers of these pamphlets [relating to the propriety of the ruling by Lord Cockburn in *Bedingfield's case*] towards 'the American cases,'—but it is true that there is nothing looser upon the doctrine of the *res gesta* to be found anywhere than is found in the English cases." Thayer, *Bedingfield's Case*, 14 Amer. L. Rev. 828n. (1880).

4. § 2582.

5. § 3026.

Gestae ⁶ stage in the evolution of the case. A careful examination of a considerable number of decisions in which it has been held that certain evidence was admissible as "part of the *res gestae*" will, it is believed, convince the student of two facts, (1) that a rational and true reason may be discovered for admitting the evidence in every case where it was properly admitted, without resorting to a meaningless phrase; (2) that the court, feeling from the standpoint of reason or "common sense" that the jury should have the aid of the evidence, admitted it as "part of the *res gestae*" without taking the trouble to discover and assign the true reason for its admissibility. Illustrations of this loose and hurried use of the convenient term *res gestae* are not rare in judicial opinions.⁷

§ 2986. (*Declarations part of a Fact in the Res Gestae*); Relevancy to Fact Asserted.—That the relevancy of an extrajudicial statement to the existence of the fact asserted in it is due to the spontaneous nature of the utterance rather than to position among the *res gestae* becomes obvious upon comparing those *res gestae* utterances deemed admissible for the purpose and those not so regarded. A very large number of extrajudicial statements deemed independently relevant are undoubtedly part of the *res gestae*, properly so called, as being constitutently relevant.¹ These utterances, however, have no tendency, in the absence of spontaneity, to establish the existence of the facts which they assert. That the defendant, for instance, said, speaking of the plaintiff, "A. B. is a thief," may on an action of slander be proved as a relevant, indeed, a necessary fact. Such a declaration would have little tendency, standing alone, though obviously part of the *res gestae*, to show that it was true, that A. B. was, in point of fact, a thief. True, the addition

6. § 3027.

7. "A proper predicate for the admission of the dying declarations of the deceased was laid, and there was no error in their admission in evidence. The statements made, at the time, by the deceased, . . . were a part of the *res gestae* of the homicide." *Starks v. State*, 137 Ala. 9, 11, 34 So. 687 (1903), per Haralson, J.

"Complaint is also made that the court refused to permit defendants to prove what Walls said five minutes after the pistol was fired, and after

Walls had left the saloon. This was not error. What was then said by Walls was not a part of the *res gestae*, and therefore inadmissible." *State v. Noeninger*, 108 Mo. 166, 172, 18 S. W. 990 (1891), per Thomas, J.

"Statements made by the engineer after the accident in no way bind his employer. They are not part of the *res gestae*." *Hall v. Uvalde Asphalt Pav. Co.*, 92 N. Y. Suppl. 46, 47 (1905), per Davis, J.

§ 2986-1. §§ 2593 *et seq.*

of other circumstances may contribute to an extrajudicial statement such elements of probative force as may confer upon it a logical tendency to establish the truth of the fact, if any, alleged in it. For immediate purposes, it is sufficient to notice that among circumstances creating such a probative tendency, mere position among the *res gestae* is not one, whatever may be the true view of the meaning of that phrase. An extrajudicial statement among the *res gestae* may often be highly probative of the fact which it alleges; but this result is not due to the position in which it is found. Something else has added the probative quality to the otherwise inert utterance. That "something else" is the *spontaneousness* of a declaration made by a person of adequate knowledge. It completes the subjective relevancy of his utterance by showing that the speaker was under no controlling motive to misrepresent.

§ 2987. (*Declarations part of a Fact in the Res Gestae; Relevancy to Fact Asserted*); Circumstantial Proof.—Whether the exhibition by an extrajudicial statement of a proving power resulting from an intimate relation to attending circumstances would ever be accepted as sufficient judicial proof of the fact asserted is very doubtful. Upon principle, it may fairly be contended that such proof should be sufficient. As an extrajudicial declaration ought to be properly accepted in proof of any proposition of which it is logically probative, an utterance so naturally fitting into the place in which it finds itself as rationally to warrant the belief that it is true should, it would seem, be received as tending to prove the facts asserted. The somewhat elaborate, if vague, language of Prof. Greenleaf might well lead us to expect that something of the kind would correctly represent the state of the law. "There are *other declarations*," he says,¹ "which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting

its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestae*, may always be shown to the jury, along with the principal fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description." Apparently, unless this portentous deliverance is to be regarded as *brutum fulmen*, it suggests that the bare connection of an extrajudicial declaration with its surroundings may confer admissibility for any legitimate purpose. Aside from the noticeably perverted meaning given in the above extract to the conveniently ambiguous phrase *res gestae*, there could be little objection to Greenleaf's statement if correctly paraphrased. An extrajudicial statement, like any other fact, should be received as grounding any inference to which it logically gives rise. To judicial administrators, however, apprehensive that the jury might be misled² in the absence of cross-examination, Greenleaf's doctrine has somehow failed to commend itself so far as relates to the assertive capacity of an unsworn statement. Full force and effect is given to the doctrine in connection with the probative use of independently relevant unsworn statements.³ Two special forms of relevancy, that of Spontaneity⁴ and that of Regularity⁵ are alone generally recognized as sufficient to admit extrajudicial statements as primary proof of the facts asserted.

§ 2988. (Declarations part of a Fact in the Res Gestae; Relevancy to Fact Asserted); Criminal Cases.—The definition of the term *res gestae* by Chief Justice Cockburn, elsewhere given,¹ is, it will be noticed, expressly limited to the use of the term in criminal cases. Undoubtedly, on account of the serious consequences to the prisoner, the inertia of the court² against admitting an extrajudicial statement calculated to mislead the jury may be greatly increased. Where, for example, it may rationally be feared that an independently relevant extrajudicial statement, properly part of the *res gestae*, or probative in some legitimate connection,³ may

2. § 1745.

3. §§ 2624 *et seq.*

4. §§ 2982 *et seq.*

5. §§ 3051 *et seq.*

§ 2988-1. § 2582.

2. § 1016.

3. Haynes v. Com., 28 Gratt. (Va.) 942 (1877).

be used by the jury as proof of the facts asserted in it, the trial judge may well be warranted in excluding it. No distinction, however, as a matter of principle or of authority, exists between the meaning of *res gestae* when employed in criminal as distinguished from civil cases.⁴ What is law for a criminal case is law for a civil case, and *vice versa*.

§ 2989. (Declarations part of a Fact in the Res Gestae; Relevancy to Fact Asserted); Independent Relevancy Contrasted.—

This caution of judicial administrators in receiving independently relevant extrajudicial statements, which may, it is apprehended, be used by the jury in their assertive capacity, i. e., as proof of the facts alleged, must be kept constantly in mind in order to properly estimate the effect and scope of many judicial rulings, especially those made at *nisi prius*, the reporting of which has done much, for obvious reasons, to unsettle the law.

In broad outline, the distinction which procedure draws between the two capacities in which an extrajudicial declaration may be used seems clear. Briefly to repeat what has already frequently been said, the independently relevant statement establishes the *factum probandum* by reason of the mere *fact* of its own existence. Its relevancy may be constituent,¹ as part of the *res gestae*, properly so called. For example, the making of an extrajudicial statement may be used as the basis of an action for libel or slander,² as where the defendant says, speaking of the plaintiff, "A. B. forged that will." The relevancy may be probative,³ as where the existence of a particular mental condition⁴ may be established by showing that the person in question announced that he was made of glass or was entitled to receive homage as a royal personage. Or again, this relevancy may be deliberative,⁵ as where a particular extrajudicial statement is shown to have been made by a witness inconsistent with or even contradictory of his present testimony.⁶ Whatever may be the relation in which the independently relevant

4. "No distinction between civil cases and criminal cases as to the admission of declarations as a part of the *res gesta* has as yet been made out, and it is very late in the day to adventure upon such an enterprise." Thayer, *Bedingfield's Case*, 14 *Amer. L. Rev.* 829 (1880).

§ 2989-1. § 1713.

2. § 2621.

3. § 1712.

4. §§ 2638 *et seq.*

5. § 1714.

6. § 1785.

extrajudicial statement stands to the issue raised by the pleadings, it has, in itself considered, no tendency to prove the truth of that which is stated. In the examples given, the alleged libellous or slanderous statement that the defendant forged a will ordinarily furnishes little proof that he actually did so. The care which the person whose mental condition is in question claims for himself on the ground of his brittle nature or high social position by no means establishes the fact that he is right about the matter. A declaration such as mentioned in the third instance by no means establishes its own truth. It simply discredits the testimony to which it is opposed. In these, as in all the practically innumerable instances of the use of independently relevant unsworn statements, it is the *fact* and not the truth of the statement which confers probative force. So far as proving power is exhibited, it is, as it were, a physical or circumstantial rather than a mental or moral one, based upon the manifested thought, ratiocination or deduction of the declarant.

§ 2990. (*Declarations part of a Fact in the Res Gestae; Relevancy to Fact Asserted; Independent Relevancy Contrasted*); Function of Hearsay.—The assertive capacity of an extrajudicial statement presents, as compared to that of independent relevancy, certain essential differences, at least on the surface. The *fact* of the statement, its circumstantially probative quality in establishing the existence of a physical or psychological fact in itself relevant, recedes into the background. The inference of truth to which the making of the statement gives rise, under the circumstances disclosed, assumes the first importance. Fresh lines of consideration at once open up. Usually, these relate to the subjective relevancy of the declarant. We are dealing with the thought, the voluntary, deliberate announcement of the speaker. We are relying upon his credit. How far is he trustworthy? The tribunal is forced to weigh with care the accuracy of his knowledge, the disinterestedness of his motives. As to these, cross-examination confessedly would be of the greatest assistance. Deprived of this guide to truth, hearsay statements cannot properly be rated higher, in an administrative sense, than secondary evidence, the corresponding primary being the testimony of the declarant as a witness. Indeed, so long as the tribunal is obliged to rely mainly or solely upon the credit of the declarant, this would seem to be the proper adminis-

trative position to be assigned to hearsay,¹ i. e., of extrajudicial statements tendered as proof of the facts asserted in them. With many of these lines of inquiry the extrajudicial independently relevant statement furnishes judicial administrators no reason for concerning themselves. Until it is sought to raise the inference of truth from the existence of an extrajudicial declaration, the only question presented to a tribunal is as to whether the declaration was or was not actually made. The subjective mental state of the declarant is, therefore, of little or no concern. We do not find it necessary to be informed as to how much the declarant knew about the matter. The purity of his motives in saying what he has said is a consideration wide of the mark. All the court is called upon to decide is whether the speaker has been reported correctly. As to this, no better evidence can customarily be produced than the exhibition of a writing properly identified as that of the declarant or the testimony of a witness who swears that he heard the declarant make the statement which he is claimed to have made. Under these circumstances, the benefit of cross-examination can be but of comparatively slight judicial importance and the evidence of the statement is properly regarded, not as secondary, but as primary.² Nor will it entirely escape observation that while the independently relevant extrajudicial statement may present any of the three phases or aspects of relevancy, constituent, probative or deliberative, the relevancy of a hearsay statement, an extrajudicial declaration in its assertive capacity, can be but of one kind. In relation to the fact established by it, such a declaration can only be *probative*.

§ 2991. (*Declarations part of a Fact in the Res Gestae; Relevancy to Fact Asserted; Independent Relevancy Contrasted*); Fundamental Unity.—Notwithstanding these seeming differences, the distinction which procedure recognizes between the independently relevant capacity of an extrajudicial statement and its use in an assertive capacity is, at bottom, false and misleading. The circumstantially probative quality of any statement, the proving power of the fact of its existence, persists in all cases, whether the statement be judicial or extrajudicial, the capacity in which it is used, assertive or relevant, independent of its truth or falsity. The juridical effect of any intelligible verbal utterance is deter-

mined, not by anything intrinsically characteristic but by the circumstances under which it is made and the then present state of the case. These "circumstances" may be objective in their nature, as the naturalness of the utterance in view of its environment or the demeanor of one testifying as a witness. They may on the contrary be subjective to the witness, his knowledge, his moral character, his freedom from motive to misrepresent and the like. Whatever they are, they determine the inferences including that of truth, which may be logically drawn from the mere existence of an extrajudicial statement. The state of the case, the issue between the parties and the like determine which among these logically permissible inferences is relevant, at any particular moment. Extrajudicial statements should, as a matter of principle, be received in favor of any admissible inference to which they logically give rise, under the circumstances developed in the evidence. In case of an extrajudicial statement, for example, which is, normally and standing alone, independently relevant, e. g., for the establishment of pain or other bodily sensations,¹ the presence of additional facts, such as the operation of shock or excruciating pain, may readily create the probative force of spontaneity, making the declaration evidence of the truth of the facts asserted. Divorced from these facts, the extrajudicial utterance falls back into its appropriate class as an independently relevant statement, losing its proving power in an assertive capacity.

Judicial Control of Admissibility.—Partly for these reasons,² a heavy burden is placed upon judicial administration to be constantly on guard lest the jury be misled into violating the rule against hearsay by using an independently relevant extrajudicial statement in its assertive capacity, as proof of the facts alleged. A jury, as is well known to practiced administrators, possess a well marked inclination to credit hearsay statements at their face value and, in view of the unstable equilibrium of any distinction between the inference of truth and other inferences logically arising from the existence of an unsworn statement, many judges have deemed it wise to exclude extrajudicial statements from the consideration of the jury where there is danger of their being misled into acting in violation of the rule against hearsay.³ Judicial

§ 2991-1. §§ 2625 *et seq.*

2. § 2580.

3. *State v. Oliver*, 39 La. Ann. 470,

2 So. 194 (1887); *R. v. Megson*, 9 C. & P. 420 (1840) (rape).

control may be exercised in the opposite direction. Not only may relevant extrajudicial statements be excluded if likely to mislead but a presiding judge may permit the facts which constitute the *res gestae*, properly so called, to be amplified or supplemented by other facts, including statements, which tend to place the *res gestae*, as it were, in an appropriate setting, giving them cohesion or persuasiveness.

Deception.—Should it appear from all the circumstances of any particular case that the declarations which it is proposed to prove in it are intended to deceive, and not made in good faith, the court may properly exclude them in its administrative capacity.⁴

§ 2992. (Declarations part of a Fact in the Res Gestae); Statement Must be Contemporaneous.—The rule as commonly laid down is that an extrajudicial declaration must, in order to be received in evidence, be contemporaneous with some principal fact in the *res gestae*.¹ Few rules are more confusing. In the

4. *Meek v. Perry*, 36 Miss. 190 (1858).

§ 2992-1. *Alabama.*—*Harris v. State*, 59 So. 205 (-1912); *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176 (1893).

California.—*People v. Piggott*, 126 Cal. 509, 59 Pac. 31 (1899).

Connecticut.—*Rockwell v. Taylor*, 41 Conn. 55 (1874). See also *Leonard v. Mallory*, 75 Conn. 433, 53 Atl. 778 (1903).

Georgia.—*Cox v. State*, 64 Ga. 374, 37 Am. Rep. 76 (1879).

Illinois.—*Reiten v. Lake St. El. R. Co.*, 85 Ill. App. 657 (1899).

Iowa.—*Frink v. Coe*, 4 Greene 555, 61 Am. Dec. 141 (1854).

Kansas.—*State v. Montgomery*, 8 Kan. 351 (1871). See also *Atchison, etc., R. Co. v. Logan*, 65 Kan. 748, 70 Pac. 878 (1902).

Louisiana.—*De Mahy v. Morgan's Louisiana, etc., R., etc., Co.*, 45 La. Ann. 1329, 14 So. 61 (1893).

Maryland.—*Johnson v. Johnson*, 96 Md. 144, 53 Atl. 792 (1902).

Massachusetts.—*Eastman v. Bos-*

ton, etc., R. Co., 165 Mass. 342, 43 N. E. 115 (1896); *Lund v. Tyngsborough*, 9 Cush. 36 (1851).

Michigan.—*Mabley v. Kittleberger*, 37 Mich. 360 (1877).

Missouri.—*Stoeckman v. Terre Haute, etc., R. Co.*, 15 Mo. App. 503 (1884).

Nebraska.—*Clancy v. Barker*, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559 (1904). See also *Davidson v. Davidson*, 2 Neb. (Unoff.) 90, 96 N. W. 409 (1901).

New Jersey.—*Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637 (1897); *Luse v. Jones*, 39 N. J. L. 707 (1877).

New York.—*McCabe v. Dry-Dock, etc., R. Co.*, 15 Daly, 504, 8 N. Y. Suppl. 336, 28 N. Y. St. Rep. 879 (1890).

North Carolina.—*Bumgardner v. Southern R. Co.*, 132 N. C. 438, 43 S. E. 948 (1903). See also *Lyman v. Southern R. Co.*, 132 N. C. 721, 44 S. E. 550 (1903).

first place, strictly speaking, it is not and cannot be insisted on. Practical contemporaneousness is all that is required.² Precise

Ohio.—Cleveland, etc., R. Co. v. Mara, 26 Ohio St. 185 (1875).

Pennsylvania.—Com. v. Howe, 35 Pa. Super. Ct. 554 (1908); Elkins v. McKean, 79 Pa. St. 493 (1875).

South Carolina.—State v. Wyse, 32 S. C. 45, 10 S. E. 612 (1889). See also Gosa v. Southern R. Co., 67 S. C. 347, 45 S. E. 810 (1903).

South Dakota.—Fallon v. Rapid City, 17 S. D. 570, 97 N. W. 1009 (1904); Tenney v. Rapid City, 17 S. D. 283, 96 N. W. 96 (1903).

Vermont.—State v. Davidson, 30 Vt. 377, 73 Am. Dec. 312 (1858).

United States.—Chicago Travelers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437 (1869). See also Atchison, etc., R. Co. v. Phipps, 125 Fed. 478, 60 C. C. A. 314 (1903).

England.—Reg. v. Bedingfield, 14 Cox. Cr. C. 341 (1879).

"It is only when the declarations accompany the transaction so as to be wrought into it and to emanate from it that they can be rightly regarded as excepted from the rule that excludes hearsay." Com. v. Howe, 35 Pa. Super. Ct. 554, 562 (1908), per Henderson, J.

Contemporaneousness not alone sufficient.—Chiefly as a necessary condition for the operation of a spontaneous impulse does the existence of contemporaneousness assume an aspect of importance in determining the relevancy and consequent admissibility of an extrajudicial statement in its assertive capacity. Much may be said, moreover, as to the increased probative force of memoranda made when recent for the purpose of refreshing memory or concerning the evidentiary cogency of similar entries regularly made in the course of private or official business or duty. Mere contemporaneousness, however, is not an independent ground of admissi-

bility. Nor does the circumstance that an extrajudicial statement was made at the same time as a relevant act was done constitute an adequate ground for admitting the former. "It is not the law that any and all conversation which happens to be going on at the time of an act can be proved if the act can be proved." Com. v. Chance, 174 Mass. 245, 251, 54 N. E. 551, 75 Am. St. Rep. 306 (1899), per Holmes, C. J.

"In cases of this character, it is important to ascertain what, if any, relevancy the declaration has, in other words, what it tends to prove; for unless its natural effect is to prove or explain a point in issue or a controverted fact, it is not admissible." Murray v. Boston, etc., R. Co., 72 N. H. 32, 34, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903), per Walker, J.

"While proximity in point of time with the act causing the injury is in every case of this kind essential to make what was said by a third person, competent evidence against another as part of the *res gestae*, that alone is insufficient, unless what was said may be considered part of the principal fact, and so a part of the act itself." Butler v. Manhattan R. Co., 143 N. Y. 417, 423, 38 N. E. 454, 42 Am. St. Rep. 738, 26 L. R. A. 46 (1894) per Andrews, C. J.

2. "Where the books say—when this court has said—that the declarations must be contemporaneous with the act, . . . it is a question for judicial discretion, of embarrassing nicety—one which must depend upon the application of the principle upon which the rule is founded. If the declarations appear to spring out of the transaction—if they elucidate it—if they are voluntary and spontaneous, and if they are made at a

identity in time is usually out of the question.³ This, however, is by no means a full statement of the fact. In its broad form the rule does not state the true legal situation. We have seen,⁴ that, whatever meaning be applied to *res gestae*, whether the limited or English⁵ or the broad, the American,⁶ view be adopted, the extrajudicial declarations which properly constitute part of the *res gestae* may fall within one or the other of two general classes. (1) They may be independently relevant, circumstantially probative by reason of their mere existence, e. g., the utterance in an action of libel or slander or proof of the mental state with which a particular act is done. (2) They may be hearsay statements, used in their assertive capacity, as proof of the facts alleged, e. g., where one injured in a railroad collision gives a spontaneous account of it, before he has time to invent anything to his own advantage. To the admissibility of these two classes or species of extrajudicial statement an entirely different standard of contemporaneity is customarily applied by judicial administrators. In case of the independently relevant statement the test is a logical one. Such a statement will be received in evidence, provided only it was made

time so near to it, as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous." *Mitchum v. State*, 11 Ga. 615, 626, 627 (1852) per Nisbet, J.

3. *California*.—*People v. Wong Ah Foo*, 69 Cal. 180, 10 Pac. 375 (1886).

Georgia.—*Mitchum v. State*, 11 Ga. 615 (1852).

Louisiana.—*State v. Molisse*, 38 La. Ann. 381, 58 Am. Rep. 181 (1886).

Massachusetts.—*Com. v. Hackett*, 2 Allen 136 (1861).

Mississippi.—*Archer v. Helm*, 70 Miss. 274, 12 So. 702 (1893); *Head v. State*, 44 Miss. 731 (1871).

New Hampshire.—*Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 459, 101 Am. St. Rep. 660 (1903); *Caverno v. Jones*, 61 N. H. 623 (1882).

South Carolina.—*State v. Belcher*, 13 S. C. 459 (1880).

Texas.—*Boothe v. State*, 4 Tex. App. 202 (1878).

England.—*Rex v. Foster*, 6 C. & P. 325, 25 E. C. L. 455 (1834).

"Nor need any such declarations be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let-down from the moment of the event they illustrate." *Carr v. State*, 43 Ark. 99, 104 (1884), per Smith, J.

"The better reasoning is, that the declaration, to be a part of the *res gestae*, need not be coincident, in point of time, with the main fact to be proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous exclamation of the real cause." *Leahy v. R. Co.*, 97 Mo. 165, 172, 10 S. W. 58 (1888), per Black, J.

See also, *Hill's Case*, 2 Gratt. (Va.) 604 (1845).

4. § 2581.

5. § 2582.

6. § 2583.

within such limits of time that it continues to be evidentiary of the fact to be proved by it.⁷ Nor, so long as this relevancy persists, is it material whether the extrajudicial statement tendered in evidence precedes,⁸ accompanies⁹ or follows the principal fact to be established by such declaration.¹⁰ Prominent among facts shown to exist in this way are those of mental state or regarding the declarant's physical¹¹ or mental condition. Thus, an extra-

7. *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176 (1893); *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

8. *Alabama*.—*Ridgell v. State*, 1 Ala. App. 94, 55 So. 327 (1911).

Georgia.—*Hightower v. State*, 9 Ga. App. 236, 70 S. E. 1022 (1911).

Iowa.—*State v. Vincent*, 24 Iowa, 570, 95 Am. Dec. 753 (1868).

Kentucky.—*Lewis' Adm'r v. Bowling Green Gaslight Co.*, 135 Ky. 61, 117 S. W. 278, 22 L. R. A. (N. S.) 1169n. (1909).

Michigan.—*People v. McArron*, 121 Mich. 1, 79 N. W. 944 (1899).

Missouri.—*Cunningham v. Wabash R. Co.*, 79 Mo. App. 524 (1899); *State v. Thompson*, 141 Mo. 408, 42 S. W. 949, *affirmed*, 171 U. S. 380, 18 Sup. Ct. 922, 43 L. ed. 204 (1897).

Nebraska.—*Lamb v. State*, 69 Neb. 212, 95 N. W. 1050 (1903).

New Jersey.—*State v. Laster*, 71 N. J. L. 586, 6 Atl. 361 (1905).

North Carolina.—*State v. Jarrell*, 141 N. C. 722, 53 S. E. 127 (1906).

Oklahoma.—*Baysinger v. Territory*, 15 Okla. 386, 82 Pac. 728 (1905).

Wisconsin.—*Mack v. State*, 48 Wis. 271, 4 N. W. 449 (1880).

A letter written by a passenger on a vessel and found in his stateroom, indicating an intention to commit suicide, is admissible as a part of the *res gestae* on an issue as to his death. *Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (1903).

9. *Alabama*.—*Wray v. State*, 2 Ala. App. 139, 57 So. 144 (1911); *Gandy v. Humphries*, 35 Ala. 617 (1860).

Georgia.—*Monroe v. State*, 5 Ga. 85 (1848).

Illinois.—*McMahon v. Chicago City R. Co.*, 239 Ill. 334, 88 N. E. 223 (1909).

Iowa.—*State v. Vincent*, 24 Iowa, 570, 95 Am. Dec. 753 (1868).

Kentucky.—*Howard v. Com.*, 70 S. W. 295, 24 Ky. L. Rep. 950 (1902).

Maine.—*Collagan v. Burns*, 57 Me. 449 (1870).

Massachusetts.—*Harnett v. McMahon*, 168 Mass. 3, 46 N. E. 392 (1897); *Com. v. Hackett*, 2 Allen 136 (1861).

Mississippi.—*Head v. State*, 44 Miss. 731 (1870).

Missouri.—*State v. Banks*, 10 Mo. App. 111 (1881).

North Carolina.—*State v. Mace*, 118 N. C. 1244, 24 S. E. 798 (1896).

Texas.—*Upton v. State*, 48 Tex. Cr. App. 289, 88 S. W. 212 (1905).

England.—*Reg. v. Beddingfield*, 14 Cox Cr. C. 341 (1879).

10. *Bradley v. State*, 54 Tex. Cr. App. 53, 111 S. W. 733 (1908).

11. *Alabama*.—*Starks v. State*, 137 Ala. 9, 34 So. 687 (1902).

Colorado.—*Union Casualty, etc., Co. v. Mondy*, 18 Colo. App. 395, 71 Pac. 677 (1903).

Maine.—*State v. Wagner*, 61 Me. 178 (1873).

New Hampshire.—*Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

Texas.—*St. Louis Southwestern R. Co. v. Brown*, 30 Tex. Civ. App. 57, 69 S. W. 1010 (1902).

Wisconsin.—*Bliss v. State*, 117 Wis. 596, 94 N. W. 325 (1903).

judicial statement of a present intention to abandon an existing domicile or to acquire a new one, though made prior or subsequent to the time of the actual removal may be admissible as to the intention with which the essential act was done, if not too remote to be relevant. Naturally, it is not regarded by judicial administration as sufficient that the unsworn statement should accompany *some* act in the *res gestae*. It should, so far as independent relevancy is concerned, accompany or at least unmistakably indicate the act of which it is said to form a part.¹²

In case of a spontaneous statement it is of course necessary that the controlling fact or facts from which spontaneity arises should be actually present or that its or their influence should remain, dominating the mind of the declarant.¹³ In other words, the essential consideration is as to the presence of what may be called the reflection-numbing operation of certain impressive facts upon the mind of the declarant. Whether, regarded as physical entities, the dominating facts are themselves present is considered by judicial administration as comparatively immaterial.¹⁴ Indeed, as may be noticed as a very usual incident, an appreciable interval may elapse between the physical disappearance of the stimulating cause and the extrajudicial statement to which the after effects of the latter gives rise.¹⁵ Judicial administration will shorten this

12. *Alabama*.—Cooper v. State, 63 Ala. 80 (1879).

Connecticut.—Baxter v. Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514 (1898).

Iowa.—Hoover v. Cary, 86 Iowa 494, 53 N. W. 415 (1892).

Maine.—McLeod v. Johnson, 96 Me. 271, 52 Atl. 760 (1902).

Massachusetts.—Haynes v. Rutter, 24 Pick. 242 (1836).

Texas.—Galveston v. Barbour, 62 Tex. 172, 50 Am. Rep. 519 (1884).

Vermont.—Barnum v. Hackett, 35 Vt. 77 (1862).

Washington.—Spokane, etc., Gold, etc., Co. v. Colfelt, 24 Wash. 568, 64 Pac. 847 (1901).

13. Plaintiff came into a mill about three minutes after he was hurt, with his clothes covered with dirt. An employee asked what was the matter, and he replied that he had fallen into

an excavation, and was hurt. It was held that such declaration was admissible as *res gestae*, and competent as explanatory of his appearance. Keyes v. Cedar Falls, 107 Iowa 509, 78 N. W. 227 (1899).

14. Sullivan v. State (Miss. 1902), 32 So. 2; Hanover R. Co. v. Coyle, 55 Pa. St. 396 (1867).

"Soon afterward."—"The *res gestae* or transaction was the accident, and how it occurred. It is not essential that the declaration sought to be introduced in evidence was uttered at the identical time the accident occurred, but, if made soon afterwards, and explanatory thereof, it is admissible." Armil v. Chicago, etc., R. Co., 70 Iowa 130, 132 30 N. W. 42 (1886), per Seever, J.

15. *California*.—People v. Vernon, 35 Cal. 49, 95 Am. Dec. 49 (1868).

Colorado.—Union Casualty, etc.,

interval so that, so far as practicable, any suspicion of fabrication will be eliminated.¹⁶ In the nature of things, a spontaneous state-

Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677 (1903).

Georgia.—*Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18 (1890); *Stevenson v. State*, 69 Ga. 68 (1882).

Indiana.—*Green v. State*, 154 Ind. 655, 57 N. E. 637 (1900).

Iowa.—*Rothrock v. City of Cedar Rapids*, 128 Iowa 252, 103 N. W. 475 (1905).

Michigan.—*People v. Simpson*, 48 Mich. 474, 12 N. W. 662 (1882).

Missouri.—*Stevens v. Walpole*, 76 Mo. App. 213 (1898).

South Carolina.—*Shelton v. Southern Ry. Co.*, 86 S. C. 98, 67 S. E. 899 (1910).

Texas.—*Missouri, K. & T. Ry. Co. v. Brown*, (Civ. App. 1911) 135 S. W. 1076; *Stagner v. State*, 9 Tex. App. 440 (1880).

Virginia.—*Kirby v. Com.*, 77 Va. 681, 46 Am. Rep. 747 (1883).

16. *Alabama*.—*Nelson v. State*, 130 Ala. 83, 30 So. 728 (1900).

California.—*People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49 (1868).

Colorado.—*Graves v. People*, 18 Colo. 170, 32 Pac. 63 (1893). See also *Union Casualty, etc., Co. v. Mondy*, 18 Colo. App. 395, 71 Pac. 677 (1903).

Georgia.—*Glover v. State*, 89 Ga. 391, 15 S. E. 496 (1892); *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18 (1890); *Flanagan v. State*, 64 Ga. 52 (1879); *Barns v. State*, 61 Ga. 192 (1878); *Rutland v. Hathorn*, 36 Ga. 380 (1867); *Mitchum v. State*, 11 Ga. 615 (1852).

Indiana.—*Louisville, etc., R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. 714 (1891).

Iowa.—*Alsever v. Minneapolis, etc., R. Co.*, 115 Iowa 338, 88 N. W. 841, 56 L. R. A. 748 (1902); *State v. Jones*, 64 Iowa 349, 17 N. W. 911, 20 N. W. 470 (1884).

Kentucky.—*O'Donnell v. Louisville Electric Light Co.*, 55 S. W. 202, 21 Ky. L. Rep. 1362 (1900).

Louisiana.—*State v. Blanchard*, 108 La. 110, 32 So. 397 (1902); *State v. Maxey*, 107 La. Ann. 799, 32 So. 206 (1902); *State v. Robinson*, 52 La. Ann. 541, 27 So. 129 (1900); *State v. Euzebe*, 42 La. Ann. 727, 7 So. 784 (1890).

Maine.—*State v. Wagner*, 61 Me. 178 (1873); *Stewart v. Hanson*, 35 Me. 506 (1853).

Massachusetts.—*Com. v. McPike*, 3 Cush. 181 50 Am. Dec. 727 (1849). See also *Com. v. Hackett*, 2 Allen 136 (1861).

Michigan.—*People v. Simpson*, 48 Mich. 474, 12 N. W. 662 (1882).

Mississippi.—*Mobile, etc., R. Co. v. Stinson*, 74 Miss. 453, 21 So. 14, 522 (1896); *Head v. State*, 44 Miss. 731 (1871); *Meek v. Perry*, 36 Miss. 190 (1858).

Missouri.—*Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 445, 72 S. W. 154 (1903); *State v. Lockett*, 168 Mo. 480, 68 S. W. 563 (1902); *State v. Martin*, 124 Mo. 514, 28 S. W. 12 (1894).

Nebraska.—*Friend v. Burleigh*, 53 Nebr. 674, 74 N. W. 50 (1898). See also, *Pledger v. Chicago, etc., R. Co.*, 69 Neb. 456, 95 N. W. 1057 (1903).

New York.—*Casey v. New York Cent. R. Co.*, 78 N. Y. 518 (1879), *affirming* 8 Daly 220 (1879); *Courtney v. Baker*, 34 N. Y. Super. Ct. 529 (1872); *Spatz v. Lyons*, 55 Barb. 476 (1870).

Oklahoma.—*Smith v. Territory*, 11 Okla. 669, 69 Pac. 805 (1902).

Oregon.—*State v. Garrand*, 5 Oreg. 216 (1874).

Pennsylvania.—*Com. v. Van Horn*, 188 Pa. St. 143, 41 Atl. 469 (1898); *Hanover R. Co. v. Coyle*, 55 Pa. St. 396, 402 (1867).

Texas.—*Gulf, etc., R. Co. v. Pierce*,

ment cannot precede the presence of the controlling influence under which it comes into being.¹⁷ Dread of what may occur may create a present influence for a future event, resulting in a spontaneous statement.¹⁸

§ 2993. (*Declarations part of a Fact in the Res Gestae; Statements Must be Contemporaneous*); Declaration Must Characterize.—The rule is customarily laid down that an extrajudicial statement admitted as part of the *res gestae* must characterize some proper fact within its scope.¹ This may be doubted,

7 Tex. Civ. App. 597, 25 S. W. 1052, affirmed 87 Tex. 144, 27 S. W. 60 (1894); Craig v. State, 30 Tex. App. 619, 18 S. W. 297 (1892); Pilkenton v. Gulf, etc., R. Co., 70 Tex. 226, 7 S. W. 805 (1888); Continental Ins. Co. v. Pruitt, 65 Tex. 125 (1885); Galveston v. Barbour, 62 Tex. 172, 50 Am. Rep. 519 (1884).

Vermont.—Hawkes v. Chester, 70 Vt. 271, 40 Atl. 727 (1898).

Virginia.—Andrews v. Com., 100 Va. 801, 40 S. E. 935 (1902); Kirby v. Com., 77 Va. 681, 46 Am. Rep. 747 (1883).

West Virginia.—Sample v. Consolidated Light R. Co., 50 W. Va. 472, 40 S. E. 597, 694, 57 L. R. A. 186 (1901).

Wisconsin.—Charley v. Potthoff, 118 Wis. 258, 95 N. W. 124 (1903).

United States.—Westall v. Osborne, 115 Fed. 282, 53 C. C. A. 74 (1902); Doyle v. Clark, 7 Fed. Cas. No. 4,053, 1 Flipp. 536 (1876); Mutual Ben. L. Ins. Co. v. Newton, 22 Wall. 32, 22 L. ed 793 (1874); Chicago Travelers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437 (1869). See, also, Kansas City Southern R. Co. v. Moles, 121 Fed. 351, 58 C. C. A. 29 (1903).

England.—Aveson v. Kinnaird, 6 East. 188, 2 Smith K. B. 286, 8 Rev. Rep. 455 (1805); Thompson v. Trevanion, Skin. 402 (1694).

The operation of deliberate design will be excluded. Hightower v. State, 9 Ga. App. 236, 70 S. E. 1022 (1911).

17. Com. v. McPike, 3 Cush.

(Mass.) 181, 50 Am. Dec. 727 (1849); Chicago Travelers' Ins. Co. v. Mosley, 8 Wall. (U. S.) 397, 19 L. ed. 437 (1869).

18. Shirley v. State, 144 Ala. 35, 40 So. 269 (1906); Monroe v. State, 5 Ga. 85 (1848); Kennedy v. Com., 100 S. W. 242, 30 Ky. L. Rep. 1063 (1907); Washington v. State, 19 Tex. App. 521, 53 Am. Rep. 387 (1885); Cox v. State, 8 Tex. App. 254, 34 Am. Rep. 746 (1880).

Compare. Holland v. State, 162 Ala. 5, 50 So. 215 (1909); Flynn v. State, 43 Ark. 289 (1884).

Evidence that the child of deceased said, "Don't shoot pap" just before the fatal shot was fired was properly admitted, the child being present at the shooting and a participant to the extent of trying to prevent the accused from shooting his father. Kennedy v. Com., 100 S. W. 242, 30 Ky. L. Rep. 1063 (1907).

Upon a trial for murder, it appeared that the deceased was shot while in church by someone from outside. It was held that his declaration, made just before the shot was fired, and after looking from the window, that A, the defendant, "is outside, fixing to shoot me," was admissible as part of the *res gestae*. Means v. State, 10 Tex. App. 16, 38 Am. Rep. 640 (1881).

§ 2993-1. Alabama.—Harris v. State, 59 So. 205 (1912); Stevens v. State, 138 Ala. 71, 35 So. 122 (1902); Robertson v. Smith, 18 Ala. 220

notwithstanding the well-settled character of the rule. Certainly, the proposition does not hold true in case of a *spontaneous* utterance. What the half-dazed victim of a railroad accident, for example, has to say regarding the cause of his condition has, as a rule, little effect in limiting, explaining or otherwise characterizing any fact in the *res gestae*, whatever may be the meaning attached to that elastic phrase.

The independently relevant extrajudicial statement stands in a somewhat different position in this connection. Undoubtedly, the meaning and quality of an act, its legal and logical effect, may differ widely according to the mental state, the *animus*, with which

(1850); *Tomkies v. Reynolds*, 17 Ala. 109 (1849).

Connecticut.—*Rockwell v. Taylor*, 41 Conn. 55 (1874); *Russell v. Frisbie*, 19 Conn. 205 (1848); *Wooden v. Cowlie's Ex'r*, 11 Conn. 292 (1836); *Enos v. Tuttle*, 3 Conn. 247 (1820).

Florida.—*Hardee v. Langford*, 6 Fla. 13 (1855).

Georgia.—*Sims v. Macon, etc.*, R. Co., 28 Ga. 93 (1859); *Clayton v. Tucker*, 20 Ga. 452 (1856); *Robinson v. Lane*, 19 Ga. 337 (1856).

Illinois.—*Chicago, West Div. R. Co. v. Becker*, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144 (1889).

Indiana.—*Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271 (1889).

Kentucky.—*Massie v. Com.*, 29 S. W. 871, 16 Ky. L. Rep. 790 (1895); *Tabor v. Hardin*, 9 Ky. L. Rep. 491 (1887); *McLeod v. Ginther's Adm'x*, 80 Ky. 399, 4 Ky. L. Rep. 276 (1882).

Massachusetts.—*Lund v. Tyngsborough*, 9 Cush. 36 (1851).

Minnesota.—*Reem v. St. Paul City R. Co.*, 77 Minn. 503, 80 N. W. 638, 778 (1899).

Mississippi.—*Meek v. Perry*, 36 Miss. 190 (1858); *Wells v. Shipp*, Walk. 353 (1829).

Nevada.—*State v. Daugherty*, 17 Nev. 376, 30 Pac. 1074 (1883); *Rolins v. Strout*, 6 Nev. 150 (1870).

New Hampshire.—*Tucker v. Peaslee*, 36 N. H. 167 (1858); *Morrill v.*

Foster, 33 N. H. 379 (1856); *Plumer v. French*, 22 N. H. 450 (1851).

New Jersey.—*Frome v. Dennis*, 45 N. J. L. 515 (1883).

New York.—*Smith v. National Ben. Soc.*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616 (1890); *Gibbs v. Huyler*, 41 N. Y. Super. Ct. 190 (1876); *Tilson v. Terwilliger*, 56 N. Y. 273, 277 (1874).

North Carolina.—*State v. Huntley*, 25 N. C. 418, 40 Am. Dec. 416 (1843).

Ohio.—*Wetmore v. Mell*, 1 Ohio St. 26, 59 Am. Dec. 607 (1852).

Pennsylvania.—*Shannon v. Castner*, 21 Pa. Super. Ct. 294 (1902); *Stein v. Railroad Co.*, 7 Leg. Gaz. 223, 10 Phila. 440 (1875).

South Carolina.—*Turpin v. Brannon*, 3 McCord 261 (1825); *Hall v. James*, 3 McCord 222 (1825).

Tennessee.—*Nelson v. State*, 2 Swan 237 (1852).

Vermont.—*Elkins v. Hamilton*, 20 Vt. 627 (1848).

Virginia.—*Scott v. Shelor*, 28 Gratt. 891 (1877).

Wisconsin.—*Mack v. State*, 48 Wis. 271, 280, 4 N. W. 449 (1879).

United States.—See *Chicago-Travelers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437 (1869).

In an action by a passenger to recover on account of injuries, where the issue was whether the company negligently permitted or caused the street car to be overcrowded, and if

it is done. This is equally true in criminal² or In civil cases, whether the relevancy of the fact said to be characterized is constituent or probative. It seems important, however, to bear in mind that what characterizes, limiting, identifying, giving force and character to, the act which it accompanies and of which, as it were, it forms part is not the extrajudicial statement but the mental state which the unsworn declaration tends to prove. In other words, that which characterizes the physical act is the mental state, and the declaration is merely received because it is an appropriate, perhaps the most appropriate, way of proving the *animus*. The latter, not being subject to direct sense-perception, frequently is overlooked, attention being focused exclusively upon that which is perceived, to wit, the extrajudicial statement. Take, for example, the familiar case of the revocation of a will. Sup-

so, whether such overcrowding was the cause of plaintiff's injuries, evidence that the conductor said to the witness when she yelled at him to stop the car, after the injury, "Never mind. . . . Just give me your fare," was not a part of the *res gestae*, although it may have been contemporaneous in point of time, as it did not illustrate, explain, or characterize the transaction in any degree. *Reem v. St. Paul City R. Co.*, 77 Minn. 503, 80 N. W. 638, 778 (1899).

Declarations of one computing interest on certain notes as to what his motive and purpose will be in trying to collect them are not part of the *res gestae*. *Plumer v. French*, 22 N. H. 450 (1851).

Declarations admissible as part of the *res gestae* "must be calculated to unfold the nature and quality of the facts which they are intended to explain, they must so harmonize with those facts as to form one transaction." *Smith v. National Ben. Soc.*, 123 N. Y. 85, 88, 25 N. E. 197, 9 L. R. A. 616 (1890), per Finch, J.

"It becomes a part of the act itself, is explanatory of it, and gives it, to a great extent, its character." *Mack v. State*, 48 Wis. 271, 280, 4 N. W. 449 (1879), per Taylor, J..

Completeness not required.—While it is said to be necessary that the extrajudicial statement should characterize the *res gestae* fact, no requirement is made that the utterance should be, even approximately, a complete account regarding the subject-matter. Especially where the declaration is a spontaneous one, a brief ejaculation or a disjointed sentence may be more probative than a fully detailed narrative. Thus, the unsworn declarations of a deceased person in a homicide case, made as he fell at defendants' feet, when shot by them, "Oh, Lord, they have murdered me for nothing in the world," is not inadmissible because deceased did not call the names of his slayers. *State v. Mace*, 118 N. C. 1244, 24 S. E. 798 (1896). See, also, *Stitt v. Wilson*, *Wright (Ohio)* 505 (1834).

The exclamation of the deceased at the moment of receiving the fatal injury, "Banks has shot me," has been held competent. *State v. Banks*, 10 Mo. App. 111 (1881).

2. *Campbell v. State*, 133 Ala. 81, 31 So. 802, 91 Am. St. Rep. 17 (1902); *State v. Mickler*, 73 N. J. L. 513, 64 Atl. 148 (1906); *Irvine v. State*, 104 Tenn. 132, 56 S. W. 845 (1900).

pose it to be shown, on the one hand, that the testatrix upon tearing her will exclaimed, "That is one thing over. Susan (the principal legatee) has grossly deceived me about that young man." Suppose, on the other hand, her exclamation upon discovering the condition of the will to be "What have I done! The will must have been lying under John's (her nephew's) letter. He wrote me for a loan and I supposed I was tearing up his letter." On an issue of revocation, the admissibility of these statements would be undoubted. Can it fairly be said, however, that either of them directly *characterize* the act of tearing or that it furnishes any evidence of the truth of the facts asserted in it? The fact, to the existence of which the statement is relevant is a psychological one, the *animus revocandi*. The presence or absence of this gives character to the act of tearing, determining the legal effect of an otherwise ambiguous act. The utterances of the speaker, equally with her tone, gestures and the like, are admissible merely because they are good circumstantial evidence of the actual mental state.

§ 2994. (*Declarations part of a Fact in the Res Gestae; Statement Must be Contemporaneous; Declaration Must Characterize*); Responsibility for Injury.—In ascertaining who is the party responsible for injuries received by a person, whether they were inflicted with criminal intent or otherwise, great assistance is furnished by admitting in evidence spontaneous statements of the participants in the transaction. In civil actions, the declarations of the person injured are received if they are spontaneous as proof of the facts declared.¹ Thus, the declarations of one who died as the result of injuries received by being run over by a railroad car, as to how the accident happened, made after he was carried 400 feet to the depot, were admitted.² The declarations of the party sought to be charged with the liability or of his agent are likewise received if they can be regarded as spontaneous.³

§ 2994-1. *Dorr v. Atlantic Shore Line Ry.*, 76 N. H. 160, 80 Atl. 336 (1911); *Speir v. Quirin*, 77 N. Y. App. Div. 624, *affirmed* 177 N. Y. 568, 69 N. E. 1130 (1904); *Williams v. Southern Ry.*, 68 S. C. 369, 47 S. E. 706 (1903); *Gulf, C. & S. F. Ry. Co. v. Willoughby* (Tex. Civ. App. 1904), 81 S. W. 829.

2. *Gilbert v. Ann Arbor R. Co.*, 161 Mich. 73, 125 N. W. 745 (1910).

3. *Louisville & N. R. Co. v. Lee*, 140 Ky. 91, 130 S. W. 813 (1910); *United Rys. & Electric Co. v. Cloman*, 107 Md. 681, 69 Atl. 379 (1908); *Walters v. Spokane International Ry. Co.*, 58 Wash. 293, 108 Pac. 593 (1910); *Stone v. Campbells Creek R.*

For example, where a girl was injured by the starting of a loom, the declarations of the superintendent of the mill, made while he was carrying her out after the injury, were received.⁴ In criminal prosecutions, the same rule naturally obtains and the declarations of the injured party are received when the element of spontaneity is present as proof of the facts asserted.⁵ For instance, what the deceased said in regard to who the guilty person was while the blood was gushing from her throat, which had been cut, and while fleeing from the defendant, was received.⁶ The spontaneous statements of the accused are likewise admitted.⁷ Those of the person injured tending to exculpate the accused may also be shown.⁸ Doubt is often judicially expressed as to whether the declarations of a bystander, as distinguished from an active participant in the main event, are ever properly admissible. They are, however, sometimes received.⁹

Self-serving statements.—The prompting of self-interest being silenced by the agencies which have rendered an extrajudicial statement spontaneous, the circumstance that the utterance is a self-serving one is regarded by judicial administration as being a matter of no consequence. Assertions of this nature are customarily received as constituting proof of the facts alleged in both civil¹⁰ and criminal cases.¹¹

Co., 66 W. Va. 417, 66 S. E. 521 (1909).

4. American Mfg. Co. v. Bigelow, 188 Fed. 34, 110 C. C. A. 77 (1911).

5. People v. Gilmore, 17 Cal. App. 737, 121 Pac. 697 (1912); Williams v. State, 58 Fla. 138, 50 So. 749 (1909); Herrington v. State, 130 Ga. 307, 60 S. E. 572 (1908); State v. Wilmbusse, 8 Idaho 608, 70 Pac. 849 (1902).

6. Com. v. Van Horn, 188 Pa. St. 143, 41 Atl. 469 (1898).

7. Darby v. State, 9 Ga. App. 700, 72 S. E. 182 (1911); State v. Rutledge, 135 Iowa 581, 113 N. W. 461 (1907); Selby v. Com., 25 Ky. L. Rep. 2209, 80 S. W. 221 (1904); Humphrey v. State, 55 Tex. Cr. App. 329, 116 S. W. 570 (1909).

8. Johnson v. State, 8 Wyo. 494, 58 Pac. 761 (1899).

9. See §§ 2983 and 3015.

10. Di Prisco v. Wilmington City Ry. Co., 4 Pennw. (Del.) 527, 57 Atl. 906 (1904); Murer Coal & Ice Co. v. Howell, 217 Ill. 190, 75 N. E. 469 (1905); Hutcheis v. Cedar Rapids & M. C. Ry. Co., 128 Iowa 279, 103 N. W. 779 (1905).

11. Georgia.—Darby v. State, 9 Ga. App. 700, 72 S. E. 182 (1911).

Iowa.—State v. Rutledge, 135 Iowa 581, 113 N. W. 461 (1907).

Kentucky.—Selby v. Com., 25 Ky. L. Rep. 2209, 80 S. W. 221 (1904).

Missouri.—State v. Jacobs, 133 Mo. App. 182, 113 S. W. 244 (1908).

New Jersey.—State v. Kane, 77 N. J. L. 244, 72 Atl. 39 (1909).

Oklahoma.—Price v. State, 1 Okla. Cr. App. 358, 98 Pac. 447 (1908).

Texas.—Humphrey v. State, 55 Tex. Cr. App. 329, 116 S. W. 570

§ 2995. (*Declarations part of a Fact in the Res Gestae; Statement Must be Contemporaneous*); Fact Must be Material.

— The rule admitting statements as part of the *res gestae* requires, as commonly formulated, that the so-called *res gestae* fact should itself be receivable in evidence,¹ as one material to the issue raised in the case.² In other words, the subordinate or explanatory facts which may, as has been seen,³ be permitted to go to the jury as part of the *res gestae*, properly so-called, are not counted as among those to which the operation of the rule is regarded as applying.⁴ In a probative sense, facts of this nature appear comparatively inert, serving rather to give proper form and relation to more significant circumstances.

§ 2996. (*Declarations part of a Fact in the Res Gestae; Statement Must be Contemporaneous; Fact Must be Material*); A Dual Capacity.— Taking the rule as it stands, that a hearsay statement receivable as part of the *res gestae* must constitute a portion of a material fact, the familiar distinction between an extrajudicial statement which is independently relevant

(1909); *Wakefield v. State*, (Cr. App. 1906) 94 S. W. 1046; *Teel v. State*, (Cr. App. 1902) 69 S. W. 531; *Griffin v. State*, 40 Tex. Cr. App. 312, 50 S. W. 366, 76 Am. St. Rep. 718 (1899); *Koller v. State*, 36 Tex. Cr. App. 496, 38 S. W. 44 (1896).

§ 2995-1. Alabama.— *Fail & Miles v. McArthur*, 31 Ala. 26 (1857); *Gilbert v. Gilbert*, 22 Ala. 529, 58 Am. Dec. 268 (1853).

Connecticut.— *Pinney v. Jones*, 64 Conn. 545, 30 Atl. 762, 42 Am. St. Rep. 209 (1894).

Maryland.— *State v. Ridgely*, 2 Harr. & M. 120, 1 Am. Dec. 372 (1785).

Massachusetts.— *Lund v. Tyngsborough*, 9 Cush. 36 (1851); *Kingsley v. Slack*, 5 Cush. 585 (1850).

New Hampshire.— *Ordway v. Sanders*, 58 N. H. 132 (1877); *Patten v. Ferguson*, 18 N. H. 528 (1847).

New York.— *People v. Williams*, 3 Park. Cr. Rep. 84 (1855).

England.— *Wright v. Doe*, 4 Bing. N. Cas. 489, 33 E. C. L. 821, 5 Cl. &

F. 676, 7 Eng. Reprint 559, 2 Jur. 461, 6 Scott 58, *affirming* 7 A. & E. 313, 7 L. J. Exch. 340, L. N. & P. 303, 34 E. C. L. 178 (1837).

2. Alabama.— *Fouville v. State*, 91 Ala. 39, 8 So. 688 (1890); *Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403 (1882); *Masterson v. Phinizy*, 56 Ala. 336 (1876); *Gassenheimer v. State*, 52 Ala. 313 (1875).

Delaware.— *State v. Frazier*, *Houst. Cr. Cas.* 176 (1865).

Indiana.— *Jones v. State*, 71 Ind. 66 (1880).

North Carolina.— *State v. Whitt*, 113 N. C. 716, 18 S. E. 715 (1893).

England.— *Reg. v. Bedingfield*, 14 Cox. Cr. C. 341 (1879).

3. § 2991.

4. Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18 (1890); *Tucker v. Peaslee*, 36 N. H. 167 (1858); *Currier v. Boston, etc., R. Co.*, 34 N. H. 498 (1857); *Scott v. Sheler*, 28 Gratt. (Va.) 891 (1877).

and a spontaneous assertion used in proof of the facts alleged, may be of assistance. The *animus* with which an immaterial act is done is itself immaterial. Little reason could, therefore, well be shown for receiving proof of the extrajudicial statement by which the mental state is established. On the other hand, the administrative indulgence at times accorded to facts of but slight significance¹ for the purpose of adding to the force and symmetry of the *res gestae* may well be felt to be pushed to unwarrantable lengths if made to include an unsworn statement in characterization of a merely explanatory fact.

From the point of view of spontaneous utterance, it can seldom, if ever, be found to happen that a fact not material to the issue should exert such a controlling influence upon the mind of a declarant as to result in the making of a spontaneous statement relevant as proof of admissible facts.

§ 2997. The "Principle of the *Res Gestae*."—What did Prof. Greenleaf understand by "the principle of the *res gestae*"? To attempt grasping, even in outline, the present situation regarding the meaning of *res gestae* as employed by American courts and something as to the rule admitting extrajudicial statements as part of this class of facts, it may be necessary to examine the work of this eminent authority in some detail. "*Res gestae*" means what, if anything, Greenleaf has made it mean. To him, it owes its great extension in scope, its rank as a so-called "principle." Until such an effort is made to reach its underlying conception, the influence in this respect of the eminent authority who has dominated, for over half a century, the English law of evidence in both hemispheres and among all branches of the English-speaking race, cannot be in the least understood. To repeat, what may fairly be taken to be the underlying principle admitting extrajudicial statements as part of the *res gestae*?

§ 2998. (*The "Principle of the Res Gestae"*); Greenleaf's View.—Subject to verification by the author's exact language so far as material, it may be provisionally taken for granted that, as already pointed out by Prof. Thayer,¹ the feature which the

§ 2996-1. § 2991.

§ 2998-1. Bedingfield's Case, 15 Amer. L. Rev. 1.

various rules relied upon by Greenleaf in illustration of his general "principle" of the *res gestae* possess in common is that of introducing as a ground for receiving the evidence an element of probative force *distinct from the general credit of the declarant*.

The administrative objection to the use of hearsay, as Greenleaf understands it, is that the tribunal is asked to repose credit in the unaided statement of one who has not been sworn and cannot be cross-examined as a witness. Wherever, therefore an extrajudicial declaration is found to be probative by reason of some additional element of evidentiary power, the mischief to be prevented by the rule excluding hearsay no longer threatens, and the rule itself need not, in his judgment, be applied. The phrase, "part of the *res gestae*," as applied to an extrajudicial statement, thus serves Greenleaf as a generic term embracing all collocations of fact which present any elements of probative force additional to the credit of the declarant. From this, to the broad assertion that an extrajudicial statement which is logically probative, under the circumstances of the case, to establish a given inference should be received, under proper administrative safeguards, in support of that inference, would have been but a step. The step, however, is one which Greenleaf never saw fit to take. On the contrary, he seeks, with somewhat inadequate success, to apply the so-called "principle of the *res gestae*," as a sort of bed of Procrustes among various rules of evidence, the main result being the utter breaking down of any definite meaning of the term *res gestae*.

Apart from the declarations of agents,² including conspirators,³ partners⁴ or of persons in possession of land⁵ which seem more properly regarded as matters of substantive law; and postponing for consideration elsewhere his treatment of entries upon shop books or books of account⁶ examined in connection with the so-called Relevancy of Regularity,⁷ Greenleaf's so-called "principle of the *res gestae*" seems naturally cognizable as stating an exception to hearsay, i. e., that relating to Pedigree⁸ as setting forth the relevancy of Contemporaneous Incorporation,⁹ and as covering the Independent Relevancy of extrajudicial statements.¹⁰

2. 1 Glf. Ev. §§ 113, 114.

3. 1 Glf. Ev. § 111.

4. 1 Glf. Ev. § 112.

5. 1 Glf. Ev. § 109.

6. 1 Glf. Ev. §§ 115-122 inc.

7. §§ 3051 *et seq.*

8. § 2999.

9. § 3000.

10. § 3001.

These are grouped under his summary¹¹ and may briefly be considered in this order.

§ 2999. (*The "Principle of the Res Gestae"; Greenleaf's View*); A Sweeping Exception to Hearsay.—Once more speaking generally, before seeking to ascertain how far our view of the common basis of Greenleaf's subordinate rules is correct, it may be further observed that what is apparently contemplated by our author is the establishment of a sweeping exception to the operation of the rule against hearsay, as the latter has been commonly understood. To repeat what has already, in part, been said: Where some element of probative power other than the simple assertion of the declarant is present the hearsay rule, according to Greenleaf, is to be refused application. With the general forensic merit of such a suggestion, it is not necessary to concern ourselves in an attempt to get at Greenleaf's view of this "principle of the *res gestae*." Among the numerous recognized "exceptions" to the hearsay rule Greenleaf finds but one which seems to him to illustrate his meaning. The exception relating to declarations concerning pedigree, treated in the present work as secondary evidence,¹ is regarded by the author² as falling within his so-called

11. "Thus, we have seen that there are four classes of declarations, which, though usually treated under the head of hearsay, are in truth *original evidence*; the first class consisting of cases where the fact that the declaration was made, and not its truth or falsity, is the point in question; the second, including expressions of bodily or mental feelings, where the existence, or nature of such feelings is the subject of inquiry; the third, consisting of cases of pedigree, and including the declarations of those nearly related to the party whose pedigree is in question; and the fourth, embracing all other cases, where the declaration offered in evidence may be regarded as part of the *res gestae*. All these classes are involved in the principle of the last; and have been separately treated, merely for the sake of greater distinctness." 1 Glf. Ev. (15th ed.) § 123.

§ 2999-1. §§ 2910 *et seq.*

2. "To this head [original evidence as distinguished from hearsay] may be referred much of the evidence sometimes termed 'hearsay,' which is admitted in cases of *pedigree*. The principal question, in these cases, is that of parentage, or descent of the individual; and in order to ascertain this fact, it is material to know how he was acknowledged and treated by those who were interested in him, or sustained towards him any relations of blood or affinity. It was long unsettled, whether any and what kind of relation must have subsisted between the person speaking and the person whose pedigree was in question; and there are reported cases in which the declarations of servants, and even of neighbors and friends, have been admitted. But it is now settled, that the law resorts to hearsay evidence in cases of pedigree,

“principle of the *res gestae*.” The inquirer is at once stimulated to ask: How does this exception, with regard to pedigree, differ from the others in any respect connected with the *res gestae*, whatever be the proper scope of that phrase? Such a distinction might, if discovered, furnish a helpful clue to the solution of our puzzle. Unfortunately, the hope is destined to be disappointed. No substantial or characteristic difference, from a juridical point of view, presents itself in case of this particular “exception” to the rule excluding hearsay, as distinguished from the other so-called ex-

upon the ground of the interest of the declarants in the person, from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is, therefore, restricted to the declarations of deceased persons who were related by blood or marriage to the person, and, therefore, interested in the succession in question. And *general repute in the family*, proved by the testimony of a surviving member of it, has been considered as falling within the rule.

The term *pedigree*, however, embraces not only descent and relationship, but also the facts of *birth, marriage, and death*, and the times when these events happened. These facts, therefore, may be proved in the manner above mentioned, in all cases where they occur incidentally, and in relation to pedigree. Thus, an entry by a deceased parent, or other relative, made in a Bible, family misal, or any other book, or in any document or paper, stating the fact and date of the birth, marriage, or death of a child, or other relative is regarded as the declaration of such parent or relative in a matter of pedigree. So, also, the correspondence of deceased members of the family, recitals in family deeds, such as marriage settlements, descriptions in wills, and other solemn acts, are original evidence in all cases, where the oral declarations of the parties are admissible. In regard to recitals of pedigree in bills and answers in Chan-

cery, a distinction has been taken between those facts which are not in dispute and those which are in controversy; the former being admitted, and the latter excluded. Recitals in deeds, other than family deeds, are also admitted, when corroborated by long and peaceable possession according to the deed.

Inscriptions on tombstones, and other funereal monuments, engravings on rings, inscriptions on family portraits, charts or pedigree, and the like, are also admissible, as original evidence of the same facts. Those which are proved to have been made by, or under the direction of a deceased relative are admitted as his declarations. But if they have been publicly exhibited and were well known to the family, the publicity of them supplies the defect of proof, in not showing that they were declarations of deceased members of the family; and they are admitted on the ground of tacit and common assent. It is presumed, that the relatives of the family would not permit an inscription without foundation to remain; and that a person would not wear a ring with an error on it. Mural and other funereal inscriptions are provable by *copies*, or other secondary evidence, as has been already shown. Their value, as evidence, depends much on the authority under which they were set up, and the distance of time between their erection and the events they commemorate. Under this head, may be mentioned

ceptions.³ It is, of course, true in case of the extrajudicial statement relating to pedigree that it rests, for its probative force, upon considerations, such as family pride, discussions among relatives and the like, which are in addition to the individual trustworthiness of the declarant.⁴ In this circumstance, addition to the credit

family conduct, such as the tacit recognition of relationship, and the disposition and devolution of property, as admissible evidence, from which the opinion and belief of the family may be inferred, resting ultimately on the same basis as evidence of family tradition. Thus, it was remarked by Mansfield, C. J., in the Berkley Peerage case, that 'if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate.' And Mr. Justice Ashhurst, in another case, remarked that the circumstance of the son's taking the name of the person with whom his mother at the time of his birth lived in a state of adultery, which name he and his descendants ever afterwards retained, 'was a very strong family recognition of his illegitimacy.' So, the declarations of a person, since deceased, that he was going to visit his relatives at such a place, have been held admissible to show that the family had relatives there.

It is frequently said, that *general reputation* is admissible, to prove the fact of the *marriage* of the parties alluded to, even in ordinary cases, where pedigree is not in question. In one case, indeed, such evidence was, after verdict, held sufficient, *prima facie*, to warrant the Jury in finding the fact of marriage, the adverse party not having cross examined the witness, nor controverted the fact by proof. But the evidence, produced in the other cases cited in support of this position, cannot be properly called hearsay evidence, but was strictly and truly original evidence of facts, from which the marriage might well be inferred; such as evidence of the parties

being received into society as man and wife, and being visited by respectable families in the neighborhood, and of their attending church and public places together as such, and otherwise demeaning themselves in public and addressing each other, as persons actually married." 1 Glf. Ev. (15th ed.) §§ 103-107, inc.

3. To distinguish this exception, for example, from that relating to dying declarations, §§ 2811 *et seq.*, seems impossible.

4. The suggestion may properly be offered that while these particular considerations involved in family affairs apply only to the pedigree exception, other lines of probative force, the solemnity of approaching death, the general discussion of matters of public and general interest, operate to lend credibility to other recognized exceptions to the hearsay rule with equal, if not greater, belief-compelling power. As may be seen in detail in the present work, relevancy, as well as necessity is an essential administrative requisite for the reception of any and all the exceptions to the hearsay rule, used as secondary evidence. In every such case, therefore, some element of probative force is present to aid the mere weight of the declarant's assertion.

On the other hand, it is to be observed that the general requirement applicable to the pedigree and other hearsay exceptions that the declarant should be shown to be dead or that the proponent has some other satisfactory administrative reason for not producing the evidence has at no time been regarded as insisted upon by judicial administration in connection with any form of the rule relating to

of the declarant, we recognize the presence of that which we have previously assumed to be the common feature among Greenleaf's illustrations of his "principle" of the *res gestae*. It will remain to consider as to how far this same feature persists in other of Greenleaf's subordinate rules and as to whether any additional unifying factor is found to be present.

§ 3000. (*The "Principle of the Res Gestae"; Greenleaf's View*); Force of Contemporaneous Incorporation.—Pursuing the inquiry as to the common feature presented by Greenleaf's illustrations of his "principle of the *res gestae*," we pass from the fairly specific exception relating to pedigree into so broad and fathomless a sea of facts that any continuous channel of thought or distinction seems in danger of being lost. As incidentally mentioned at another place, this one, at least, among Greenleaf's illustrations of the "principle of the *res gestae*" presents the appearance of laying down a general rule of admissibility. In the sonorous phrase which has puzzled generations of readers the author apparently announces that an extrajudicial statement may derive such probative force from the circumstances under which it was delivered, including contemporaneous incorporation with a fact in itself admissible,¹ as to entitle it to be received as primary evidence. "There are other declarations," he says,² "which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation.

the *res gestae*. Whatever may be said of the latter species of evidence, it is at least primary. All exceptions to the hearsay rule, including the one relating to pedigree, furnish evidence of an uncontestably secondary grade.

Undoubtedly, to enable Greenleaf to engraft a much needed sweeping exception to the rule against hearsay, no branch of evidence would furnish a more attractive combination of apparent learning and real obscurity than the rule receiving hearsay as "part of the *res gestae*." Assuming that the, in some respects beneficent, work of establishing a general exception to hearsay in accordance with modern thought has not succeeded according to the views of its distin-

guished promoter, the juridical consequences of the attempt itself are frequently noticeable. Among these, Prof. Thayer notices that "the plural phrase [*res gestae*] has certainly contributed to a mistaken impression that hearsay is always admissible if only it be evidential without requiring trust in the credit of the declarant." Thayer Cas. Ev. 630 (1892). See also *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

§ 3000-1. So far as the doctrine of contemporaneous incorporation has extended it seems in no just sense to be limited to *res gestae* facts, properly so-called.

2. 1 Glf. Ev. § 108.

The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known, in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestae*, may always be shown to the jury, along with the principal fact, and then admissibility is determined by the judge, according to the degree of their relation to that fact, and in exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are, whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." Clearly, Greenleaf is entirely justified in assuming that, as a matter of logic, many concatenations of circumstances may generate, in favor of an extrajudicial statement, a very satisfactory degree of probative force in no way dependent upon the individual credit of the declarant. Taken as part of a broader proposition, that, under proper administrative regulations of necessity, protecting the jury and the like, any extrajudicial statement should be received in support of whatever inference it may logically tend to prove, such a rule as that formulated by Greenleaf in the present connection might properly have been adopted, with advantage to judicial administration.

What common feature, however, can fairly be said to be presented by the two rules specified by Greenleaf and hitherto considered, that of a pedigree exception to the hearsay rule³ and contemporaneous incorporation with facts arising in the order of nature? It will be at once observed, upon examining the question as thus broadened in scope, that the very general nature of Greenleaf's language, the wide range of the facts included, has an immediate effect in limiting the answer. No particular relation, for example, to the issue raised in the case need be sustained by any given statement admissible under Greenleaf's section just quoted. Assuming that relevancy of some sort is required for admissibility,

the relation of the extrajudicial statement received as part of the *res gestae* may be either constituent⁴ or probative.⁵ That possibly large class of facts which the presiding judge in pursuance of his administrative power,⁶ may admit for the purpose of giving form and symmetry to a bare enumeration of the *res gestae* is not necessarily excluded under Greenleaf's definition. Assuming, however, that a distinct form of intrinsic relevancy is required, that the facts in connection with which or as part of which an extrajudicial declaration is made must be material,⁷ it is obvious that so far as relevancy is required at all, it will not be found to be dependent solely upon the credit which the tribunal seems disposed to give to the declarant. An additional element of probative force is justly regarded as having been derived from the clear *naturalness* with which the extrajudicial statement exists in the place where it is found. To discover any other common feature in so varied a range of eligible facts would, perhaps, be difficult.

§ 3001. (The "Principle of the *Res Gestae*"; Greenleaf's View); Independent Relevancy.—The basis of Greenleaf's "principle of the *res gestae*" is further defined by his inclusion, as illustrations of it, of classes of extrajudicial statements which are chiefly evidentiary by reason of their mere existence and which, in the present treatise it has seemed appropriate to denominate independently relevant,¹ i. e., probative, regardless of their truth or falsity. Under this head are grouped all juridical uses of an unsworn statement in its circumstantial aspect, no inference being suggested as to the truth of the facts asserted.² In a similar way,

4. § 1713.

5. § 1712.

6. § 2991.

7. § 2995.

§ 3001-1. § 2581.

2. "Wherever the *bodily or mental feelings* of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence. And whether they were real or feigned, is for the jury to de-

termine. Thus, in actions for criminal conversation, it being material to ascertain upon what terms the husband and wife lived together before the seduction, their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence. But, to guard against the abuse of this rule, it has been held, that, before the letters of the wife can be received, it must be proved that they were written prior to any misconduct on her part, and when there existed no ground for imputing collusion. If

Greenleaf employs as an illustration of his so-called "principle of the *res gestae*" not only unsworn statements constitutently relevant,³ where, as in the use of words alleged to be slanderous or as constituting the basis of an oral contract,⁴ the existence of the unsworn statement as forming an element in the right or liability asserted, is one of the *res gestae*, properly so-called; but also where the relevancy of the extrajudicial statement is probative. Classified, therefore, by Greenleaf as part of the *res gestae*, are extrajudicial statements which logically tend, by reason of their own existence, to prove pain or other bodily sensation or, on the other hand, to establish a particular mental state or other psychological fact.

Here, again, the sole feature which these extrajudicial statements seem to possess in common with those previously examined in connection with the elucidation of Greenleaf's "principle of the *res gestae*" is that, in estimating their probative force, little, if any, reliance is placed by judicial administration upon the credit of the declarant.

§ 3002. (The "Principle of the *Res Gestae*"; Greenleaf's View); Results of Greenleaf's Reasoning.—What then is to be regarded as the significant feature of Greenleaf's view of the *res gestae* and its so-called "principle"? Apparently nothing in relation to the term *res gestae* itself. As to that phrase, the principal immediate result of Greenleaf's work in this connection has been to expand it to a degree which deprives an otherwise useful term of all juridical significance. The gain, and it is no inconsiderable one, in point of legal theory, lies in a different direction,

written after an attempt of the defendant to accomplish the crime, the letters are inadmissible. Nor are the dates of the wife's letters to the husband received as sufficient evidence of the time when they were written, in order to rebut a charge of cruelty on his part; because of the danger of collusion. So, also, the representation, by a *sick person*, of the nature, symptoms, and effects of the *malady*, under which he is laboring at the time, are received as original evidence. If made to a medical attendant, they are of greater weight as evidence;

but, if made to any other person, they are not on that account rejected. In prosecutions for *rape*, too, where the party injured is a witness, it is material to show that she made complaint of the injury while it was yet recent. Proof of such complaint, therefore, is original evidence; but the statement of details and circumstances is excluded, it being no legal proof of their truth." 1 Glf. Ev. § 102.

3. §§ 1713, 2594.

4. § 2612.

that of the rule against hearsay. The expression *res gestae* has been made to lose all distinctive meaning by being stretched, in connection with extrajudicial statements, to the outmost bounds of relevancy. Practically all classes of extrajudicial statements where the proving power comes in main from some source independent of the declarant, should be received, in Greenleaf's view, as part of the *res gestae*. Implied in this is the significant proposition, from which much legal growth has been derived in the past and still more may be expected in the future, that an unsworn statement is admissible in support of any inference which it logically tends to establish. The sacrifice of all definiteness in the term *res gestae* would be a small price to pay for the establishment of so simple and satisfactory a rule.

§ 3003. (The "Principle of the Res Gestae"); Relation to Rule Against Hearsay.—The firm establishment and general acceptance among courts and jurists of the proposition really implied in Greenleaf's "principle of the *res gestae*" would seem to promise much benefit to the practical operation of the rule against hearsay. That an extrajudicial statement should be received under proper administrative restrictions in individual cases, as primary evidence in support of any relevant inference, not resting in main upon the credit of the declarant, to which it logically gives rise would at once deprive the hearsay rule of its anomalous character and introduce a simplifying rule of much scientific value and of great practical assistance to judicial administration. The rule against hearsay, shorn of its dangers to the interests of society, by the suppression of truth would thus be reduced to its appropriate work, that of dealing with the admissibility of extrajudicial statements resting principally or solely upon the credit of the declarant and when tendered as proof of the facts asserted in them. Unsworn statements of this nature may properly be regarded as establishing a species of secondary evidence. Under suitable administrative conditions of Necessity and of probative Relevancy, objective and subjective, little danger and much occasional advantage to the cause of justice may be expected to arise from receiving the evidence for what it may be worth.

§ 3004. The Modern View.—Recognizing the actual and the still greater potential value of Greenleaf's work in this connection,

it may be reluctantly admitted that the main body of the legal progress along lines of evidence has by no means taken up the entire advanced ground which the eminent authority of the last century, as it were, staked out for it. The mere logical relevancy of an unsworn statement, though not resting in main upon the credit of the declarant, is not in itself as yet a sufficient ground for receiving it in support of a proposition as to which it convinces the mind. This is true regardless of the forensic necessities of the proponent or the administrative situation of the case. Still, much progress has been made in accordance with Greenleaf's "principle of the *res gestae*." While mere relevancy is insufficient for the purpose, certain of the stronger less ambiguous forms of probative force are judicially so regarded. Chief among these are those which it has seemed proper to call the Relevancy of Spontaneity and the Relevancy of Regularity, the former constituting the subject of the present chapter.

§ 3005. (*The Modern View*); A Typical Instance; Insurance Company v. Mosley.— Courts had long been familiar with the probative force of an extrajudicial statement rendered spontaneous by the controlling influence of a fact in the *res gestae*, properly so-called. That they should hesitate to do justice by receiving spontaneous statements where the dominating fact is an evidentiary or probative one could scarcely be expected. The essential element of proving power was the spontaneous, unreflecting nature of the utterance. The relation which the controlling fact sustained to the proposition in issue, whether its relevancy was constituent, as being that of a *res gestae* fact, or probative as being that of an evidentiary one could not be permitted to be a determining factor in the doing of justice. As Greenleaf's classification made all spontaneous statements "part of the *res gestae*," modern courts have felt no hesitation in extending the term *res gestae* so as to cover relevant facts controlling the volition of the declarant, whatever be their relation to the issue.

A typical case of this nature, a much discussed and widely influential one, is that of Travellers' Insurance Company v. Mosley.¹ As briefly stated in the opinion of Mr. Justice Swayne of the Supreme Court of the United States, facts material to the ruling

§ 3005-1. 8 Wall. (U. S.) 397, 403,
19 L. ed. 437 (1869).

which sustained the court below in admitting the evidence are as follows: "This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois. The action was upon a policy of insurance. It insured Arthur H. Mosley, against loss of life, or personal injury by any accident within the meaning of the instrument, and was issued to Mrs. Arthur H. Mosley, the wife of the assured, for her benefit. The declaration was in assumpsit. The defendant pleaded the general issue, and the cause was tried by a jury. The plaintiff recovered. During the trial, a bill of exceptions was taken by the plaintiff in error, by which it appears that the contest between the parties was upon the question of fact, whether Arthur H. Mosley, the assured, died from the effects of an accidental fall downstairs in the night, or from natural causes. The defendant in error was called as a witness in her own behalf, and testified 'that the assured left his bed Wednesday night, the 18th of July, 1866, between 12 and 1 o'clock; that when he came back he said he had fallen down the back stairs, and almost killed himself; that he had hit the back part of his head in falling down stairs; . . . she noticed that his voice trembled; he complained of his head, and appeared to be faint and in great pain.' To the admission of all that part of the testimony which relates to the declarations of the assured, about his falling down stairs, and the injuries he received by the fall, the counsel of the defendants objected. The court overruled the objection, and the defendants excepted. William H. Mosley, son of the assured, testified, in behalf of the plaintiff, 'that he slept in the lower part of the building occupied by his father; that about 12 o'clock of the night before mentioned he saw his father lying with his head on the counter, and asked him what was the matter; he replied, that he had fallen down the back stairs and hurt himself very badly.' The defendants objected to both the question and the answer. An exception to their admission followed. The same witness testified further, 'that on the day after the fall, his father said he felt very badly, and that if he attempted to walk across the room, his head became dizzy; on the following day he said he was a little worse, if anything.' The admission of this testimony also was excepted to by the defendants." Limiting the term *res gestae* to its English meaning,² the

actual world-happenings out of which the right or liability claimed in the action comes into being, if at all, it can scarcely be successfully contended that these declarations of the deceased are "part of the *res gestae*." In this sense, the *res gestae* were entirely over at the time at which the statements were made. All that remained open to the tribunal were evidentiary or probative facts. What the plaintiff in the court below, the defendant in error, was seeking to do, was to reconstruct, by the aid of the probative facts, for the consideration of the tribunal, an essential part of the actual *res gestae* of which all direct evidence had been removed by the death of the insured. Under the hearsay rule, this could not be done. The declaration of the deceased is, however, quite as spontaneous if made under the controlling influence of a probative fact as if made under that of a *res gestae* one. No reason, therefore, is perceived why, being equally probative, it should not be equally admissible. In other words, from the standpoint of spontaneity, the ruling which admitted the evidence is defensible; from that of the "*res gestae*," it is not.

The reasoning of the court, however, in view of the authorities naturally proceeds upon different lines. After citing *Thompson and Wife v. Trevanion*,³ where Lord Chief Justice Holt "allowed that what the wife said immediately upon the hurt received, and before that she had time to devise or contrive anything for her own advantage, might be given in evidence," a ruling which is said to have been approved by Lord Ellenborough in *Aveson v. Kinnaird*,⁴ the supreme court, relying also upon *Rex v. Foster*,⁵

3. *Skinner*, 402 (1694).

4. 6 East 188, 197 (1805).

"It is in everyday's experience in actions of assault, that what a man has said of himself to his surgeon is evidence, to shew what he suffered by reason of the assault." *Aveson v. Kinnaird*, 6 East 197, 198 (1805), per Lawrence, J.

5. C. & P. 325 (1834).

This was an indictment for manslaughter, for killing the deceased by driving a cab over him. A wagoner was called as a witness for the prosecution. He stated that he saw the cab drive by at a very rapid rate,

but did not see the accident, and that immediately after on hearing the deceased groan, he went to him and asked him what was the matter. The counsel for the prisoner objected that what was said by the deceased in the absence of the prisoner could not be received in evidence. Gurney, B. said that what the deceased said at that instant, as to the cause of the accident, was clearly admissible. Park, J., added, that it was the best possible testimony that, under the circumstances, could be adduced to show what knocked the deceased down; *Rex v. Foster*, 6 C. & P. 325 (1834).

and a Massachusetts case⁶ thus continue: "Here the principal fact is the bodily injury. The *res gestae* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestae* are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below. In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason. The want of this concurrence in the law is often deeply to be regretted. The weight of this reflection, in reference to the case under consideration, is increased by the fact that what was said could not be received as 'dying declarations,' although the person who made them was dead, and hence, could not be called as a witness."⁷

A much to be regretted vagueness impairs the usefulness of a decision which is correct in itself and of an influence upon the development of this branch of law, commensurate with the high standing of the tribunal by which it was rendered. Perhaps the

6. Com. v. M'Pike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727 (1849).

The indictment in this case was for manslaughter. The defendant was charged with killing his wife. It appeared that the deceased ran upstairs from her own room, in the night, crying murder, and bleeding. Another woman, into whose room she was admitted, went at her request for a physician. A third person, who heard her cries, went for a watchman, and, on his return, proceeded to the room in which she was. He found her on the floor, bleeding profusely. She

said the defendant had stabbed her. The defendant's counsel objected to the admission of this declaration in evidence. The objection was overruled. The Supreme Court of Massachusetts held that the evidence was properly admitted. It was said that the declaration was "of the nature of *res gestae*," and that the time it was made was so recent, after the injury was inflicted, as to justify receiving it upon that ground.

7. Insurance Co. v. Mosley, 8 Wall. (U. S.) 397, 408, 19 L. ed. 437 (1869), per Mr. Justice Swayne.

most salient fact in connection with it is the utter failure of the court to distinguish between the exclamations of bodily pain, indicative of present physical conditions which are circumstantially relevant, independent of their truth or falsity,⁸ and the statement of the deceased in relation to a past fact, viz., that he had fallen down stairs, which the court below was asked to accept as proof of that all important circumstance. With regard to these declarations as to present bodily condition, the ruling of the supreme court in *Insurance Company v. Mosley* is entirely unexceptionable.⁹ This branch of the opinion did not, however, relate to the real *'crux'* of the case. It may fairly be surmised that the true dispute between the parties was not as to whether the deceased had come to his death, by means of a particular injury, but as to what was the *cause* of the latter. It gives but scant consideration to the rule against hearsay, so characteristic of the English law of evidence, to thus fail to recognize that there exists an important distinction between the statement of the deceased that he had fallen down stairs as evidence of the fact asserted by him and the exclamation of pain accompanying a bodily or mental condition. As has been said above, the *res gestae* — a very important fact in which was the accidental falling down stairs — were over. The court's general observations, as to the administrative necessity for receiving statements as to the cause of the injury and concerning its cogency or its probative nature, are none too strong.¹⁰

8. §§ 2625 *et seq.*

9. "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony when relevant to the issue." *Insurance Company v. Mosley*, 8 Wall. (U.

S.) 404, 397, 19 L. ed. 437 (1869), per Swayne, J.

10. Had it been possible for the trial court to have observed the *res gestae* themselves, including the falling down stairs; could these facts have been admitted by the parties, or even could the wife or son have testified to having observed them, no doubt would have existed that the *res gestae* were over at the time of the earliest statement to which exception was taken. The fact that, in the absence of direct perception by the court or direct testimony by witnesses, an administrative necessity arises for reproducing the actual *res gestae*, properly so-called, or certain of them, to the tribunal by the use of probative facts as, here, the declara-

§ 3006. (*The Modern View*); Considerations Determining Spontaneity.—Whether the circumstances under which a declaration was made are such as to make it reasonably probable that it was spontaneous presents a preliminary question for the determination of the trial judge.¹ The burden is upon the proponent to show the essential fact.² Should the judge be of opinion that an opportunity for deliberation and reflection has been afforded to the speaker, it will be assumed to have been utilized, the declaration being rejected.³ The question of admissibility is one of ad-

tion of the deceased, cannot rationally be regarded as extending the scope or number of the actual *res gestae*. Of necessity, an essential difference exists between the *res gestae* fact of falling down stairs, which no witness before the court directly observed, and the most probative statement of the deceased by which it is sought to convince the court, circumstantially, that, that particular *res gestae* fact of the accidental fall, really existed. While the court in *Insurance Company v. Mosley* continue to use the language of the *res gestae* rule, it is evident from the cases on which they rely, that the real ground for admitting the statement of the deceased, as to the cause of his injury, is that the evidence is necessary to the case of the proponent, and that the statement itself was *spontaneous*. In other words, the rule actually announced by the court is, that where an unsworn statement is made while the declarant is so far under the control of a physical or mental condition, created by the presence of relevant facts, whether *res gestae* or probative, as to make it reasonably probable, that it is the result of no contrivance or invention, but is the spontaneous utterance of the speaker, it will be received as primary evidence of the fact asserted. Such is the present rule prevailing in the majority of American states.

§ 3006-1. The assertions of the declaration itself cannot be used to establish the fact of spontaneity. State

v. Williams, 108 La. 222, 32 402 (1902).

2. *Arkansas*.—*Blair v. State*, 69 Ark. 558, 64 S. W. 948 (1901).

Georgia.—*Pool v. Warren County*, 123 Ga. 205, 51 S. E. 328 (1905); *O'Shields v. State*, 55 Ga. 696 (1876). See also *Everett v. State*, 62 Ga. 65 (1878).

Iowa.—*Hoover v. Carey*, 86 Iowa 494, 53 N. W. 415 (1892).

Kentucky.—*Tucker v. Hood*, 2 Bush. 85 (1867).

Nebraska.—*Pledger v. Chicago, etc.*, R. Co., 69 Neb. 456, 95 N. W. 1057 (1903).

New Mexico.—*Territory v. Armijo*, 7 N. M. 428, 37 Pac. 1113 (1894).

Texas.—*Carter v. State*, 44 Tex. Cr. App. 312, 70 S. W. 971 (1902); *Cahn v. State*, 27 Tex. App. 709, 11 S. W. 723 (1889). See also *International, etc., R. Co. v. Boykin*, 32 Tex. Civ. App. 72, 74 S. W. 93 (1903).

West Virginia.—*State v. Abbott*, 8 W. Va. 741 (1875).

Wisconsin.—*Hooker v. Chicago, etc.*, R. Co., 76 Wis. 542, 44 N. W. 1085 (1890).

3. *Delaware*.—*State v. Seymour*, *Houst. Cr. Cas.* 508 (1877).

Georgia.—*Everett v. State*, 62 Ga. 65 (1878).

Louisiana.—*State v. Gianfala*, 113 La. 463, 37 So. 30 (1904).

Maryland.—*Wright v. State*, 83 Md. 705, 41 Atl. 1060 (1898).

Mississippi.—*Lloyd v. State*, 70 Miss. 251, 11 So. 689 (1892).

ministration, each case being properly decided upon its own facts.⁴ That a very wide power of admitting hearsay testimony, and one difficult to review in an appellate court, is thus placed in the hands of the presiding judge cannot be doubted. The safety or propriety of conferring such a discretion has been earnestly controverted.⁵ In the interests of justice, however, it would seem that the proper hands into which to lodge so great a power are those of the presiding judge, subject at all times to legal reasoning as illustrated by the facts of particular cases.⁶ To reconcile a different ruling upon the question as to what utterances should be regarded as spontaneous would be an impossible task. The most which can be undertaken would be to consider what has been judicially felt to be the effect of particular considerations, upon the existence of spontaneity examining these as if they alone were operative in their result.

§ 3007. (*The Modern View; Considerations Determining Spontaneity*); Elapsed Time.—A number of considerations may properly assist in determining the ruling of the judge as to whether a given extrajudicial statement is spontaneous. Spontaneity is often a function of many variables, none of which, standing alone, may properly be accorded an unlimited influence. It may how-

Texas.—*Chalk v. State*, 35 Tex. Cr. App. 116, 32 S. W. 534 (1895).

On the other hand, it has been suggested that no greater reason exists for rejecting a hearsay statement because an opportunity for invention was furnished than for refusing to allow evidence to be given of the bodily position in which an injured person was found because he might have intentionally altered it to his supposed advantage. *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

4. *State v. Blanchard*, 108 La. 110, 32 So. 397 (1902); *Wright v. State*, 88 Md. 705, 41 Atl. 1060 (1898); *Com. v. McPike*, 3 Cush. (Mass.) 181, 50 Am. Dec. 727 (1849); *Pledger v. Chicago, etc., R. Co.*, 69 Neb. 456, 95 N. W. 1057 (1903).

The matter has been regulated

otherwise by statute, the question being reserved for the jury. *State v. Tighe*, 27 Mont. 327, 71 Pac. 3 (1903).

5. *Equitable Mut. Acc. Assoc. v. McClusky*, 1 Colo. App. 473, 29 Pac. 383 (1892); *Sullivan v. Oregon R., etc., Co.*, 12 Oreg. 392, 7 Pac. 508, 53 Am. Rep. 364 (1885). See also *Lund v. Tyngsborough*, 9 Cush. (Mass.) 36 (1851).

6. "Undoubtedly such statements should be received with great caution, and only when they are made so recently after the injury is received and under such circumstances as to place it beyond all doubt that they are not made from design or for the purpose of manufacturing evidence. Hence, from the very nature of the thing, very much must be left to the discretion of the presiding judge." *State v. Ah Loi*, 5 Nev. 99, 101 (1869), per Lewis, C. J.

ever, fairly be said that so far as any single influence can be regarded as paramount, it is that of elapsed *time*, other considerations being viewed by administration according as they tend to lengthen or to shorten the period over which an utterance is normally instinctive.¹ Other things being equal, the shorter the interval of elapsed time the greater the probability that the declaration is spontaneous.² The maximum of probative force which this particular condition of relevancy is capable of conferring upon a declaration, is apparently presented when the unsworn statement is practically contemporaneous with the fact which dominates the mind of the declarant.³ Usually, it may be added, the interval between the statement and the exciting cause of which it is deemed a natural and, to a certain extent, an inevitable form of expression, is brief.⁴ No definite rule can, however, be laid down on the subject. Shortness of elapsed time is by no means equivalent to proof of spontaneity. So long as the presiding judge feels justified in finding that the statement is a spontaneous one, it will be received, even after a more extended interval.⁵ On the other hand,

§ 3007-1. Whether particular sayings constitute a part of *res gestae* depends rather on the spontaneity of the events than on the precise time which may have elapsed between the main fact and the statements made. *Cobb v. State* (Ga. App. 1912) 74 S. E. 702.

No controlling influence is necessarily exerted by the element of time. *Jones v. State*, 71 Ind. 66 (1880); *State v. Molisse*, 38 La. Ann. 381, 58 Am. Rep. 181 (1886).

2. *State v. Molisse*, 38 La. Ann. 381, 58 Am. Rep. 181 (1886); *Houston, etc., R. Co. v. Weaver*, (Tex. Civ. App. 1897) 41 S. W. 846; *Boothe v. State*, 4 Tex. App. 202 (1878).

3. *State v. Molisse*, 38 La. Ann. 381, 58 Am. Rep. 181 (1886); *Sullivan v. State*, (Miss. 1902) 32 So. 2; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396 (1867); *Houston, etc., R. Co. v. Weaver*, (Tex. Civ. App. 1897) 41 S. W. 846; *Boothe v. State*, 4 Tex. App. 202 (1878).

4. *Schattler v. Daily Herald Co.*, 162 Mich. 115, 127 N. W. 42, 17 Detroit

Leg. N. 481 (1910) (immediately); *Knittel v. United Rys. Co. of St. Louis*, 147 Mo. App. 677, 128 S. W. 5 (1910) (almost instantly).

5. *District of Columbia*.—*Patterson v. Ocean Accident & Guarantee Corp.*, 25 App. D. C. 46 (1905).

Iowa.—*Du Bois v. Luthmer*, 147 Iowa 315, 126 N. W. 147 (1910) (ten minutes); *Christopherson v. Chicago, M. & St. P. R. Co.*, 135 Iowa 409, 109 N. W. 1077 (1906).

South Carolina.—*Shelton v. Southern Ry. Co.*, 86 S. C. 98, 67 S. E. 899 (1910).

Texas.—*Missouri, K. & T. Ry. Co. v. Brown*, (Civ. App. 1911) 135 S. W. 1076.

Washington.—*Britton v. Washington Water Power Co.*, 59 Wash. 440, 110 Pac. 20, 33 L. R. A. (N. S.) 109n. (1910); *Walters v. Spokane International Ry. Co.*, 58 Wash. 293, 108 Pac. 593 (1910); *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 83 Pac. 113, 4 L. R. A. (N. S.) 636n. (1905).

Wyoming.—*Johnson v. State*, 8 Wyo. 494, 58 Pac. 761 (1899).

declarations, though made shortly after an adequate cause, will be excluded if, in the opinion of the court, the statement is the result of deliberation.⁶ The mere circumstance, in other words, that but a short interval of time has elapsed furnishes no ground for admitting the extrajudicial statement. If it has ceased to be spontaneous, it falls back into the general class of narratives. Thus, the declaration of a locomotive engineer as to the rate of speed at the time of an accident "is not to be deemed part of the *res gestae*, simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it."⁷ *A fortiori*, a declaration made after a considerable interval from the occurrence of the fact said to be controlling will be assumed not to be spontaneous.⁸

In any case, adequate knowledge on the part of the declarant must be shown.⁹

"It [the second statement] was later in time by several minutes, but we do not think this is decisive, since the controlling element of admissibility is not the interval of time, but the real and illustrative connection with the thing done, in which the interval of time is a factor. . . . That which is recognized by such common experience as the instinctive outcome of an act is, for this reason, deemed to be part of it, whether the time of the expression be five or fifteen minutes after." *State v. Murphy*, 16 R. I. 528, 532, 533, 17 Atl. 998 (1889), per Stiness, J.

6. *Hightower v. State*, 9 Ga. App. 236, 70 S. E. 1022 (1911); *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027 (1906); *Moorhead v. Eckert*, 114 N. Y. Suppl. 31, 61 Misc. Rep. 612 (1909).

7. *Vicksburg, etc., R. Co. v. O'Brien*, 119 U. S. 99, 106, 7 Sup. Ct. 118, 30 L. ed. 299 (1886), per Mr. Justice Harlan.

8. These declarations were not made on the spot and spontaneously; they were not strictly or even substantially contemporaneous. . . . One very good

reason for excluding such narratives is that the party has had time to deliberate and shape them in his own interest, and may be under strong temptation to do so. . . . The longer the time allowed for deliberation, the greater would be the danger that the utterances would be unreliable. But after such lapse of time as appeared in this case, the declarations cannot with any propriety be considered part of the *res gestae*." *Merkle v. Bennington*, 58 Mich. 156, 161, 162, 24 N. W. 776, 55 Am. Rep. 666 (1885), per Cooley, C. J.

9. *New Hampshire*.—*Davis v. Boston & M. R. R.*, 75 N. H. 467, 76 Atl. 170 (1910).

South Carolina.—*Shelton v. Southern Ry. Co.*, 86 S. C. 98, 67 S. E. 899 (1910).

Texas.—*Parks v. Knox*, (Civ. App. 1910) 130 S. W. 203.

Utah.—*Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 37 Utah 475, 109 Pac. 10, 24 Am. & Eng. Ann. Cas. 307 (1910).

Washington.—*Walters v. Spokane International Ry. Co.*, 58 Wash. 293, 108 Pac. 593 (1910).

§ 3008. (*The Modern View; Considerations Determining Spontaneity; Elapsed Time*); Indefinite Periods.—As presented in the evidence for the determination of the presiding judge, the interval of elapsed time which is to assist in his decision as to whether a particular statement is spontaneous, may be an indeterminate one. The administrative difficulty here presented is this: spontaneity must be affirmatively shown by the proponent and even a very short interval of time is not conclusive in favor of its existence. Even where the utterance is shown to have been made “immediately” after the occurrence of the fact which is said to dominate it, the declaration may nevertheless be rejected.¹ Different circumstances being presented, the “immediate” utterance of an assertion has been deemed to justify its reception in evidence.² The same explanation, the modifying presence of facts

§ 3008-1. *Arkansas*.—Crowley v. State, 147 S. W. 47 (1912).

California.—People v. Ah. Lee, 60 Cal. 85 (1882).

Georgia.—Western, etc., R. Co. v. Beason, 112 Ga. 553, 37 S. E. 863 (1901).

Illinois.—Hellmuth v. Katschke, 35 Ill. App. 21 (1889).

Indiana.—Indianapolis St. R. Co. v. Whitaker, 160 Ind. 125, 66 N. E. 433 (1903).

Iowa.—State v. Deuble, 74 Iowa 509, 38 N. W. 383 (1888).

Kansas.—Atchison, etc., R. Co. v. Logan, 65 Kan. 748, 70 Pac. 878 (1902).

Kentucky.—Early v. Louisville, etc., R. Co., 115 Ky. 13, 72 S. W. 348, 24 Ky. L. Rep. 1807 (1903).

Massachusetts.—Tyler v. Old Colony R. Co., 157 Mass. 336, 32 N. E. 227 (1892); Williamson v. Cambridge R. Co., 144 Mass. 148, 10 N. E. 790 (1887); Lane v. Bryant, 9 Gray 245, 247, 69 Am. Dec. 282 (1857).

Michigan.—Detroit, etc., R. Co. v. Van Steinberg, 17 Mich. 99 (1868).

Missouri.—Koenig v. Union Depot R. Co., 173 Mo. 698, 73 S. W. 637 (1903).

Nevada.—State v. Dougherty, 17 Nev. 376, 30 Pac. 1074 (1883).

Ohio.—Cleveland, etc., R. Co. v. Mara, 26 Ohio St. 185 (1875); Forrest v. State, 21 Ohio St. 641 (1871).

Oregon.—Sullivan v. Oregon R., etc., Co., 12 Oreg. 392, 7 Pac. 508, 53 Am. Rep. 364 (1885).

South Carolina.—Gosa v. Southern R. Co., 67 S. C. 347, 45 S. E. 810 (1903).

South Dakota.—Tenney v. Rapid City, 17 S. D. 283, 96 N. W. 96 (1903).

Texas.—Hickman v. State, (Cr. App. 1912) 145 S. W. 914 (shortly after).

Virginia.—Norfolk, etc., R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718 (1891).

“It is no more competent because made immediately after the accident than if made a week or a month afterwards.” Lane v. Bryant, 9 Gray (Mass.) 245, 247, 69 Am. Dec. 282 (1857), per Bigelow, J.

2. *Alabama*.—Stevens v. State, 138 Ala. 71, 35 So. 122 (1902).

Arkansas.—Little Rock, etc., R. Co. v. Leverett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230 (1886).

Colorado.—Union Casualty, etc., Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677 (1903); Trumbull v. Donahue, 18 Colo. App. 460, 72 Pac. 684

in connection with the existence of spontaneity other than the length of time elapsed, accounts for a difference of ruling where substantially similar expressions indicating short but indeterminate intervals of time appear in the evidence. Thus, extrajudicial

(1903); *Lord v. Pueblo Smelting, etc., Co.*, 12 Colo. 390, 21 Pac. 148 (1888).

District of Columbia.—*McUin v. U. S.*, 17 App. Cas. 323 (1900).

Georgia.—*Fuller v. State*, 127 Ga. 47, 55 S. E. 1047 (1906); *Knight v. State*, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17 (1901); *Gaines v. State*, 108 Ga. 772, 33 S. E. 632 (1899); *Von Pollnitz v. State*, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72 (1893); *Flanegan v. State*, 64 Ga. 52 (1879).

Indiana.—*Louisville, etc., R. Co. v. Buck*, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520 (1888).

Iowa.—*Sutcliffe v. Iowa State Traveling Men's Assoc.*, 119 Iowa 220, 93 N. W. 90, 97 Am. St. Rep. 298 (1903); *State v. Driscoll*, 72 Iowa 583, 34 N. W. 428 (1887); *Funston v. Chicago, etc., R. Co.*, 61 Iowa 452, 16 N. W. 518 (1883).

Kentucky.—*Hughes v. Com.*, 41 S. W. 294, 19 Ky. L. Rep. 497 (1897); *Norfleet v. Com.*, 33 S. W. 938, 17 Ky. L. Rep. 1137 (1896).

Louisiana.—*State v. Maxey*, 107 La. 799, 32 So. 206 (1902); *State v. Euzebe*, 42 La. Ann. 727, 7 So. 784 (1890).

Massachusetts.—*Com. v. Hackett*, 2 Allen 136 (1861); *Com. v. McPike*, 3 Cush. 181, 50 Am. Dec. 727 (1849).

Michigan.—*Herrick v. Wixom*, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333 (1899); *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221 (1882); *Cleveland v. Newsom*, 45 Mich. 62, 7 N. W. 222 (1880). See also *Ensley v. Detroit United R. Co.*, 134 Mich. 195, 96 N. W. 34 (1903); *Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622 (1902).

Minnesota.—*State v. Horan*, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583 (1884); *O'Connor v. Chicago, etc., R. Co.*, 27 Minn. 166, 6 N. W. 481, 38 Am. Rep. 288 (1880).

Missouri.—*State v. Walker*, 78 Mo. 380 (1883); *Entwhistle v. Feighner*, 60 Mo. 214 (1875); *Brownell v. Pacific R. Co.*, 47 Mo. 239 (1871). See also *Shaefer v. Missouri Pacific R. Co.*, 98 Mo. App. 445, 72 S. W. 154 (1902).

New York.—*Scheir v. Quirin*, 177 N. Y. 568, 69 N. E. 1130 (1904), *affirming* 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956 (1902); *Casey v. New York Cent., etc., R. Co.*, 78 N. Y. 518 (1879), *affirming* 8 Daly 220; *Spatz v. Lyons*, 55 Barb. 476 (1870); *Curry's Case*, 4 City Hall Rec. 109 (1819).

North Carolina.—*Seawell v. Carolina Cent. R. Co.*, 132 N. C. 856, 44 S. E. 610, 133 N. C. 515, 45 S. E. 850 (1903).

Pennsylvania.—*Coll v. Eastern Transit Co.*, 180 Pa. St. 618, 37 Atl. 89 (1897); *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. Rep. 701 (1889); *Stein v. R. Co.*, 7 Leg. Gaz. 223, 10 Phila. 440 (1875).

Rhode Island.—*State v. Harris*, 69 Atl. 506 (1908); *State v. Epstein*, 25 R. I. 131, 55 Atl. 204 (1903); *State v. Murphy*, 16 R. I. 528, 17 Atl. 998 (1889).

South Carolina.—*State v. Talbert*, 41 S. C. 526, 19 S. E. 852 (1894). See also *Gosa v. Southern R. Co.*, 67 S. C. 347, 45 S. E. 810 (1903); *Oliver v. Columbia, etc., R. Co.*, 65 S. C. 1, 43 S. E. 307 (1902).

Texas.—*Bice v. State*, 51 Tex. Cr. App. 133, 100 S. W. 949 (1907); *Texas, etc., R. Co. v. Hall*, 83 Tex. 675,

statements said to have been made within "a short time" of³ or within "a few minutes after" the happening of a controlling event have been both accepted⁴ and rejected⁵ by sound judicial administrators. For similar reasons, rulings made where, in respect to the fact said to be controlling, the unsworn statement is made "just after,"⁶ "almost immediately after,"⁷ "a very few

19 S. W. 121 (1892); *Ex p. Albitz*, 29 Tex. App. 128, 15 S. W. 173 (1890); *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519 (1884).

Utah.—*People v. Callaghan*, 4 Utah 49, 6 Pac. 49 (1885).

Vermont.—*Hawkes v. Chester*, 70 Vt. 271, 40 Atl. 727 (1898).

Washington.—*Lambert v. La Connor Trading, etc., Co.*, 30 Wash. 346, 70 Pac. 960 (1902).

Wisconsin.—*Hupfer v. National Distilling Co.*, 119 Wis. 417, 96 N. W. 809 (1903).

United States.—*Kansas City Southern R. Co. v. Moles*, 121 Fed. 351, 58 C. C. A. 29 (1903).

England.—*Rex v. Foster*, 6 C. & P. 325, 25 E. C. L. 455 (1834).

3. *State v. Smith*, 26 Wash. 354, 67 Pac. 70 (1901). See also *Gotwald v. St. Louis Transit Co.*, 102 Mo. App. 492 (1903).

4. *California*.—*Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700, 74 Pac. 307 (1903).

Georgia.—*Ferguson v. Columbus, etc., R. Co.*, 75 Ga. 637 (1885).

Idaho.—*State v. Wilmbusse*, 8 Idaho 608, 70 Pac. 849 (1902).

Kentucky.—*Galloway v. Com.*, 5 Ky. L. Rep. 213 (1883). See also *Fitzgerald v. Com.*, 6 S. W. 152, 9 Ky. Law. Rep. 664 (1887).

Louisiana.—*State v. Sadler*, 51 La. Ann. 1397, 26 So. 390 (1899).

Minnesota.—*State v. Williams*, 96 Minn. 351, 105 N. W. 265 (1905).

Nebraska.—*Missouri Pac. R. Co. v. Baier*, 37 Nebr. 235, 55 N. W. 913 (1893). Writ of error dismissed, 154 U. S. 510, 14 Sup. Ct. 1149, 38 L. ed. 1083.

New York.—*People v. Leonardo*, 199 N. Y. 432, 92 N. E. 1060 (1910).

North Carolina.—*State v. Whitt*, 113 N. C. 716, 18 S. E. 715 (1893). See also *Sewell v. Carolina Cent. R. Co.*, 132 N. C. 856, 44 S. E. 610, 133 N. C. 515, 45 S. E. 850 (1903).

Texas.—*Humphrey v. State*, 55 Tex. Cr. App. 329, 116 S. W. 570 (1909); *Griffin v. State*, 40 Tex. Cr. App. 312, 50 S. W. 366, 76 Am. St. Rep. 718 (1899); *Ingram v. State*, (Cr. App. 1897) 43 S. W. 518; *Morris v. State*, 35 Tex. Cr. App. 313, 33 S. W. 539 (1895); *Lindsey v. State*, 35 Tex. Cr. App. 164, 32 S. W. 768 (1895); *King v. State*, 34 Tex. Cr. App. 228, 29 S. W. 1086 (1895).

Virginia.—*Little v. Com.*, 25 Gratt. 921 (1874).

Wisconsin.—*Christianson v. Pioneer Furniture Co.*, 92 Wis. 649, 66 N. W. 699 (1896).

5. *Alabama*.—*Alabama, etc., R. Co., v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403 (1882).

California.—*People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115 (1892); *disapproving People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49 (1868).

Illinois.—*Ohio, etc., R. Co. v. Culison*, 40 Ill. App. 67 (1891); *Chicago West Div. R. Co. v. Becker*, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144 (1889), *reversing* 30 Ill. App. 200.

Indiana.—*Jones v. State*, 71 Ind. 66 (1880).

New Jersey.—*Estell v. State*, 51 N. J. L. 182, 17 Atl. 118 (1889).

Oklahoma.—*Smith v. Territory*, 11 Okla. 669, 69 Pac. 805 (1902).

6. *Indianapolis St. R. Co. v. Whitaker*, 160 Ind. 125, 66 N. E. 433

minutes after,"⁸ "several minutes after"⁹ or the like¹⁰ must be regarded rather as suggestions made by those charged with the duty of judicial administration than as precedents controlling as a matter of law. A statement made by a woman just before she was shot has been received¹¹ as has likewise the statement of a man who had been stabbed, made while he was struggling with his antagonist.¹² From the administrative viewpoint, the decisions are reasonably consistent and harmonious.

§ 3009. (*The Modern View; Considerations Determining Spontaneity; Elapsed Time*); Definite Periods.—The witnesses upon whose testimony the judge is to determine spontaneity so far as affected by lapse of time may, on the other hand, be able to state definite periods. This greater definiteness does not necessarily imply an increased determinative effect for the element of time, a comparatively long interval being regarded as by no means fatal to admissibility under certain circumstances while, under others, one much shorter might operate to exclude the testimony. In proportion, however, as the interval of elapsed time grows shorter, the comparative number of receptions to rejections of the evidence as spontaneous is found to increase. Thus, after an interval of two minutes¹ or less² a large proportion of statements

(1903); Louisville, etc., R. Co. v. Earls' Adm'x, 94 Ky. 368, 22 S. W. 607, 15 Ky. L. Rep. 184 (1893); Seawell v. Carolina Cent. R. Co., 132 N. C. 856, 44 S. E. 610, 133 N. C. 515, 45 S. E. 850 (1903).

7. Pierce v. Van Dusen, 78 Fed. 693, 24 C. C. A. 280, 19 Sup. Ct. 879, 43 L. ed. 1184 (1897).

8. State v. Ah Loi, 5 Nev. 99 (1869).

9. Williams v. State, 130 Ala. 107, 30 So. 484 (1901).

10. State v. Smith, 26 Wash. 354, 67 Pac. 70 (1901) (within a short time after). See also Gotwald v. St. Louis Transit Co., 102 Mo. App. 492 (1903).

11. Trulock v. State, 70 Ark. 558, 69 S. W. 677 (1902).

12. People v. Gilmore, 17 Cal. App. 737, 121 Pac. 697 (1912).

§ 3009-1. Alabama.—Nelson v.

State, 130 Ala. 83, 30 So. 728 (1901).

Florida.—Williams v. State, 58 Fla. 138, 50 So. 749 (1909).

Georgia.—Cason v. State, 134 Ga. 786, 68 S. E. 554 (1910); Thomas v. State, 27 Ga. 287 (1859).

Iowa.—Fish v. Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995 (1896).

New Hampshire.—Murray v. Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

Pennsylvania.—Coll v. Easton Transit Co., 180 Pa. St. 618, 37 Atl. 89 (1897).

Texas.—Drake v. State, 29 Tex. App. 265, 15 S. W. 725 (1890).

See, also, Bumgardner v. Southern R. Co., 132 N. C. 438, 43 S. E. 948 (1903); State v. Carlton, 48 Vt. 636 (1876).

2. Georgia.—Mitchum v. State, 11 Ga. 615 (1852).

offered as spontaneous are received as being so, although, under appropriate circumstances, very short intervals have not served to confer spontaneity.³ Stated periods, though covering several minutes, have not been deemed inconsistent with admissibility,⁴ and even where the minutes have lengthened into hours,⁵ or, under exceptional circumstances,⁶ such as loss of consciousness,⁷ into still

Indiana.—Keyes v. State, 122 Ind. 527, 23 N. E. 1097 (1889).

Kentucky.—Brown v. Louisville R. Co., 53 S. W. 1041, 21 Ky. L. Rep. 995 (1899); McLeod v. Ginther's Adm'r, 80 Ky. 399, 4 Ky. L. Rep. 276 (1882).

Missouri.—State v. Hudspeth, 150 Mo. 12, 51 S. W. 483 (1899).

Oklahoma.—Price v. State, 1 Okl. Cr. App. 358, 98 Pac. 447 (1908).

Texas.—Johnson v. State, (Cr. App. 1912) 149 S. W. 165; Missouri, etc., R. Co. v. Schilling, 32 Tex. Civ. App. 417, 75 S. W. 64 (1903); Foster v. State, 8 Tex. App. 248 (1880).

3. King v. State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681 (1888) (a little more than a minute).

4. *Alabama*.—Richmond, etc., R. Co. v. Hammond, 93 Ala. 181, 9 So. 577 (1890) (five).

Arizona.—Territory v. Davis, 2 Ariz. 59, 10 Pac. 359 (1886) (three).

District of Columbia.—Washington, etc., R. Co. v. McLane, 11 App. Cas. 220 (1897) (ten).

Georgia.—Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. Rep. 838 (1884) (thirty); Mitchell v. State, 71 Ga. 128 (1863) (five); O'Shields v. State, 55 Ga. 696 (1876) (five).

Kansas.—State v. Morrison, 64 Kan. 669, 68 Pac. 48 (1902) (three to five).

Louisiana.—State v. Molisse, 38 La. Ann. 381, 58 Am. Rep. 181 (1886) (ten).

Michigan.—Lambert v. People, 29 Mich. 71 (1874) (three).

Rhode Island.—State v. Murphy, 16 R. I. 528, 17 Atl. 998 (1889) (ten).

South Carolina.—State v. Arnold,

47 S. C. 9, 24 S. E. 926, 58 Am. St. Rep. 867 (1896) (ten).

Texas.—Brown v. State, 56 Tex. Cr. App. 389, 120 S. W. 444 (1909) (six or seven); San Antonio, etc., R. Co. v. Gray, 95 Tex. 424, 67 S. W. 763 (1902) (six); De Walt v. Houston, East Texas R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534 (1900) (five); McKinney v. State, 40 Tex. Cr. App. 372, 50 S. W. 708 (1899) (five); Benson v. State, 38 Tex. Cr. App. 487, 43 S. W. 527 (1897) (twenty).

Utah.—Sullivan v. Salt Lake City, 13 Utah 122, 44 Pac. 1039 (1896) (three).

In Hart v. Powell, 18 Ga. 635 (1855) it was left to the jury to determine whether a statement made after an interval of "less than thirty minutes" was spontaneous.

5. State v. Alton, 105 Minn. 410, 117 N. W. 617, 15 Am. & Eng. Ann. Cas. 806 (1908) (about half an hour); Carver v. State (Tex. Cr. App. 1912), 148 S. W. 746 (within half an hour); Freeman v. State, 40 Tex. Cr. App. 545, 46 S. W. 641, 51 S. W. 230 (1899) (an hour); Walters v. Spokane International Ry. Co., 58 Wash. 293, 108 Pac. 593 (1910) (nearly two hours); Johnson v. State, 8 Wyo. 494, 58 Pac. 761 (1899) (an hour).

6. Lewis v. State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720 (1890).

7. Ft. Worth, etc., R. Co. v. Partin, 33 Tex. Civ. App. 173, 76 S. W. 236 (1903); Lewis v. State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720 (1890); Britton v. Washington Water Power Co., 59 Wash. 440, 110

longer periods. The comparative worthlessness as precedents of such rulings in matter of fact is shown by the circumstance that, in the event of countervailing considerations, fairly short lapses of time have been regarded as inconsistent with spontaneity,⁸ while

Pac. 20, 33 L. R. A. (N. S.) 109 n. (1910) (eight days).

Statements to Physicians.—A marked extension of time has been permitted in case of statements to physicians when such declarations are offered in their assertive capacity. *Com. v. Werntz*, 161 Pa. St. 591, 29 Atl. 272 (1894); *Chapman v. State*, 43 Tex. Cr. App. 328, 65 S. W. 1098, 96 Am. St. Rep. 874 (1901) (an hour and a half). Probably, however, the relevancy of such assertions rests, in large part, upon other grounds. As a matter of administration, a presiding judge may exclude from such a statement to the doctor circumstances, such as the name of the assailant or the nature of the weapon employed, likely to prejudice the defendant or to mislead the jury. *Denton v. State*, 1 Swan (Tenn.) 279 (1851). See also *People v. O'Brien*, 92 Mich. 17, 52 N. W. 84 (1892).

8. *Alabama*.—*Pitts v. State*, 140 Ala. 70, 37 So. 101 (1904) (fifteen minutes); *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176 (1893) (five minutes); *Richmond, etc., R. Co. v. Hammond*, 93 Ala. 181, 9 So. 577 (1890) (five minutes).

Arkansas.—*Williams v. State*, 66 Ark. 264, 50 S. W. 517 (1899) (fifteen minutes); *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106 (1893) (thirty minutes).

Connecticut.—*McCarrick v. Kealy*, 70 Conn. 642, 40 Atl. 603 (1898) (five minutes).

Delaware.—*State v. Trusty*, 1 Penn. 319, 40 Atl. 766 (1898) (five minutes); *State v. Frazier, Houst. Cr. Cas.* 176 (1865) (thirty minutes).

Georgia.—*Warrick v. State*, 125 Ga. 133, 53 S. E. 1027 (1906) (five minutes); *Sullivan v. State*, 101 Ga.

800, 29 S. E. 16 (1897) (five minutes); *Roach v. Western, etc., R. Co.*, 93 Ga. 785, 21 S. E. 67 (1894) (twenty minutes); *Savannah, etc., R. Co. v. Holland*, 82 Ga. 257, 10 S. E. 200, 14 Am. St. Rep. 158 (1888) (thirty minutes); *Hall v. State*, 48 Ga. 607 (1873) (ten minutes).

Illinois.—*Chicago, etc., R. Co. v. Fietsam*, 19 Ill. App. 55 (1886) (thirty minutes).

Indiana.—*Cleveland, etc., R. Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174 (1894) (ten minutes); *Pittsburg, etc., R. Co. v. Wright*, 80 Ind. 182 (1881) (thirty minutes); *Jones v. State*, 71 Ind. 66 (1880) (five minutes).

Iowa.—*Armil v. Chicago, etc., R. Co.*, 70 Iowa 130, 30 N. W. 42 (1886) (thirty minutes).

Kansas.—*Tennis v. Rapid Transit R. Co.*, 45 Kan. 503, 25 Pac. 876 (1891) (five minutes); *State v. Pomeroy*, 25 Kan. 349 (1881) (five minutes).

Kentucky.—*O'Donnell's Adm'r v. Louisville Electric Light Co.*, 55 S. W. 202, 21 Ky. L. Rep. 1362 (1900) (thirty minutes).

Louisiana.—*State v. Estoup*, 39 La. Ann. 219, 1 So. 448 (1887) (ten minutes); *State v. Melton*, 37 La. Ann. 77 (1885) (eight minutes).

Maine.—*Barnes v. Rumford*, 96 Me. 315, 52 Atl. 844 (1902) (four minutes).

Massachusetts.—*Eastman v. Boston, etc., R. Co.*, 165 Mass. 342, 43 N. E. 115 (1896) (five minutes).

Mississippi.—*Brown v. State*, 78 Miss. 637, 29 So. 519, 84 Am. St. Rep. 641 (1901) (thirty minutes); *Mayes v. State*, 64 Miss. 329, 1 So. 733, 60 Am. Rep. 58 (1886) (five minutes).

New Jersey.—*Estell v. State*, 51 N.

periods of increased length, such as, for instance, of an hour⁹ or more,¹⁰ show a marked tendency to evoke a finding that the essential element of mental automatism no longer exists. The administrative situation of the parties, the so-called "state of the case," especially the forensic necessities under which the proponent rests in the exercise of his right to prove his case, must naturally be held in view in judging of the propriety of particular rulings, and may even, with entire propriety, exercise an influence over the decision far greater than that exerted by the mere lapse of time.

J. L. 182, 17 Atl. 118 (1889) (fifteen minutes).

North Carolina.—State v. Whitt, 113 N. C. 716, 18 S. E. 715 (1893) (ten minutes).

Pennsylvania.—Keefer v. Pacific Mut. L. Ins. Co., 201 Pa. St. 448, 51 Atl. 366, 88 Am. St. Rep. 822 (1902) (thirty minutes). See, also, Briggs v. East Broad Top R., etc., Co., 206 Pa. St. 564, 56 Atl. 36 (1903).

Tennessee.—Denton v. State, 1 Swan 279 (1851) (thirty minutes).

Texas.—Carter v. State, 44 Tex. Cr. App. 312, 70 S. W. 971 (1902) (five minutes); McNeal v. State, (Cr. App. 1897) 43 S. W. 792 (thirty minutes); Crow v. State, (Cr. App. 1893) 21 S. W. 543 (thirty minutes); Lynch v. State, 24 Tex. App. 350, 6 S. W. 190, 5 Am. St. Rep. 888 (1887) (twenty minutes).

Virginia.—Norfolk, etc., R. Co. v. Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737 (1896) (thirty minutes).

See, also, Clack v. Southern Electrical Supply Co., 72 Mo. App. 506 (1897); Lyman v. Southern R. Co., 132 N. C. 721, 44 S. E. 550 (1903); Missouri, etc., R. Co. v. Tarwater, 33 Tex. Civ. App. 116, 75 S. W. 937 (1903); Dewalt v. Houston, etc., R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534 (1900); Jones v. Com., 86 Va. 740, 10 S. E. 1004 (1890).

9. *Alabama*.—Stewart v. State, 78 Ala. 436 (1885).

Connecticut.—Leonard v. Mallory, 75 Conn. 433, 53 Atl. 778 (1903).

Iowa.—Armil v. Chicago, etc., R. Co., 70 Iowa 130, 30 N. W. 42 (1886).

Kansas.—State v. Petty, 21 Kan. 54 (1878).

Louisiana.—State v. Johnson, 35 La. Ann. 968 (1883).

Virginia.—Norfolk, etc., R. Co. v. Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737 (1896).

Wisconsin.—Steinhofel v. Chicago, etc., R. Co., 92 Wis. 123, 65 N. W. 852 (1896).

United States.—Travelers' Protective Assoc. of America v. West, 102 Fed. 226, 42 C. C. A. 284 (1900).

Three quarters of an hour has been regarded as inconsistent with spontaneity. People v. Dewey, 2 Idaho (Hasb.) 83, 6 Pac. 103 (1885); Candle v. State, 34 Tex. Cr. App. 26, 28 S. W. 810 (1894); People v. Kessler, 13 Utah 69, 44 Pac. 97 (1896); Gowen v. Bush, 76 Fed. 349, 22 C. C. A. 196 (1896).

10. *Florida*.—Johnson v. State, 58 So. 540 (1912) (four or five hours).

Kentucky.—Rutherford v. Com., 13 Bush. 608 (1878) (two hours).

New York.—People v. Hawkins, 109 N. Y. 408, 17 N. E. 371 (1888) (six weeks).

South Carolina.—State v. Taylor, 56 S. C. 360, 34 S. E. 939 (1900) (two hours).

Texas.—Reddick v. State, (Cr. App. 1898) 47 S. W. 993 (two hours); Ray v. State, (Cr. App. 1896) 36 S. W. 446 (three hours). See also, McCowen v. Gulf, etc., R.

§ 3010. (*The Modern View; Considerations Determining Spontaneity*); Form of Statement.—A form of statement presented in the evidence may assist judicial administration in determining whether a given utterance is spontaneous. Strong emotion is brief, incisive, often disjointed in expression. It gravitates, apparently by some rudimentary impulse, to the pulsating, the rythmical. Overflowing emotion shows a peculiar torrential quality, in itself readily distinguished from the calm, orderly word-choosing process of deliberate, purposeful discourse. An extended, involved and closely connected form of statement naturally tends, therefore, to repel the inference of spontaneity.¹ Should the utterance actually be automatic or instinctive, the circumstance that it is made in a narrative form is by no means conclusive against its admissibility.² Should a reasonable suspicion exist on the part of the judges that the statement is, as a matter of fact, a narrative, i. e., a deliberate account of past events, the administrative practice is to exclude it.³ If subject to suspicion at all, the declaration is not admissible, although in the particular case the suspicion may be erroneous.⁴

The form of an extrajudicial statement may in other ways have a legitimate bearing upon the question of spontaneity, as where made in response to questions,⁵ is uttered in a whisper⁶ or is con-

Co., (Tex. Civ. App. 1903) 73 S. W. 46.

United States.—National Masonic Acc. Assoc. v. Shryock, 73 Fed. 774, 20 C. C. A. 3 (1896) (two hours). See, also, Atchison, etc., R. Co. v. Phipps, 125 Fed. 478, 60 C. C. A. 314 (1903).

But see, Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111 (1902).

§ 3010-1. Indianapolis St. R. Co. v. Whitaker, 160 Ind. 125, 66 N. E. 433 (1903); Bionto v. Illinois Cent. R. Co., 125 La. 147, 51 So. 98, 27 L. R. A. (N. S.) 1030 (1910); State v. Hendricks, 172 Mo. 654, 73 S. W. 194 (1902). See also Potter v. Cave, 123 Iowa 98, 98 N. W. 569 (1904); Atchison, etc., R. Co. v. Logan, 65 Kan. 748, 70 Pac. 878 (1902); Pledger v. Chicago, etc., R. Co., 69 Neb. 456, 95 N. W. 1057 (1903).

2. Lovett v. Georgia, 30 Ga. 255, 4 S. E. 912 (1887); Murray v. Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903); Edwards v. Edwards, 39 Pa. St. 369 (1861).

3. People v. Dice, 120 Cal. 189, 52 Pac. 477 (1898); Thornton v. State, 107 Ga. 683, 33 S. E. 673 (1899); Savannah, etc., R. Co. v. Holland, 82 Ga. 257, 268, 10 S. E. 200, 14 Am. St. Rep. 158 (1888); Hoover v. Cary, 86 Iowa 494, 53 N. W. 415 (1892); Bradberry v. State, 22 Tex. App. 273, 2 S. W. 592 (1886).

4. Savannah, etc., R. Co. v. Holland, 82 Ga. 257, 268, 10 S. E. 200, 14 Am. St. Rep. 158 (1888).

5. Alabama.—Louisville, etc., R. Co. v. Pearson, 97 Ala. 211, 12 So. 176 (1893); Richmond, etc., R. Co. v. Hammond, 93 Ala. 181, 9 So. 577 (1890).

tained in a letter.⁷ A written statement is not *per se* inadmissible,⁸ although it would seem that deliberation must usually accompany the making of a statement in such form.

Arkansas.—*Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106 (1893).

California.—*Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700, 74 Pac. 307 (1903).

Illinois.—*Elguth v. Grueszka*, 57 Ill. App. 193 (1894); *Chicago West. Div. R. Co. v. Becker*, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144 (1889).

Iowa.—*State v. Deuble*, 74 Iowa 509, 38 N. W. 383 (1888).

Kansas.—*Atchison, etc., R. Co. v. Logan*, 65 Kan. 748, 70 Pac. 878 (1902).

Massachusetts.—*Leistriz v. American Zylonite Co.*, 154 Mass. 382, 28 N. E. 294 (1891).

Mississippi.—*Meek v. Perry*, 36 Miss. 190 (1858).

Missouri.—*State v. Hendricks*, 172 Mo. 654, 73 S. W. 194 (1902); *Leahey v. Cass Ave., etc., R. Co.*, 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300 (1888); *Parsons v. Yeager Mill Co.*, 7 Mo. App. 594 (1879); *State v. Dominique*, 30 Mo. 585 (1860).

New York.—*Leahey v. Ottmann*, 73 Hun, 61, 25 N. Y. Suppl. 897 (1893).

Ohio.—*Atchison v. Bond*, Hill, 2 Ohio S. & C. Pl. Dec. 48, 1 Ohio N. P. 166 (1894).

Tennessee.—*Denton v. State*, 1 Swan 279 (1851).

In the absence of exceptional circumstances, however, the unsworn statement is none the less admissible because made in response to questions.

Alabama.—*Starks v. State*, 137 Ala. 9, 34 So. 687 (1902).

Colorado.—*Union Casualty, etc., Co. v. Mondy*, 18 Colo. App. 395, 71 Pac. 677 (1903).

District of Columbia.—*Washington, etc., R. Co. v. McLane*, 11 App. Cas. 220 (1897).

Georgia.—*Kirk v. State*, 73 Ga. 620 (1884).

Iowa.—*Sutcliffe v. Iowa State Traveling Men's Assoc.*, 119 Iowa 220, 93 N. W. 90, 97 Am. St. Rep. 298 (1903); *Fish v. Illinois Cent. R. Co.*, 96 Iowa 702, 65 N. W. 995 (1896).

Kentucky.—*Louisville, etc., R. Co. v. Shaw*, 53 S. W. 1048, 21 Ky. L. Rep. 1041 (1899).

Maine.—*State v. Wagner*, 61 Me. 178 (1873).

Michigan.—*People v. Simpson*, 48 Mich. 474, 12 N. W. 662 (1882).

Missouri.—*State v. Martin*, 124 Mo. 514, 28 S. W. 12 (1894).

New Hampshire.—*Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

South Carolina.—*State v. Arnold*, 47 S. C. 9, 24 S. E. 926, 58 Am. St. Rep. 867 (1896).

Texas.—*Berry v. State*, 44 Tex. Cr. App. 395, 72 S. W. 170 (1903); *Houston, etc., R. Co. v. Loeffler*, (Civ. App. 1899) 51 S. W. 536.

West Virginia.—*Crookham v. State*, 5 W. Va. 510 (1871).

United States.—*Chicago Travelers' Ins. Co. v. Mosley*, 8 Wall. 397, 10 L. ed. 437 (1869).

6. *Futch v. State*, 90 Ga. 472, 16 S. E. 102 (1892). Compare *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746 (1880).

7. *Small v. Gilman*, 48 Me. 506 (1860).

8. From three to five minutes after her throat was cut, the windpipe being severed so that she could not speak, the deceased wrote, "Jess Morrison killed me." This was shown in evidence. *State v. Morrison*, 64 Kan. 669, 68 Pac. 48 (1902).

§ 3011. (*The Modern View; Considerations Determining Spontaneity*); *Consciousness*.—In determining the existence of spontaneity, judicial administration is called upon to compare the inherent force, the numbing power of the event or state claimed to be controlling; and, having done this, to decide what, under all the circumstances of the case, may reasonably be deemed to have been the actual power which this force exerted, at the time of the statement, upon the particular mind subjected to its influence. Many considerations, those tending to continue the power of the original impression and those likely to interrupt or divert the continuity of its influence, may properly be considered by the presiding judge. Certain of the more salient remain to be examined.

Paramount among these determining factors is, as has been said,¹ the lapse of time, tending as it does, to restore the normal self-assertive balance of the mind. A necessary condition for this important action seems to be the presence of consciousness. Judicial administration will not, in determining the existence of spontaneity, give weight to occurrences which took place while the person in question was unconscious, irresponsive to sense-impressions,² or to the phases of his own mind. Should the person in question, after having been conscious subsequent to his injury, relapse into unconsciousness, his statements upon again recovering consciousness do not become admissible as spontaneous declarations.³

§ 3012. (*The Modern View; Considerations Determining Spontaneity*); *Lack of Motive to Misstate*.—For obvious reasons, an unsworn statement made in derogation of the declarant's interest will be readily accepted by the presiding judge as being spontaneous,¹ while a self-serving assertion² or one in favor of a

§ 3011-1. § 3007.

2. *Alabama*.—Ritter v. Griswold, 2 Ala. App. 618, 56 So. 860 (1911).

Iowa.—Christopherson v. Chicago, M. & St. P. R. Co., 135 Iowa 409, 109 N. W. 1077 (1906).

Missouri.—Mills v. Missouri Pac. Ry. Co., 199 Mo. 56, 94 S. W. 973 (1906).

South Carolina.—Douglass v. Southern Ry. Co., 82 S. C. 71, 62 S. E. 15 (1908).

Texas.—Hobbs v. State, 55 Tex. Cr. App. 299, 117 S. W. 811 (1909); Fulcher v. Texas, 28 Tex. App. 465, 13 S. W. 750 (1890).

Washington.—Britton v. Washington Water Power Co., 59 Wash. 440, 110 Pac. 20, 33 L. R. A. (N. S.) 109n., 140 Am. St. Rep. 858 (1910).

3. *State v. Curtis*, 70 Mo. 594 (1879).

§ 3012-1. *O'Shields v. State*, 55 Ga. 696 (1876); *State v. Estoup*, 39

fellow conspirator,³ will be viewed with much more careful scrutiny.

§ 3013. (*The Modern View; Considerations Determining Spontaneity*); Permanence of Impression.—A fact receiving great judicial consideration is as to the permanent nature of the impression which the controlling circumstances are calculated to create.¹ “The seriousness of the injury, the character of the accident, and the surrounding physical circumstances and results of the occurrence, attending the declaration as well as the principal fact, are necessary matters for consideration in the determination of the question of the admissibility of the declaration.”²

§ 3014. (*The Modern View; Considerations Determining Spontaneity; Permanence of Impression*); Excitement or Its Absence.—That the presence of an excited state of mind on the part of a declarant or those by whom he is surrounded tends to continue the vividness of the impression created by the occurrences alleged to dominate his mind seems obvious. This has been clearly recognized by the courts.¹ On the other hand, an interval of calm

La. Ann. 219, 1 So. 448 (1887); Sullivan v. State, 58 Nebr. 796, 79 N. W. 721 (1899).

2. Bradberry v. State, 22 Tex. App. 273, 2 S. W. 582 (1886); U. S. v. King, 34 Fed. 302 (1888). See also Atchison, etc., R. Co. v. Logan, 65 Kan. 748, 70 Pac. 878 (1902); Pledger v. Chicago, etc., R. Co., 69 Neb. 456, 95 N. W. 1057 (1903).

3. Martin v. State, 44 Tex. Cr. App. 279, 70 S. W. 973 (1902); Wright v. State, 10 Tex. App. 476 (1881); Pharr v. State, 10 Tex. App. 485 (1881); Draper v. State, 22 Tex. 400 (1858).

§ 3013-1. Soto v. Territory, 12 Ariz. 36, 94 Pac. 1104 (1908); Murray v. Boston, etc., R. Co., 72 N. H. 32, 37, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

2. Murray v. Boston, etc., R. Co., 72 N. H. 32, 37, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903), per Walker, J.

§ 3014-1. Alabama.—Bessiere v. Alabama City, G. & A. R. Co., 60 So. 82 (1912).

Arkansas.—Kansas City Southern Ry. Co. v. Morris, 80 Ark. 528, 98 S. W. 363, 10 Am. & Eng. Ann. Cas. 618 (1906).

Iowa.—State v. Rutledge, 135 Iowa 581, 113 N. W. 461 (1907).

Maryland.—United Rys. & Electric Co. v. Cloman, 107 Md. 681, 69 Atl. 379 (1908).

Texas.—Griffin v. State, 40 Tex. Cr. App. 312, 50 S. W. 366, 76 Am. St. Rep. 718 (1899); Pool v. State, (Cr. App. 1893) 23 S. W. 891; Craig v. State, 30 Tex. App. 619, 18 S. W. 297 (1892); International, etc., R. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902 (1891).

Utah.—Leach v. Oregon Short Line R. Co., 29 Utah 285, 81 Pac. 90, 110 Am. St. Rep. 708 (1905).

Washington.—Britton v. Washington Water Power Co., 59 Wash. 440,

or the relaxation of nervous tension clearly conduces to shortening what is judged to be the period of spontaneity. A speaker, for example, who refrains from making his statements until suitable witnesses can be procured,² or who modifies a different declaration previously made,³ the declarant being conscious that all danger of injury to himself is now over,⁴ furnishes circumstances indicating that the period of reflection has arrived.⁵

Premeditation in a given statement may be shown in various ways, practically unlimited in number. Thus, should one, before declaring himself, inquire as to what the testimony of certain persons on a given point would be,⁶ he impliedly negatives the existence of spontaneity.

§ 3015. (*The Modern View; Considerations Determining Spontaneity; Permanence of Impression; Excitement or Its Absence*); Spectators.—Naturally, the influence of a particular occurrence said to have created an automatic utterance is far more powerfully exerted upon the person immediately affected than upon those who have merely seen it. The exclamations of the

110 Pac. 20, 140 Am. St. Rep. 858, 33 L. R. A. (N. S.) 109 n. (1910); Dixon v. Northern Pac. R. Co., 37 Wash. 310, 79 Pac. 943, 68 L. R. A. 895, 107 Am. St. Rep. 810 (1905).

United States.—American Mfg. Co. v. Bigelow, 188 Fed. 34, 110 C. C. A. 77 (1911); North American Acc. Assoc. v. Woodson, 64 Fed. 689, 12 C. C. A. 392 (1894).

In an action for damages caused by a fire alleged to have been negligently set by defendant's employees, declarations made by such employees while the fire was still raging and while one of them was endeavoring to prevent it from approaching defendant's derrick, were admissible "as *res gestae*." Paraffine Oil Co. v. Berry, (Tex. Civ. App. 1906) 93 S. W. 1089.

An interval of nearly two hours did not rob the statements of a conductor of a train, which had been detailed, of their spontaneous character when the time had been spent in a state of anxiety and excitement in

providing relief for the injured and in efforts to obtain a relief train. Walters v. Spokane International Ry. Co., 58 Wash. 293, 108 Pac. 593 (1910).

An extended interval, even when accompanied by intense excitement, may exclude the evidence. Brown v. State, (Tex. Cr. App. 1898) 44 S. W. 174.

2. Atchison, etc., R. Co. v. Logan, 65 Kan. 748, 70 Pac. 878 (1902).

3. Fitzgerald v. Com., 6 S. W. 152, 9 Ky. L. Rep. 664 (1887).

4. People v. Dewey, 2 Idaho (Hasb.) 83, 6 Pac. 103 (1885); Kraner v. State, 61 Miss. 158 (1883); Estol v. State, 51 N. J. L. 182, 17 Atl. 118 (1889).

5. Brown v. State, (Tex. Cr. App. 1898) 44 S. W. 174.

6. Jackson v. Com., 37 S. W. 847, 18 Ky. L. Rep. 670 (1896). See also Atchison, etc., R. Co. v. Logan, 65 Kan. 748, 70 Pac. 878 (1902).

latter, though obviously competent in an independently relevant capacity,¹ are seldom spontaneous² within the meaning of the rule and cannot, therefore, be employed as proof of the facts asserted. Should it appear, however, under the circumstances of a particular case, that a given utterance by a spectator was, in point of fact, spontaneous, it is good primary evidence of the fact which it alleges.³

That a spectator has had an opportunity of thinking the matter over has been regarded as furnishing some inference that an injured person has done the same.⁴

§ 3016. (*The Modern View; Considerations Determining Spontaneity; Permanence of Impression*); Intervening Occurrences.—That a fact alleged to control the reflective faculties of a given mind into an automatic or spontaneous utterance should continue to exert its normal effect, it is essential that no occurrence should intervene to distract the mind of the declarant. From an administrative point of view, this is a consideration of the first

§ 3015-1. § 2597.

2. Georgia.—*Marsh v. South Carolina R. Co.*, 56 Ga. 274 (1876).

Indiana.—*Indianapolis St. Ry. Co. v. Taylor*, 164 Ind. 155, 72 N. E. 1045 (1905).

Maryland.—*Baltimore v. Lobe*, 90 Md. 310, 45 Atl. 192 (1900).

Michigan.—*Detroit, etc., R. Co. v. Van Steinburg*, 17 Mich. 99 (1868).

Missouri.—*Leahey v. Cass Acc., etc.*, R. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300 (1888).

In an action for the death of a person killed by a street car, the exclamation of a bystander made immediately after the accident tending to show contributory negligence on the part of the deceased was properly excluded. *Louisville Ry. Co. v. Johnson's Adm'r*, 131 Ky. 277, 115 S. W. 207, 20 L. R. A. (N. S.) 133 (1909).

"There is, however, a conflict in the authorities as to whether declarations made by a mere bystander or onlooker are admissible as a part of the *res gestae*; all other conditions necessary to make them admissible

as such being present. But I think the weight of authority is to the effect that the party making the declaration must in some way be an actor or participant in the transaction or event to which his declaration relates. . . . A bystander may, during the happening of an act or event, become an actor or participant therein." *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 37 Utah 475, 109 Pac. 10, 15, 24 Am. & Eng. Ann. Cas. 307 (1910) (dissenting remarks).

3. New York, etc., Co. v. Rogers, 11 Colo. 6, 16 Pac. 719, 7 Am. St. Rep. 198 (1887); *Coll v. Easton Transit Co.*, 180 Pa. St. 618, 37 Atl. 89 (1897); *Missouri, etc., R. Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346, 10 Am. St. Rep. 758, 1 L. R. A. 500 (1888); *Gulf, etc., R. Co. v. Moore*, 69 Tex. 157, 6 S. W. 631 (1887); *Linderberg v. Crescent Min. Co.*, 9 Utah 163, 33 Pac. 692 (1893).

See, also, § 2983.

4. Wright v. State, 88 Md. 705, 41 Atl. 1060 (1898).

importance. The attrition, as it were, of new sensations presented to the mind may rapidly crowd through the influence which benumbs the ordinary reflective faculties.¹ The spell of the controlling fact must not be broken,² if the utterance is to be received as a spontaneous one.³ An intervening occurrence of such a nature as to demand little or no attention from the declarant, such, for example, as regaining the feet after falling,⁴ may not be regarded as sufficient to destroy the spontaneous character of the statement. Naturally, it is essential to the operation of this rule of practice that the declarant should be shown to have been aware of the existence of the intervening occurrence. Where, for example, the declarant has been unconscious, his first utterances may be spontaneous even after a considerable interval.⁵

§ 3016-1. *Dodson v. State*, 44 Tex. Cr. App. 200, 70 S. W. 969 (1902); *Cockerell v. State*, 32 Tex. Cr. App. 585, 25 S. W. 421 (1894) (hiding from arrest); *Jackson v. State*, (Tex. Cr. App. 1894) 24 S. W. 896; *Bradberry v. State*, 22 Tex. App. 273, 2 S. W. 592 (1886).

2. The effect of a distracting occurrence is usually that of restoring the disturbed mental equilibrium arousing the temporarily dormant faculty of self-interested thought with which, it is assumed by judicial administration, that during waking hours the average mind is concerned. The mind apparently possesses an inertia which tends to continue its operation in a given direction when once an appropriate impulse has been communicated. How long this motion shall continue is apparently dependent, in case of a spontaneous utterance, upon the lapse of time as related to the intensity of the particular impulse creating the momentum in that type of mind. Retarding causes may assist the normal effect of time by causing the mental momentum to slacken, rendering it easier for the original impulse to come to a state of rest extending the range of consciousness by the introduction of new impressions blocks,

as it were, the path of the original impulse, either bringing it more quickly to a state of rest or changing its direction.

3. *Iowa*.—*Clark v. Van Vleck*, 135 Iowa 194, 112 N. W. 648 (1907).

Louisiana.—*State v. Gianfala*, 113 La. 463, 37 So. 30 (1904).

Michigan.—*Bernard v. Grand Rapids Paper Box Co.*, 170 Mich. 238, 136 N. W. 374 (1912).

Nebraska.—See *Pledger v. Chicago, etc., R. Co.*, 69 Neb. 456, 95 N. W. 1057 (1903).

Texas.—*Blue v. State* (Cr. App. 1912), 148 S. W. 730; *Ford v. State*, 40 Tex. Cr. App. 280, 50 S. W. 350 (1899).

Statements by the driver of the conveyance in which plaintiff was riding at the time of the injury caused by a collision with a street car, made after the plaintiff had been carried across the street and the car had gone were no part of the *res gestae*. *Hot Springs St. Ry. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245 (1904).

4. *Lexington v. Fleharty*, 74 Neb. 626, 104 N. W. 1056 (1905).

5. *Alabama*.—*Ritter v. Griswold*, 2 Ala. App. 618, 56 So. 860 (1911).

Georgia.—*Johnson v. State*, 65 Ga. 94 (1880).

§ 3017. (*The Modern View; Considerations Determining Spontaneity; Permanence of Impression; Intervening Occurrences*); Onus on Proponent.—In view of the administrative situation presented, when an intervening occurrence has been interposed between the statement alleged to be spontaneous and the controlling cause which is said to dominate it, the rule has been established, that, under such circumstances, the burden is on the proponent affirmatively to show, to the satisfaction of the court, that a subsequent utterance is still spontaneous.¹ The court can no longer assume the existence of spontaneity under circumstances which might otherwise have suggested it. The assumption, indeed, is practically to the opposite effect. Should it appear that an adequate opportunity was furnished for the rehabilitation of the mind from its automatic condition into its normal function of self-regarding cerebration, it will be assumed to have been utilized.²

§ 3018. (*The Modern View; Considerations Determining Spontaneity; Permanence of Impression; Intervening Occurrences*); Medical Assistance.—Few intervening occurrences more often distract the attention of a declarant, who is in the grasp of a mentally controlling situation due to severe bodily injury, than efforts to procure suitable medical assistance. So long as the situation of acute suffering is entirely unrelieved by medical or surgical aid, the tension of the control exerted by the dominating circumstances will normally be taken to continue,¹ even

Iowa.—Christopherson v. Chicago, M. & St. P. R. Co., 135 Iowa 409, 109 N. W. 1077 (1906).

Missouri.—Mills v. Missouri Pac. Ry. Co., 199 Mo. 56, 94 S. W. 973 (1906).

South Carolina.—Douglass v. Southern Ry. Co., 82 S. C. 71, 62 S. E. 15, 63 S. E. 5 (1908).

Texas.—Hobbs v. State, 55 Tex. Cr. App. 299, 117 S. W. 811 (1909); Missouri, etc., R. Co. v. Moore, 24 Tex. Civ. App. 489, 59 S. W. 282 (1900).

Washington.—Britton v. Washington Water Power Co., 59 Wash. 440, 110 Pac. 20 (1910); State v. Ripley, 32 Wash. 182, 72 Pac. 1036 (1903).

§ 3017-1. Ford v. State, 40 Tex. Cr. App. 280, 50 S. W. 350 (1899).

See, also, Pledger v. Chicago, etc., R. Co., 69 Neb. 456, 95 N. W. 1057 (1903).

2. Wright v. State, 88 Md. 705, 41 Atl. 1060 (1898).

§ 3018-1. *Alabama*.—Starks v. State, 137 Ala. 9, 34 So. 687 (1903).

Arkansas.—Little Rock, etc., R. Co. v. Leverett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230 (1887).

California.—Heckle v. Southern Pac. R. Co., 123 Cal. 441, 56 Pac. 56 (1899).

Colorado.—Union Casualty, etc., Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677 (1903).

Delaware.—Chielinsky v. Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127 (1894).

though efforts for procuring help are known to be in progress.² After a considerable interval³ an inference of premeditation may arise. The natural incidents attendant upon the actual furnishing of professional help may cause such a distraction in the mind of the injured person as effectively to end the period of spontaneity,⁴ introducing that of reflection.

§ 3019. (*The Modern View; Considerations Determining Spontaneity; Permanence of Impression; Intervening Occurrences*); Removal from Locus.—Continuance on the scene of an occurrence, among the sense-impressions which have given rise to an automatic mental state assists to prolong it.¹ So far as a

Illinois.—Springfield Consol. R. Co. v. Welsch, 155 Ill. 511, 40 N. E. 1034 (1895); East St. Louis Connecting R. Co. v. Allen, 54 Ill. App. 27 (1894); Quincy Horse R., etc., Co. v. Gnuse, 137 Ill. 264, 27 N. E. 190 (1891).

Indiana.—Ohio, etc., R. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733 (1892).

Maine.—State v. Wagner, 61 Me. 178 (1873).

Michigan.—Styles v. Decatur, 131 Mich. 443, 91 N. W. 622 (1902).

Missouri.—State v. Hudspeth, 159 Mo. 178, 60 S. W. 136 (1900); State v. Kaiser, 124 Mo. 651, 28 S. W. 182 (1894); State v. Martin, 124 Mo. 514, 28 S. W. 12 (1894); Leahey v. Cass Ave., etc., R. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300 (1888); Harriman v. Stowe, 57 Mo. 93 (1874).

New Hampshire.—Murray v. Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

New York.—Scheir v. Quirin, 77 App. Div. 624, 78 N. Y. Suppl. 956 (1902), *affirmed* 177 N. Y. 568, 69 N. E. 1130; Patterson v. Hochster, 38 App. Div. 398, 56 N. Y. Suppl. 467 (1899); Waldele v. New York Cent., etc., R. Co., 29 Hun 35, *reversed* 95 N. Y. 274, 47 Am. Rep. 41 (1883).

Rhode Island.—State v. Epstein, 25 R. I. 131, 55 Atl. 204 (1903).

Texas.—Galveston, etc., R. Co. v.

Davis, 27 Tex. Civ. App. 279, 65 S. W. 217 (1901); Texas, etc., R. Co. v. Hall, 83 Tex. 675, 19 S. W. 121 (1892); Texas, etc., R. Co. v. Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929 (1891). See, also, Missouri, etc., R. Co. v. Criswell, 34 Tex. Civ. App. 278, 78 S. W. 388 (1904).

Utah.—Sullivan v. Salt Lake City, 13 Utah 122, 44 Pac. 1039 (1896).

Wisconsin.—Bliss v. State, 117 Wis. 596, 94 N. W. 325 (1903).

United States.—Chicago Travelers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437 (1869).

England.—Rex v. Foster, 6 C. & P. 325, 25 E. C. L. 455 (1834).

2. Scheir v. Quirin, 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956 (1902), *affirmed* 177 N. Y. 568, 69 N. E. 1130. See, also, People v. O'Brien, 92 Mich. 17, 52 N. W. 84 (1892) (seeking a physician).

3. State v. Frazier, Houst. Cr. Cas. (Del.) 176 (1865) (twenty-five to thirty minutes).

4. State v. Deuble, 74 Iowa 509, 38 N. W. 383 (1888); Mutch v. Pierce, 49 Wis. 231, 5 N. W. 486, 35 Am. Rep. 776 (1880). See, also, International, etc., R. Co. v. Boykin, 32 Tex. Civ. App. 72, 74 S. W. 93 (1903).

§ 3019-1. The extrajudicial statement accompanying a probative fact subsequent in time to the happen-

mental balance is restored, it occurs slowly among the familiar surroundings. On the other hand, removal from the *locus* of an occurrence presents an obvious tendency to dissipate the impression already formed. The presiding judge may properly feel that the mere effort which the declarant has made in removing himself or the mental stimulus of being removed from the scene of the dominating occurrence implies such a distraction of his attention as effectually to rebut the inference of spontaneity.² The effort

ing of the *res gestae*, properly so-called, is most apt to be regarded by the court as spontaneous, when the effects of the *res gestae* are apparent to the consciousness of the declarant; the physical activity of the *res gestae* having ceased but the situation otherwise remaining unchanged. *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903). See, also, *Union Casualty, etc., Co. v. Mondy*, 18 Colo. App. 395, 71 Pac. 677 (1903).

2. *Arkansas*.—*Blair v. State*, 69 Ark. 558, 64 S. W. 948 (1901); *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106 (1893).

California.—*Boone v. Oakland Transit Co.*, 139 Cal. 490, 73 Pac. 243 (1903).

Colorado.—*Herren v. People*, 28 Colo. 23, 62 Pac. 833 (1900).

Delaware.—*State v. Seymour*, *Houst. Cr. Cas.* 508 (1877); *State v. Frazier*, *Houst. Cr. Cas.* 176 (1865).

District of Columbia.—*Washington, etc., R. Co. v. McLane*, 11 App. Cas. 220 (1897); *U. S. v. Neverson*, 1 Mackey 152 (1880).

Georgia.—*Sullivan v. State*, 101 Ga. 800, 29 S. E. 16 (1897); *Fink v. Ash*, 99 Ga. 106, 24 S. E. 976 (1895); *Augusta, etc., R. Co. v. Randall*, 79 Ga. 304, 4 S. E. 674 (1887); *Rat-teree v. State*, 53 Ga. 570 (1875); *Hall v. State*, 48 Ga. 607 (1873).

Illinois.—*Sullivan v. Henry Guth & Co.*, 148 Ill. App. 538 (1909); *Ohio, etc., R. Co. v. Cullison*, 40 Ill. App. 67 (1891); *Chicago, etc., R. Co.*

v. Howard, 6 Ill. App. 569 (1880); *Gardner v. People*, 4 Ill. 83 (1841).

Indiana.—*Citizens' St. R. Co. v. Stoddard*, 10 Ind. App. 278, 37 N. E. 723 (1894); *Shoecraft v. State*, 137 Ind. 433, 36 N. E. 1113 (1893); *Pitts-burgh, etc., R. Co. v. Wright*, 80 Ind. 182 (1881). See, also, *Golibart v. Sullivan*, 30 Ind. App. 428, 66 N. E. 188 (1903).

Iowa.—*Armil v. Chicago, etc., R. Co.*, 70 Iowa 130, 30 N. W. 42 (1886).

Kentucky.—*Matthews Adm'r v. Louisville & N. R. Co.*, 130 Ky. 551, 113 S. W. 459 (1908).

Louisiana.—*State v. Estoup*, 39 La. Ann. 219, 1 So. 448 (1887); *State v. Johnson*, 35 La. Ann. 968 (1883).

Michigan.—*White v. City of Mar-quette*, 140 Mich. 310, 103 N. W. 698, 12 Detroit Leg. N. 141 (1905); *Merkle v. Bennington Tp.*, 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666 (1885).

Missouri.—*Leahey v. Cass Ave., etc., R. Co.*, 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300 (1888); *State v. Rider*, 95 Mo. 474, 8 S. W. 723 (1888); *State v. Rider*, 90 Mo. 54, 1 S. W. 825 (1886) (two hundred yards); *State v. Curtis*, 70 Mo. 594 (1879) (one hundred yards).

Nebraska.—See *Davidson v. David-son*, 2 Nebr. (Unoff.) 90, 96 N. W. 409 (1901).

New York.—*Lahey v. Ottmann*, 73 Hun 61, 25 N. Y. Suppl. 897 (1893); *Martin v. New York, etc., R. Co.*, 103 N. Y. 626, 9 N. E. 505 (1886). But see, *Scheir v. Quirin*, 177 N. Y.

to escape from an assailant by running away from him is not, however, regarded as an intervening circumstance in such a sense that a declaration made during its continuance is no longer spontaneous.³ The period of supervening spontaneity may, however, be a short one.⁴ Removal from the *locus* of an occurrence apart from the implied diversion of attention from the circumstance alleged to dominate the mind, shows no invasion of spontaneity. Thus, removing an unconscious or intensely suffering man to another place,⁵ and even his own instinctive efforts to procure assistance,⁶ are not necessarily inconsistent with the spontaneity of an utterance.

§ 3020. (*The Modern View; Considerations Determining Spontaneity*); Physical State or Condition.—Plainly important for consideration of the court in determining the question of spontaneity is the physical state or condition in which the declarant is shown to have been at the time his statement was made. For example, an unsworn statement made while the declarant is afflicted with intense pain resulting from a recent injury,¹ would probably, were no modifying facts suggested, be judged to be spontaneous.

568, 69 N. E. 1130 (1904), *affirming* 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956.

Oregon.—State v. McCann, 43 Oreg. 155, 72 Pac. 137 (1903); State v. Smith, 43 Oreg. 109, 71 Pac. 973 (1903).

Pennsylvania.—Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. Rep. 701 (1889).

Texas.—Carter v. State, 44 Tex. Cr. App. 312, 70 S. W. 971 (1902); Cockerell v. State, 32 Tex. Cr. App. 585, 25 S. W. 421 (1894); Crow v. State, (Cr. App. 1893) 21 S. W. 543. See, also, Missouri, etc., R. Co. v. Tarwater, 33 Tex. Civ. App. 116, 75 S. W. 937 (1903); Craig v. State, 30 Tex. App. 619, 18 S. W. 797 (1891).

Utah.—People v. Callaghan, 4 Utah 49, 6 Pac. 49 (1885).

Vermont.—State v. Carlton, 48 Vt. 636 (1876).

Virginia.—Jones v. Com., 86 Va. 740, 10 S. E. 1004 (1890).

Wyoming.—Johnson v. State, 8 Wyo. 494, 58 Pac. 761 (1899).

United States.—Atchison, etc., R. Co. v. Phipps, 125 Fed. 478, 60 C. C. A. 314 (1903).

A declaration by a woman injured on a defective sidewalk, made upon reaching home after the injury was inadmissible. Miller v. McConnell, 23 S. D. 137, 120 N. W. 888 (1909).

3. Berry v. State, 44 Tex. Cr. App. 395, 72 S. W. 170 (1903); Bejarano v. State, 6 Tex. App. 265 (1879).

4. People v. Ah Lee, 60 Cal. 85 (1882); Mayes v. State, 64 Miss. 329, 1 So. 733, 60 Am. Rep. 58 (1886).

5. State v. Martin, 124 Mo. 514, 28 S. W. 12 (1894).

6. Kirby v. Com., 77 Va. 681, 46 Am. Rep. 747 (1883).

§ 3020-1. *Delaware*.—Chielinsky v. Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127 (1894).

Georgia.—Southern Ry. Co. v. Brown, 121 Ga. 1, 54 S. E. 911

As intimated at another place, severe bodily suffering or mental anguish may be highly significant in establishing the truth of facts asserted in the utterance. Thus the declarations of a woman accusing her husband of setting her clothing on fire, made while her body was still smoking;² those of a workman who had shortly before fallen into a vat of scalding liquid;³ those of a man who had been shot, made while his shirt was still on fire from the flash of the weapon;⁴ and those of a man who had both arms crushed, made about an hour after the accident,⁵ have been received in evidence as spontaneous and worthy of consideration by a jury. The first successful efforts by an injured person at articulation may be received as spontaneous though the interval of time since the original occurrence has been a considerable one.⁶

(1906); *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 838 (1884).

Indiana.—*Ft. Wayne & W. V. Trac-tion Co. v. Roudebush*, 173 Ind. 57, 88 N. E. 676 (1909).

Kentucky.—*Louisville, etc., R. Co. v. Shaw's Adm'r*, 53 S. W. 1048, 21 Ky. L. Rep. 1041 (1899).

Louisiana.—*State v. Foley*, 113 La. 52, 36 So. 885, 104 Am. St. Rep. 493 (1904).

Michigan.—*Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622 (1902).

New Hampshire.—*Murray v. Bos-ton, etc., R. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903).

New York.—*Scheir v. Quirin*, 177 N. Y. 568, 69 N. E. 1130 (1904), *af-firming* 77 App. Div. 624, 78 N. Y. Suppl. 956 (1902).

Pennsylvania.—*Elkins, Bly & Co. v. McKean*, 79 Pa. St. 493 (1875).

South Carolina.—*Gosa v. Southern R. Co.*, 67 S. C. 347, 45 S. E. 810 (1903). See, also, *Oliver v. Colum-bia, etc., R. Co.*, 65 S. C. 1, 43 S. E. 307 (1902).

Texas.—*Carver v. State* (Cr. App. 1912), 148 S. W. 746; *Blackshear v. Trinity & B. V. Ry. Co.* (Civ. App. 1910), 131 S. W. 854; *International, etc., R. Co. v. Smith*, (Sup. 1890) 14 S. W. 642.

Washington.—*Dixon v. Northern Pac. R. Co.*, 37 Wash. 310, 79 Pac. 943, 68 L. R. A. 895, 107 Am. St. Rep. 810 (1905).

Wyoming.—*Johnson v. State*, 8 Wyo. 494, 58 Pac. 761 (1899).

A statement by a passenger, who has fallen in the dark upon alighting from a train, to the effect that he was forced by the conductor to get off where he did, though made after an interval of fifteen minutes, will be received as proof of the facts as-asserted where the declarant is found groaning and apparently in intense pain. *International, etc., R. Co., v. Smith*, (Tex. Sup. 1890) 14 S. W. 642.

2. *Walker v. State*, 137 Ga. 398, 73 S. E. 368 (1912).

3. *Scheir v. Quirin*, 177 N. Y. 568, 69 N. E. 1130 (1904), *affirming* 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956 (1902).

4. *Bice v. State*, 51 Tex. Cr. App. 133, 100 S. W. 949 (1907).

5. *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 83 Pac. 113, 4 L. R. A. (N. S.) 636 n. (1905).

6. *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750 (1890).

§ 3021. Narrative Excluded.—That a spontaneous statement may relate to the existence of a fact which is physically past, though present in the influence which it exerts, is not questionable. Where, however, an extrajudicial assertion is a deliberate statement, made upon reflection of past events, the declaration is classed as narrative and cannot be received under the present rule,¹ admitting spontaneous statements as proof of the facts asserted. This is the rule in civil cases,² and the same principle applies with

§ 3021-1. "They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testified to them." *Waldele v. R. Co.*, 95 N. Y. 274, 278, 47 Am. Rep. 41 (1884), per Earl, J.

Independently relevant extrajudicial statements and those which are spontaneous unite under a common rule that narrative is excluded. In case of a spontaneous utterance, the reason for this is self-evident. No extrajudicial declaration can convincingly be claimed to have been spontaneously made when an interval, more or less extended, of reflective thinking has succeeded the stage of automatic utterance and all which is exhibited to the tribunal is a history of by-gone events. "It cannot be established by any system of logic that can be employed, that the statements and declarations of a party to a transaction, made after it has ended, are a part of it. It would be a moral impossibility." *Sullivan v. Oregon R., etc., Co.*, 12 Oreg. 392, 400, 7 Pac. 508, 53 Am. Rep. 364 (1885), per Thayer, J.

See, also, *Williams v. Bowdon*, 1 Swan (Tenn.) 282 (1851). Even the circumstantially probative effect of an independently relevant extrajudicial utterance vanishes when a mere narration is presented. Such a declaration is probative, if at all, only

in an assertive capacity as proof of the facts alleged. So regarded, it is confessedly not a spontaneous utterance, but is excluded by the rule against hearsay. However probative, for example, an extrajudicial statement made subsequent to the doing of a material act may be as to the actual animus with which the latter was done, its evidentiary force will be found to consist in the light which the existence of the later mental state proved by the declaration throws upon the prior animus with which the essential act was done. Its cogency seldom rests upon the credit of the declarant as embodied in his narrative.

2. Alabama.—*Seaboard Air Line Ry. Co. v. Hubbard*, 142 Ala. 546, 38 So. 750 (1905); *Louisville v. Pearson*, 97 Ala. 211, 12 So. 176 (1893); *Tampalin v. Still's Adm'r*, 77 Ala. 374 (1884); *Humes v. O'Bryan*, 74 Ala. 64 (1883). See, also, *Moore v. Nashville, etc., R. Co.*, 137 Ala. 495, 34 So. 617 (1902).

Arkansas.—*Fordyce v. McCants*, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296 (1889).

California.—*Herman Waldeck & Co. v. Pacific Coast S. S. Co.*, 2 Cal. App. 167, 83 Pac. 158 (1905); *Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700, 74 Pac. 307 (1903); *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. 35 (1903); *Boone v. Oakland Transit Co.*, 139 Cal. 490, 73 Pac. 243 (1903).

equal force in proceedings involving prosecutions for criminal

Connecticut.—Leonard v. Mallory, 75 Conn. 433, 53 Atl. 778 (1903).

Georgia.—McBride v. Georgia Ry. & Electric Co., 125 Ga. 515, 54 S. E. 674 (1906); White v. Southern Ry. Co., 123 Ga. 353, 51 S. E. 411 (1905); Poole v. East Tennessee, etc., R. Co., 92 Ga. 337, 17 S. E. 267 (1893); Savannah, etc., R. Co. v. Holland, 82 Ga. 257, 10 S. E. 200, 14 Am. St. Rep. 158 (1888); East Tennessee, etc., R. v. Maloy, 77 Ga. 237, 2 S. E. 941 (1886).

Idaho.—Wheeler v. Oregon R. & Nav. Co., 16 Idaho 375, 102 Pac. 347 (1909).

Illinois.—Winn v. Christian County Coal Co., 156 Ill. App. 179 (1910); Legris v. Marcotte, 129 Ill. App. 67 (1906); Springfield Consol. R. Co. v. Puntenney, 101 Ill. App. 95 (1901), *affirmed* 200 Ill. 9, 65 N. E. 442; Elguth v. Grueszka, 57 Ill. App. 193 (1894); Chicago West Div. R. Co. v. Becker, 128 Ill. 545, 548, 21 N. E. 524, 15 Am. St. Rep. 144 (1889).

Indiana.—Golibart v. Sullivan, 30 Ind. App. 428, 66 N. E. 188 (1903).

Iowa.—Hall v. Cedar Rapids, etc., R. Co., 115 Iowa 18, 87 N. W. 739 (1901).

Kansas.—Atchison, etc., R. Co. v. Logan, 65 Kan. 748, 70 Pac. 878 (1902); Stark v. Cummings, 5 Kan. 85 (1869).

Kentucky.—Wade v. Illinois Cent. R. Co., 112 S. W. 1103 (1908); Early's Adm'r v. Louisville, etc., R. Co., 115 Ky. 13, 72 S. W. 348, 24 Ky. L. Rep. 1807 (1903); New York L. Ins. Co. v. Johnson, 72 S. W. 762, 24 Ky. L. Rep. 1867, 75 S. W. 257, 25 Ky. L. Rep. 438 (1903); Standard L. Ins. Co. v. Holloway, 72 S. W. 796, 24 Ky. L. Rep. 1856 (1903).

Louisiana.—Marler v. Texas, etc., R. Co., 52 La. Ann. 727, 27 So. 176 (1900).

Maryland.—Handy v. Johnson, 5 Md. 450 (1854). See, also, Johnson v. Johnson, 96 Md. 144, 53 Atl. 792 (1902).

Massachusetts.—McKinnon v. Norcross, 148 Mass. 533, 20 N. E. 183, 3 L. R. A. 320 (1889); Johnson v. Sherwin, 3 Gray 374 (1855); Lund v. Tyngsborough, 9 Cush. 36 (1851).

Michigan.—Edwards v. Foote, 129 Mich. 121, 88 N. W. 404 (1901); Mabley v. Kittleberger, 37 Mich. 360 (1877).

Mississippi.—Mayes v. State, 64 Miss. 329, 1 So. 733, 60 Am. Rep. 58 (1886).

Missouri.—Alten v. Metropolitan St. Ry. Co., 133 Mo. App. 425, 113 S. W. 691 (1908); State v. Beard, 126 Mo. 548, 29 S. W. 592 (1895); State v. Elkins, 101 Mo. 344, 14 S. W. 116 (1890); State v. Ware, 62 Mo. 597 (1876).

Nebraska.—Clancy v. Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559 (1904); Pledger v. Chicago, etc., R. Co., 69 Neb. 456, 95 N. W. 1057 (1903); Davidson v. Davidson, 2 Nebr. (Unoff.) 90, 96 N. W. 409 (1901).

New Hampshire.—Murray v. Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903); Banfield v. Parker, 36 N. H. 353 (1858).

New York.—Austin v. Bartlett, 178 N. Y. 310, 70 N. E. 855 (1904); Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836 (1891); Kays v. Eugert, 44 Hun 630, 8 N. Y. St. Rep. 505 (1887); Waldele v. New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41 (1884); Greenfield v. People, 85 N. Y. 75, 39 Am. Rep. 636 (1881).

North Carolina.—Hill v. Aetna Life Ins. Co., 150 N. C. 1, 63 S. E. 124 (1908); Butler v. South Carolina, etc., R. Co., 130 N. C. 15, 40 S. E. 770 (1902). See, also, Lyman v. Southern R. Co., 132 N. C. 721, 44 S. E. 550 (1903); Bumgardner v. Southern R. Co., 132 N. C. 438, 43 S. E. 948 (1903).

North Dakota.—Balding v. Andrews, 12 N. D. 267, 96 N. W. 305 (1903).

Oregon.—Johnson v. Oregon Short Line, etc., R. Co., 23 Oreg. 94, 31 Pac. 283 (1892).

Pennsylvania.—Bradford v. Downs, 126 Pa. St. 622, 17 Atl. 884 (1889). See also Shannon v. Castner, 21 Pa. Super. Ct. 294 (1902).

South Carolina.—Petrie v. Columbia, etc., R. Co., 27 S. C. 63, 2 S. E. 837 (1887).

South Dakota.—Fallow v. Rapid City, 17 S. D. 570, 97 N. W. 1009 (1904).

Tennessee.—Parkey v. Yeary, 1 Heisk. 157 (1870); Williams v. Bowdon, 1 Swan 282 (1851).

Texas.—St. Louis, etc., R. Co. v. Gill, (Civ. App. 1900) 55 S. W. 386; Austin v. Ritz, 72 Tex. 391, 9 S. W. 884 (1888); Texas, etc., R. Co. v. Crowder, 70 Tex. 222, 7 S. W. 709 (1888). See also Missouri, etc., R. Co. v. Criswell, 34 Tex. Civ. App. 278, 78 S. W. 388 (1904); Missouri, etc., R. Co. v. Tarwater, 33 Tex. Civ. App. 116, 75 S. W. 937 (1903); International, etc., R. Co. v. Boykin, 32 Tex. Civ. App. 72, 74 S. W. 93 (1903).

Utah.—Lumm v. Howells, 27 Utah 80, 74 Pac. 432 (1903).

Vermont.—Richards v. Moore, 62 Vt. 217, 19 Atl. 390 (1890); Ross v. White, 60 Vt. 558, 15 Atl. 184 (1888).

Wisconsin.—Tiborsky v. Chicago, M. & St. P. Ry. Co., 124 Wis. 243, 102 N. W. 549 (1905); Schillinger v. Verona, 88 Wis. 317, 60 N. W. 272 (1894); Felt v. Amidon, 43 Wis. 467 (1877).

United States.—Cyborowski v. Kinsman Transit Co., 179 Fed. 440, 102 C. C. A. 586 (1910); Fidelity, etc., Co. v. Haines, 111 Fed. 337, 49 C. C. A. 379 (1901). See also Atchison, etc., R. Co. v. Phipps, 125 Fed. 478, 60 C. C. A. 314 (1903).

"The declaration of the defendant's servant was incompetent, and should have been rejected. It was

made after the accident occurred, and the injury to the plaintiff's carriage had been done. It did not accompany the principal act, on which the whole case turned, or tend in any way to elucidate it. It was only the expression of an opinion about a past occurrence and not part of the *res gestae*. It is no more competent because made immediately after the accident than if made a week or month afterward." Lane v. Bryant, 9 Gray (Mass.) 245, 247, 69 Am. Dec. 282 (1857), per Bigelow, J., quoted with approval in Wheeler v. Oregon R. R. & Nav. Co., 16 Idaho 375, 407, 102 Pac. 347 (1909).

Where the theory of the plaintiff was that the decedent was injured by the fall of a ventilator in a car caused by careless handling of the car, it was improper to receive the decedent's statements to the baggageman after the accident and when the car was at rest, that he had been so injured. Dunlap v. Chicago, R. I. & P. Ry. Co., 145 Mo. App. 215, 129 S. W. 262 (1910).

Where the plaintiff alleged that he was injured while employed in a building by the negligence of the defendant's engineer in charge of a hoisting engine, in failing promptly to obey a signal to lower the elevator a conversation between the plaintiff and the engineer, concerning the cause of the accident, had after the plaintiff had been brought down on the elevator and had walked outside the building to where the engineer was stationed was a mere narration of past events and inadmissible. McConnell v. Thomas & Buckley Operating Co., 133 N. Y. Suppl. 255 (1912).

Field-notes made subsequent to a survey are not admissible as part of the *res gestae*. Cable v. Jackson, 16 Tex. Civ. App. 579, 42 S. W. 136 (1897).

offences.³ Under such circumstances, no inference arises, as a rule, to the effect that the statement made is true,⁴ though the

3. Alabama.—Griffith v. State, 90 Ala. 583, 8 So. 812 (1891).

California.—People v. Wasson, 65 Cal. 538, 4 Pac. 555 (1884).

Colorado.—Herren v. People, 28 Colo. 23, 62 Pac. 833 (1900).

Florida.—Lambright v. State, 34 Fla. 564, 16 So. 552 (1894) (twelve hours).

Georgia.—Hightower v. State, 9 Ga. App. 236, 70 S. E. 1022 (1911); Williams v. State, 108 Ga. 748, 32 S. E. 660 (1899); Green v. State, 74 Ga. 373 (1884); Hall v. State, 48 Ga. 607 (1873).

Indiana.—Hall v. State, 132 Ind. 317, 31 N. E. 536 (1892); Doles v. State, 97 Ind. 555 (1884); Jones v. State, 71 Ind. 66 (1880); Binns v. State, 57 Ind. 46, 26 Am. Rep. 48 (1877).

Louisiana.—State v. Oliver, 39 La. Ann. 470, 2 So. 194 (1887); State v. Rutledge, 37 La. Ann. 378 (1885).

Maine.—State v. Maddox, 92 Me. 348, 42 Atl. 783 (1898).

Maryland.—Hays v. State, 40 Md. 633 (1874).

Minnesota.—State v. Gallehugh, 89 Minn. 212, 94 N. W. 723 (1903).

Mississippi.—Moore v. State, 86 Miss. 160, 38 So. 504 (1905); Loyd v. State, 70 Miss. 251, 11 So. 689 (1892); King v. State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681 (1888).

Missouri.—State v. Hendricks, 172 Mo. 654, 73 S. W. 194 (1903); State v. Nocton, 121 Mo. 537, 26 S. W. 551 (1894); State v. Raven, 115 Mo. 419, 22 S. W. 376 (1893).

Montana.—State v. Pugh, 16 Mont. 343, 40 Pac. 861 (1895).

Nebraska.—Collins v. State, 46 Neb. 37, 64 N. W. 432 (1895).

New Jersey.—Estell v. State, 51 N. J. L. 182, 17 Atl. 118 (1889).

New York.—Maine v. People, 9 Hun 113 (1876).

Ohio.—Forrest v. State, 21 Ohio St. 641 (1871).

Oregon.—State v. Smith, 43 Ore. 109, 71 Pac. 973 (1903).

South Carolina.—State v. Green, 48 S. C. 136, 26 S. E. 234 (1896); State v. Talbert, 41 S. C. 526, 19 S. E. 852 (1894).

Tennessee.—Turner v. State, 89 Tenn. 547, 15 S. W. 838 (1890).

Texas.—Beckman v. State, (Cr. App. 1902) 69 S. W. 534; Poyner v. State, 40 Tex. Cr. App. 640, 51 S. W. 376 (1899); Jones v. State, 22 Tex. App. 324, 3 S. W. 230 (1886).

Vermont.—State v. Davidson, 30 Vt. 377, 73 Am. Dec. 312 (1858).

West Virginia.—Crookham v. State, 5 W. Va. 510 (1871).

United States.—U. S. v. Angell, 11 Fed. 34 (1881).

Incest.—On a prosecution for incest the declarations of the daughter accusing the defendant of being the father of her child, made shortly after its birth, are not evidence of the facts asserted (part of the *res gestae*). Poyner v. State, 40 Tex. Cr. App. 640, 51 S. W. 376 (1899).

4. State v. Uzzø 6 Pennew. 212, 65 Atl. 775 (1907); White v. Southern Ry. Co., 123 Ga. 353, 51 S. E. 411 (1905); Bowles v. Com., 103 Va. 816, 48 S. E. 527 (1904); Henry v. Seattle Electric Co., 55 Wash. 444, 104 Pac. 776 (1909).

A "suspicion of after thought" prevents the use of a narrative as part of the *res gestae*. People v. Dice, 120 Cal. 189, 52 Pac. 477 (1898); Thornton v. State 107 Ga. 683, 33 S. E. 673 (1899); Savannah, etc., R. Co. v. Holland, 82 Ga. 257, 268, 10 S. E. 200, 14 Am. St. Rep. 158 (1888); Hoover v. Cary, 86 Iowa 494, 53 N. W. 415 (1892); Bradberry v. State, 22 Tex. App. 273, 2 S. W. 592 (1886).

declaration follow rapidly upon the event with which it is connected.⁵ The fact that a deliberate statement relating to past events is not receivable as a spontaneous one is most frequently put into the form of saying that such declarations are not part of the *res gestae*.⁶ "The true inquiry, according to all authorities,

5. *Alabama*.—Dean v. State, 105 Ala. 21, 17 So. 28 (1894); Kennedy v. State, 85 Ala. 326, 5 So. 300 (1888).

California.—Kimie v. San Jose-Los Gatos Interurban Ry. Co., 156 Cal. 379, 104 Pac. 986 (1909).

Connecticut.—Morse v. Consolidated Ry. Co., 81 Conn. 395, 71 Atl. 553 (1908).

Georgia.—Fink v. Ash, 99 Ga. 106, 24 S. E. 976 (1896).

Indiana.—Parker v. State, 136 Ind. 284, 35 N. E. 1105 (1893).

Louisiana.—State v. Ramsay, 48 La. Ann. 1407, 20 So. 904 (1896).

Maryland.—Baltimore v. Lobe, 90 Md. 310, 45 Atl. 192 (1900).

Massachusetts.—Com. v. James, 99 Mass. 438 (1868).

Michigan.—Edwards v. Foote, 129 Mich. 121, 88 N. W. 404 (1901); People v. O'Brien, 92 Mich. 17, 52 N. W. 84 (1892).

Minnesota.—State v. Gallehugh, 89 Minn. 212, 94 N. W. 723 (1903).

New York.—People v. Davis, 56 N. Y. 95 (1874); Smith v. Webb, 1 Barb. 230 (1847).

North Carolina.—Simon v. Manning, 99 N. C. 327, 6 S. E. 101 (1888).

Ohio.—Donald v. State, 21 Ohio Cir. Ct. Rep. 124, 11 Ohio Cir. Dec. 483 (1900); Cleveland, etc., R. Co. v. Mara, 26 Ohio St. 185 (1875).

Oklahoma.—Smith v. Territory, 11 Okla. 669, 69 Pac. 805 (1902).

Pennsylvania.—Klein v. Commercial Nat. Bank, 44 Leg. Int. 144 (1887).

Texas.—McCulloch v. State, 35 Tex. Cr. App. 268, 33 S. W. 230 (1895).

Vermont.—Downer v. Strafford, 47 Vt. 579 (1874).

On trial of an indictment for mur-

der, a witness for the commonwealth testified that she had seen the two defendants come from a room where the dead body was found, under such circumstances as tended to show that they were guilty of the crime. It was held that the commonwealth could not show by other witnesses that immediately, and while giving the alarm, she gave the names of the two persons. Com. v. James, 99 Mass. 438 (1868). See § 2991.

6. *California*.—Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307 (1903); Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243 (1903).

Connecticut.—Leonard v. Mallory, 75 Conn. 433, 53 Atl. 778 (1903).

Georgia.—Weinkle v. Brunswick, etc., R. Co., 107 Ga. 367, 33 S. E. 471 (1899).

Illinois.—Druecker v. Sandusky Portland Cement Co., 93 Ill. App. 406 (1900).

Indiana.—Ohio, etc., R. Co. v. Hammersley, 28 Ind. 371 (1867).

Iowa.—Metropolitan Nat. Bank v. Commercial State Bank, 104 Iowa 682, 74 N. W. 26 (1898).

Kentucky.—Early v. Louisville, etc., R. Co., 115 Ky. 13, 72 S. W. 348, 24 Ky. L. Rep. 1807 (1903).

Maryland.—Franklin Bank v. Pennsylvania, etc., Steam Nav. Co., 11 Gill. & J. 28, 33 Am. Dec. 687 (1839).

Massachusetts.—Lane v. Bryant, 9 Gray 245, 69 Am. Dec. 282 (1857).

Missouri.—Aldridge's Adm'r v. Midland Blast Furnace Co., 78 Mo. 559 (1883). See also Koenig v. Union Depot R. Co., 173 Mo. 698, 73 S. W. 637 (1903); Gotwald v. St. Louis Transit Co., 102 Mo. App. 492, 77 S. W. 125 (1903); Helm v. Missouri

is whether the declaration is a verbal act, illustrating, explaining or interpreting other parts of the transaction of which it is itself a part, or is merely a history or a part of a history of a completed past affair. In the one case it is competent, in the other it is not.”⁷

Substance, rather than form, of statement, is regarded by judicial administration as decisive, in this connection.⁸ Though an extrajudicial declaration be, in form, narrative, it will be received in its assertive capacity if in reality it amounts to the spontaneous assertion of a relevant fact.⁹ Nor is a statement necessarily to be regarded as lacking in spontaneity because it is made in response to a question,¹⁰ though that fact often is an important element in rendering a statement inadmissible.¹¹ A narrative

Pac. R. Co., 98 Mo. App. 419, 72 S. W. 148 (1903).

Nebraska.—Clancy v. Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446 (1904).

New York.—People v. Friedman, 134 N. Y. Suppl. 153 (1912); Sherman v. Delaware, etc., R. Co., 106 N. Y. 542, 13 N. E. 616 (1887); Green v. New York Cent. R. Co., 4 Daly 553, 12 Abb. Pr. (N. S.) 473 (1872).

North Dakota.—Balding v. Andrews, 12 N. D. 267, 96 N. W. 305 (1903).

Pennsylvania.—Briggs v. East Broad Top R. etc., Co., 206 Pa. St. 564, 56 Atl. 36 (1903).

South Carolina.—Patterson v. South Carolina R. Co., 4 S. C. 153 (1872).

Texas.—Gulf, etc., R. Co. v. York, 74 Tex. 364, 12 S. W. 68 (1889).

United States.—Fidelity, etc., Co. v. Haines, 111 Fed. 337, 49 C. C. A. 379 (1901). See also Marande v. Texas, etc., R. Co., 124 Fed. 42, 59 C. C. A. 562 (1903).

7. Chicago West. Div. R. Co. v. Becker, 128 Ill. 545, 548, 21 N. E. 524, 15 Am. St. Rep. 144 (1889), per Magruder, J.

8. A statement by a young man who had been struck by a train, made while he was fully conscious and made freely and with deliberation, going into the details to a con-

siderable extent, was inadmissible as “*res gestae*.” Bionto v. Illinois Cent. R. Co., 125 La. 147, 51 So. 98, 27 L. R. A. (N. S.) 1030 (1910).

9. Lovett v. State, 80 Ga. 255, 4 S. E. 912 (1887); Murray v. Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660 (1903); Edwards v. Edwards, 39 Pa. St. 369 (1861).

10. Denver City Tramway Co. v. Brumley, 51 Colo. 251, 116 Pac. 1051 (1911); Christopherson v. Chicago, M. & St. P. R. Co., 135 Iowa 409, 109 N. W. 1077 (1906); Lexington v. Fleharty, 74 Neb. 626, 104 N. W. 1056 (1905).

11. In an action to recover damages for the death of a rigger who it was claimed fell from an iron ladder attached to a travelling crane, because of the bending and giving way of the ladder, it was error to allow a fellow workman, who was standing a few feet away from the spot where the deceased struck the floor of the shop after he fell, to testify “when I asked him what had happened, he said ‘my feet is broke; the ladder bent over,’” as such declaration of the deceased was not spontaneous. Greener v. General Electric Co., 208 N. Y. 135, 102 N. E. 527 (1913).

statement gains nothing in probative force, as proof of the facts alleged, by the mere circumstance that it has been put into writing.¹²

Poisoning.—As in case of dying declarations,¹³ so generally, the range of probative extrajudicial statements denominated as part of the *res gestae* by American courts, seems greatly extended in cases of poisoning. Difficulty of proof presents, in this connection, as in others, a constant claim for administrative indulgence. Many of the essential facts being concealed from observation, judicial administration is reduced, as in case of mental states or conditions, to establishing the actual *res gestae* by the use of circumstantial evidence. In so doing, a wide range of proof is regarded as permissible. Among other relevant facts, any statements of the sufferer, after taking the drug, relating to its administration or operation, have been admitted as part, it is said, of the *res gestae*.¹⁴ Other tribunals have considered that this view is more liberal than is called for by the exigencies of the situation.¹⁵

§ 3022. (Narrative Excluded); Admissions Distinguished.—Carefully to be distinguished from rules regulating the admissibility of spontaneous statements as proof of the facts asserted, is the operation of the familiar principle of procedure or substantive law which receives, also in proof of the facts alleged, extrajudicial declarations as the admissions of a party.¹ The latter, it need scarcely be said, are admissible in civil² or in criminal proceed-

12. *Henkel v. Trubee*, (Conn. 1887) 11 Atl. 722; *Wilson v. Sherlock*, 36 Me. 295 (1853).

13. §§ 2811 *et seq.*

14. *Missouri.*—*State v. Thompson*, 132 Mo. 301, 34 S. W. 31 (1896).

New York.—*People v. Benham*, 63 N. Y. Suppl. 923, 30 Misc. 466, 14 N. Y. Cr. Rep. 434 (1900).

Texas.—*Johnson v. State*, 30 Tex. App. 419, 17 S. W. 1070, 28 Am. St. Rep. 930 (1891).

Virginia.—*Purvey v. Com.*, 83 Va. 51, 1 S. E. 512 (1887).

United States.—*Jack v. Mutual Reserve Fund L. Assoc.*, 113 Fed. 49, 51 C. C. A. 36 (1902).

In a prosecution for murder al-

leged to have been caused by poison contained in a lunch said to have been handed deceased by defendant, statements by deceased to another person while both were eating the lunch as to how and from whom he received it were held admissible as *res gestae*. *State v. Thompson*, 132 Mo. 301, 34 S. W. 31 (1896).

15. *Smith v. State*, 53 Ala. 486 (1875); *Graves v. People*, 18 Colo. 170, 32 Pac. 63 (1893); *Hall v. State*, 132 Ind. 317, 31 N. E. 536 (1892); *Field v. State*, 57 Miss. 474, 34 Am. Rep. 476 (1879).

§ 3022-1. §§ 1310 *et seq.*

2. *California.*—*Gulzoni v. Tyler*, 64 Cal. 334, 30 Pac. 981 (1883).

ings,³ although the extrajudicial statement, not being spontaneous,

Colorado.—Lord v. Pueblo Smelting, etc., Co., 12 Colo. 390, 21 Pac. 148 (1888).

Iowa.—Lindsay v. Carpenter, 90 Iowa 529, 58 N. W. 900 (1894); Funston v. Chicago, etc., R. Co., 61 Iowa 452, 16 N. W. 518 (1883).

Kansas.—Walker v. Brantner, 59 Kan. 117, 52 Pac. 80, 68 Am. St. Rep. 344 (1898).

Louisiana.—Oliver v. Louisville, etc., R. Co., 43 La. Ann. 804, 9 So. 431 (1891).

Michigan.—Tyler v. Nelson, 109 Mich. 37, 66 N. W. 671 (1896).

Mississippi.—Southern R. Co. v. McLellan, 80 Miss. 700, 32 So. 283 (1902).

New York.—Barrett v. New York Cent., etc., R. Co., 157 N. Y. 663, 52 N. E. 659 (1899); Thomas v. Beebe, 25 N. Y. 244 (1862).

Pennsylvania.—Ellison v. Namer, 1 Phila. 205 (1851).

Vermont.—Lewis v. Barker, 55 Vt. 21 (1883).

Probative force.—In the absence of estoppel, no conclusive effect can be attached by judicial administration to the existence of such a statement. Cooper v. Central R. Co., 44 Iowa 134 (1876); Zemp v. Wilmington, etc., R. Co., 9 Rich. L. (S. C.) 84, 64 Am. Dec. 763 (1855).

3. People v. Simonds, 19 Cal. 275 (1861); State v. Davis, 104 Tenn. 501, 58 S. W. 122 (1900); McGee v. State, 31 Tex. Cr. App. 71, 19 S. W. 764 (1892); Johnson v. State, 8 Wyo. 494, 58 Pac. 761 (1899).

Admissions by conduct.—Equally admissible, though for a less distinctly procedural reason, are the circumstantially relevant facts developed in the conduct of a party to an action. Thus, an extrajudicial statement made in the presence of a party may be received in evidence if accepted by the latter in silence or accompanied by conduct on his part

which is relevant in some essential particular.

Georgia.—Lampkin v. State, 87 Ga. 516, 13 S. E. 523 (1891).

Indiana.—Surber v. State, 99 Ind. 71 (1884).

Louisiana.—Olivier v. Louisville, etc., R. Co., 43 La. Ann. 804, 9 So. 431 (1891).

Michigan.—People v. Foley, 64 Mich. 148, 31 N. W. 94 (1887).

Missouri.—State v. Ragsdale, 59 Mo. App. 590 (1894).

Pennsylvania.—O'Mara v. Com., 75 Pa. St. 424 (1874).

Texas.—Weathersby v. State, 29 Tex. App. 278, 15 S. W. 823 (1890).

Virginia.—Puryear v. Com., 83 Va. 51, 1 S. E. 512 (1887).

Canada.—Reg. v. Drain, 8 Manitoba L. Rep. 535 (1892).

Flight.—The declarations of the person on trial made during his flight or other efforts to escape arrest may be received under the present principle. Johnson v. State, 8 Wyo. 494, 58 Pac. 761 (1899). In itself considered, flight may constitute an admission by conduct, as showing consciousness of guilt. Com. v. Goldberg, 212 Mass. 88, 98 N. E. 692 (1912); Com. v. Cline, (Mass. 1912) 100 N. E. 358; State v. Tate, (N. C. 1912) 76 S. E. 713; Pittman v. State, (Okla. Cr. App. 1912) 126 Pac. 696; Gotcher v. State, (Tex. Cr. App. 1912) 148 S. W. 574. To have this effect the evidence should be clear, however, that the flight was actually dictated by this feeling, People v. Brecker, (Cal. App. 1912) 127 Pac. 666; actual rather than constructive knowledge of the accusation against him being required. People v. Sainz, 162 Cal. 242, 121 Pac. 922 (1912); State v. Sorenson, (Iowa 1912) 138 N. W. 411. The defendant, however, is always at liberty to show, if he can, that his flight was due to some cause consistent

but relating to a past transaction, would, if offered in the declarant's favor or for a third person, be rejected as narrative. The conclusion that, under the American view,⁴ the scope of the *res gestae* has been pushed, even beyond the bounds of probative relevancy,⁵ to the outermost verge of procedural admissibility, is confirmed by the circumstance that where the statements of a party relating to the existence of a relevant fact are received as admissions they are commonly said to be accepted in evidence as part of the *res gestae*. Conversely a narrative statement is said not to be part of the *res gestae* when the real ground of decision is that it is not competent as an admission,⁶ as where a plaintiff, suing in his own right, is held not to be affected by the statements of the person for whose death or injury⁷ the action is brought, or a given statement offered as an admission is not clearly shown to have been made by the party at all.⁸

§ 3022a. (Narrative Excluded; Admissions Distinguished); Agents.— Perhaps the confusion between these two grounds of admissibility, spontaneity and admission, the former administrative and logical, the latter formal and procedural, most frequently occurs in connection with the extrajudicial statements of *agents*. The root of this ambiguity centers about the protean term "*res gestae*." A familiar rule in the law of agency prescribes that, in order to bind the principal, the declaration or other act of the

with his innocence, *Com. v. Goldberg*, 212 Mass. 88, 98 N. E. 692 (1912), and its probative tendency in this connection may be offset by an offer on the part of the accused to surrender himself to the custody of the sheriff. *Dixon v. State*, (Ga. App. 1912) 76 S. E. 794. Concealment or hiding by the accused may have the same effect as flight. *State v. Tate*, (N. C. 1912) 75 S. E. 713. On the other hand, the fact that one accused of crime made no attempt to escape cannot be shown. *Register v. State*, 10 Ga. App. 623, 74 S. E. 429 (1912). Even a voluntary surrender to the officers of the law is not regarded as relevant. *Register v. State*, 10 Ga. App. 623, 74 S. E. 429 (1912).

4. § 2583.

5. § 1712.

6. *Silviera v. Iversen*, 128 Cal. 187, 60 Pac. 687 (1900); *Fitzgerald v. Weston*, 52 Wis. 354, 9 N. W. 13 (1881).

7. *Ohio, etc., R. Co. v. Hammersley*, 28 Ind. 371 (1867).

8. Where the evidence tended to prove that there were two people in the wagon at the time of its collision with a trolley car the testimony of the motorman that "they said they did not blame" him was held to be incompetent as part of the *res gestae*, in the absence of affirmative proof that the words were spoken by the plaintiff in the pending action. *City R. Co. v. Wiggins*, (Tex. Civ. App. 1899) 52 S. W. 577.

alleged agent must have been made while the latter was acting upon the "business" of the principal, and engaged, in the exercise of his real or ostensible authority, in a *bona fide* attempt to advance it. This "business" of the principal is frequently spoken of, in common judicial parlance, as constituting the "*res gestae*" of the agency.¹ Where, for example, under the provisions of a substantive law, the statement of the agent is made while engaged on the business of the principal, the admission is said to be received in evidence as part of the *res gestae*. Should it, on the contrary, appear that, as a matter of substantive law, the statement which is claimed to affect the principal was not made in pursuance of the authority of the agent, the rejection may well be couched in the phraseology of evidence, it being announced that the declaration is no part of the *res gestae*. Neither the hearsay rule nor the existence of spontaneity has any necessary connection with either the reception or rejection of such an unsworn statement. The matter is purely

§ 3022a-1. A question of substantive law.—To determine the scope and effect of the "*res gestae*" in such a relation, may readily involve the decision of a question in the substantive law of agency.

"When the inquiry is whether the utterance of an agent, or a co-conspirator, is receivable against a party, and it is said, in the case of the agent, that it must have been made in and about the business on which the agent was employed, and while actually engaged in that business; and, of a co-conspirator, that he must have made his declaration while engaged in the common enterprise and regarding that—in such cases it is common to express this idea by saying that the declaration must be made as a part of the *res gesta*; and if it is not so made, it is deemed to be *res inter alios gesta*. Now it is obvious, on a little reflection, that to settle this question adversely to the admissibility of that which is offered in evidence, is really to settle a question in the law of agency or in the law regulating conspiracy—a question in substantive

law. . . . Observe, then, that the rule which says that a man shall be chargeable with the acts and declarations of his agent or fellow-conspirator is not a rule of evidence; and when in stating and applying this rule it is said that the agents declaration must have been made in and about his principal's business, while actually engaged in it, and as a part of the *res gestae*—or again, when it is said of a conspirator's declaration, offered against his fellow-conspirator, that it must have been made while he was actually engaged in the common enterprise about the affairs of it, and as a part of the *res gestae*—the Latin phrase adds nothing; it is used as a compact expression for the business as regards which the law for certain purposes identifies the two conspirators or the principal and agent. In such cases, evidently, the declaration may be about a past fact as well as a present one, so long as it comes up to the above-named requirements." American Law Review, XV 80 (1881), per Professor James Bradley Thayer.

one in the substantive law of agency. Thus when, as frequently happens, the narrative statement of an agent regarding the affairs of his principal is rejected as "not part of the *res gestae*," it may be important to bear in mind that no question of *spontaneity* may be involved in the ruling. It may amount to a mere statement of a proposition in the substantive law of agency, to the effect that it is the duty of an agent rather to act for his principal than to make admissions on his account or to discuss his affairs after they are over. In other words, the exclusion of a narrative statement, though couched in the same language — "because no part of the *res gestae*," — may be due to entirely different reasons in two closely analogous cases. Both statements being tendered as primary evidence of the facts asserted, in case of the utterance not offered as an admission the reason may well be one in the law of evidence, i. e., that the statement cannot properly be regarded as spontaneous. Where, however, the admission of an agent is rejected on the same ostensible ground, the real reason may be one in the substantive law of agency, to wit, that under the facts of the case, the statement is not so related to the business of the principal that, whether spontaneous or otherwise, it can affect him. On the other hand, where the admission of an agent relates to a past transaction, its narrative character will not necessarily exclude it.² The plain reason is that an admission may relate to a past event while a spontaneous statement cannot properly do so, except within narrow limits.³

Form of agency.— This agency may be in any legal form recognized by substantive law, e. g., that of a fellow-conspirator⁴ or of a municipal officer or agent.⁵

§ 3023. (Narrative Excluded); Spontaneous Statements by Agents.— The spontaneous statements of an agent stand in an

2. While a narrative statement by an agent may be received if within the legitimate scope of the agency, upon the same procedural theory that the admission of his principal would be accepted in evidence, a history by an agent of the past events not competent as an admission would be rejected.

3. § 2992.

4. *Tillery v. State*, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882 (1887).

5. *Dixon v. Liberty*, Tp. Sub-Dist. No. 5, 3 Ohio Cir. Ct. 517, 2 Ohio Cir. Dec. 298 (1888); *Circleville v. Throne*, 1 Ohio Cir. Ct. 359, 1 Ohio Cir. Dec. 200 (1885).

entirely different administrative position, as evidence of the facts asserted, from his extrajudicial admissions. The latter, whatever may be the phraseology employed in relation to the term *res gestae*, involve questions of *law*, procedural or substantive. On a question of spontaneity, judicial administration, is concerned with logic and psychology, with proving power and automatic, instinctive mental action. In respect to admissions, the agent is constantly conditioned by his relations to his principal. As the maker of a spontaneous statement, he appears as an individual, in his personal capacity, having the same right to be heard as any other equally competent observer.¹ One is not precluded from

§ 3023-1. *California*.—Durkee v. Central Pac. R. Co., 9 Pac. 99; *reversed* in bank 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562 (1885).

Colorado.—Trumbull v. Donahue, 18 Colo. App. 460, 72 Pac. 684 (1903).

Delaware.—Baldwin v. Peoples R. Co., 7 Pennw. 81, 76 Atl. 1088 (1909).

Idaho.—Anderson v. Great Northern Ry. Co., 15 Idaho 513, 99 Pac. 91 (1908).

Indiana.—Ft. Wayne & W. V. Traction Co. v. Roudebush, 173 Ind. 57, 88 N. E. 676 (1909); Cincinnati, L. & A. Electric St. R. Co. v. Stahle, 37 Ind. App. 539, 76 N. E. 551 (1905); Louisville, etc., R. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520 (1888).

Iowa.—Alseyer v. Minneapolis, etc., R. Co., 115 Iowa 338, 88 N. W. 841, 56 L. R. A. 748 (1902).

Kentucky.—Louisville & N. R. Co. v. Lee, 140 Ky. 91, 130 S. W. 913 (1910); McLeod v. Ginther's Adm'x, 80 Ky. 399, 4 Ky. L. Rep. 276 (1882).

Maryland.—United Rys. & Electric Co. v. Clomans, 107 Md. 681, 69 Atl. 379 (1908).

Michigan.—Ensley v. Detroit United R. Co., 96 N. W. 34 (1903).

Minnesota.—O'Connor v. Chicago, etc., R. Co., 27 Minn. 166, 6 N. W. 481, 38 Am. Rep. 288 (1880).

Nebraska.—Union Pac. R. Co. v. Edmondson, 77 Neb. 682, 110 N. W.

650 (1906); Union Pac. R. Co. v. Elliott, 54 Neb. 299, 74 N. W. 627 (1898).

North Dakota.—Balding v. Andrews, 12 N. D. 267, 96 N. W. 315 (1903).

Texas.—City of Austin v. Nuchols, 42 Tex. Civ. App. 5, 94 S. W. 336 (1906); Missouri, K. & T. Ry. Co. v. Jones, 35 Tex. Civ. App. 584, 80 S. W. 852 (1904); Gulf, etc., R. Co. v. Milner, 28 Tex. Civ. App. 86, 66 S. W. 574 (1902); Texas, etc., R. Co. v. Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929 (1891).

Washington.—Lambert v. La Conner Trading, etc., Co., 30 Wash. 346, 70 Pac. 960 (1902); Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111 (1902).

Wisconsin.—Hermes v. Chicago, etc., R. Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69 (1891); Bass v. Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437 (1877). See also Hupfer v. Nat. Distilling Co., 119 Wis. 417, 96 N. W. 809 (1903).

United States.—American Mfg. Co. v. Bigelow, 188 Fed. 34, 110 C. C. A. 77 (1911); Kansas City Southern R. Co. v. Moles, 121 Fed. 351, 58 C. C. A. 29 (1903).

"The rules of evidence permitting the immediate and spontaneous declarations and acts of persons to be received in evidence as an exception to the hearsay rule, when they are

making effective statements which will be evidence of the facts asserted merely because he is at the same time an agent, employee or servant. Nice administrative questions may well arise, especially in suits for personal injury, as to whether a declaration by an employee of a defendant company relating to the existence of a past *res gestae* or probative fact is to be received in evidence as the admission of a qualified agent, as the spontaneous utterance of an observer, as independently relevant; or is, on the contrary, to be rejected altogether. A locomotive engineer, for example, whose every nerve is vibrating as a result of a fatal highway collision, just past in point of time, but still present in its influence upon the speaker and in its physical effects, which lie all about him, makes a statement. Had he been looking, he says, and applied his brakes promptly, the dead man would now be alive.² Objection is made that the statement is mere hearsay, a narrative of a past transaction. Should the contention that the declaration is in fact a spontaneous one not be approved, it is still open to the proponent to tender it as the admission of the defendant company, made by an authorized agent in the course of his employment. Such forensic situations occur with especial frequency in actions for personal injuries brought against railroads,³ street

part of the *res gestae* of a transaction itself admissible in evidence, and permitting declarations and acts of the agent to be received in evidence as the declarations or acts of the principal himself, 'involve two distinct and unrelated principles.' . . . In the one case the admission of the declarations or acts rests on the principle that they are intimately interwoven with the transaction of which they are a part, and that they are the spontaneous expression of thoughts or acts created by and springing out of such transaction. The declarations in such case are admissible in evidence for or against either party, regardless of the relation of agency. In such case it is proper enough to say that the declarations 'must be voluntary and spontaneous,' and 'so as to preclude the idea of design,' etc. In the other the admission rests upon the prin-

ciple of agency and the authority of the agent in the particular instance to speak for the principal." *Meyers v. San Pedro, L. A. & S. L. R. Co.*, 36 Utah 307, 104 Pac. 736, 21 Am. & Eng. Ann. Cas. 1229 (1909).

2. The statement made by a locomotive engineer shortly after the occurrence that he would have killed a person crossing the track if he had not applied the air-brakes promptly is admissible as part, it is said, of the *res gestae*. *International, etc., R. Co. v. Bryant*, (Tex. Civ. App. 1899) 54 S. W. 364.

3. *Alabama*.—*Memphis, etc., R. Co. v. Womack*, 84 Ala. 149, 4 So. 618 (1887); *Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403 (1882); *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621 (1877).

Arkansas.—*St. Louis, etc., R. Co. v. Kelley*, 61 Ark. 52, 31 S. W. 884 (1895).

railways⁴ and other corporate defendants.⁵ A narrative extrajur-

California.—Durkee v. Central Pac. R. Co., 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562 (1886).

Colorado.—Trumbull v. Donahue, 18 Colo. App. 460, 72 Pac. 684 (1903).

Georgia.—Newsom v. Georgia R. Co., 66 Ga. 57 (1880); Central R. etc., Co. v. Kelly, 58 Ga. 107 (1877); Marsh v. South Carolina R. Co., 56 Ga. 274 (1876).

Idaho.—Anderson v. Great Northern Ry. Co., 15 Idaho 513, 99 Pac. 91 (1908).

Iowa.—Scott v. St. Louis, etc., R. Co., 112 Iowa 54, 83 N. W. 818 (1900); Norman v. Chicago, etc., R. Co., 110 Iowa 283, 81 N. W. 597 (1900).

Kentucky.—Louisville & N. R. Co. v. Lee, 140 Ky. 91, 130 S. W. 813 (1910); Cincinnati, N. O. & T. P. Ry. Co. v. Evans' Adm'r, 129 Ky. 152, 33 Ky. L. Rep. 596, 110 S. W. 844 (1908); Illinois Cent. R. Co. v. Cotter, 31 Ky. L. Rep. 679, 103 S. W. 279 (1907); Hughes v. Louisville, etc., R. Co., 104 Ky. 774, 48 S. W. 671, 20 Ky. L. Rep. 1029 (1898); Chesapeake, etc., R. Co. v. Reeves' Adm'r, 11 S. W. 464, 11 Ky. L. Rep. 14 (1889).

Missouri.—Shaefer v. Missouri Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154 (1902); Helm v. Missouri Pac. R. Co., 98 Mo. App. 419, 72 S. W. 148 (1902); Barker v. St. Louis, etc., R. Co., 126 Mo. 143, 28 S. W. 866, 47 Am. St. Rep. 646, 26 L. R. A. 843 (1894).

Nebraska.—Union Pac. R. Co. v. Edmondson, 77 Neb. 682, 110 N. W. 650 (1906).

North Carolina.—Willis v. Atlantic, etc., R. Co., 120 N. C. 508, 26 S. E. 784 (1897); Southerland v. Wilmington, etc., R. Co., 106 N. C. 100, 11 S. E. 189 (1890).

Pennsylvania.—Erie, etc., R. Co. v. Smith, 125 Pa. St. 259, 17 Atl. 443, 11 Am. St. Rep. 895 (1889).

Texas.—Missouri, K. & T. Ry. Co. v. Jones, 35 Tex. Civ. App. 584, 80

S. W. 852 (1904); Houston, etc., R. Co. v. Norris, (Civ. App. 1897) 41 S. W. 708; Missouri Pac. R. Co. v. Ivy, 71 Tex. 409, 9 S. W. 346, 10 Am. St. Rep. 758, 1 L. R. A. 500 (1888); Houston, etc., R. Co. v. Hicks, 2 Tex. Unrep. Cas. (Posey) 437 (1883). See also Southern Kansas R. Co. v. Crump, 32 Tex. Civ. App. 222, 74 S. W. 335 (1903).

Virginia.—Jammison v. Chesapeake, etc., R. Co., 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813 (1895).

West Virginia.—Hawker v. Baltimore, etc., R. Co., 15 W. Va. 628, 36 Am. Rep. 825 (1879).

United States.—Vicksburg, etc., R. Co. v. O'Brien, 119 U. S. 99, 7 S. Ct. 118, 172, 30 L. ed. 299 (1886).

What a hostler in charge of an engine said, immediately after the plaintiff had been injured because of the moving of the engine, and while the plaintiff was lying on the ground, concerning why the engine moved, was admissible. Douda v. Chicago, R. I. & P. Ry. Co., 141 Iowa 82, 119 N. W. 272 (1909).

Statements by a conductor of a train which had been derailed that the derailment was caused by spikes pulling out, made nearly two hours after the accident, the interval being spent in providing relief, were admissible as spontaneous statements. Walters v. Spokane International Ry. Co., 58 Wash. 293, 108 Pac. 593 (1910).

4. *Alabama*.—Merrill v. Sheffield Co., 169 Ala. 242, 53 So. 219 (1910).

Arkansas.—Little Rock Traction, etc., Co. v. Nelson, 66 Ark. 494, 52 S. W. 7 (1899).

California.—Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243 (1903).

Delaware.—Baldwin v. People R. Co., 7 Pennew. 81, 76 Atl. 1088 (1909).

District of Columbia.—Metropoli-

dicial statement of an agent will be received as an admission, if shown to be suitably connected with the agency.⁶ Otherwise it will generally be rejected.⁷

tan R. Co. v. Collins, 1 App. Cas. 383 (1893).

Indiana.—*Ft. Wayne & W. V. Traction Co. v. Roudebush*, 173 Ind. 57, 88 N. E. 676 (1909); *Cincinnati, L. & A. Electric St. R. Co. v. Stahle*, 37 Ind. App. 539, 76 N. E. 551 (1905); petition for rehearing overruled, 37 Ind. App. 539, 77 N. E. 363 (1906).

Kentucky.—*Louisville Ry. Co. v. Johnson's Adm'r*, 131 Ky. 277, 115 S. W. 207, 20 L. R. A. (N. S.) 133n. (1909).

Maryland.—*United Rys. & Electric Co. v. Cloman*, 107 Md. 681, 69 Atl. 379 (1908); *Dietrich v. Baltimore, etc., R. Co.*, 58 Md. 347 (1882).

Massachusetts.—*Williamson v. Cambridge R. Co.*, 144 Mass. 148, 10 N. E. 790 (1887).

Missouri.—*Ruschenberg v. Southern Electric R. Co.*, 161 Mo. 70, 61 S. W. 626 (1900). See also *Koenig v. Union Depot R. Co.*, 173 Mo. 698, 73 S. W. 637 (1903); *Gotwald v. St. Louis Transit Co.*, 102 Mo. App. 492, 77 S. W. 125 (1903).

New Jersey.—*Blackman v. West Jersey, etc., R. Co.*, 68 N. J. L. 1, 52 Atl. 370 (1902).

New York.—*Hendricks v. Sixth Ave. R. Co.*, 44 N. Y. Super. Ct. 8 (1878).

Tennessee.—*Citizens' St. R. Co. v. Howard*, 102 Tenn. 474, 52 S. W. 864 (1899).

The declarations of a street car conductor, made while assisting a passenger thrown from the car while alighting, that the motorman started the car without a signal were admissible as spontaneous statements. *Denver City Tramway Co. v. Brumley*, 51 Colo. 251, 116 Pac. 1051 (1911).

A statement of the motorman of a trolley car concerning the bad condi-

tion of the gong on the car, made just after the accident and before he had time to reflect was admissible against the railway company. *Lexington St. Ry. v. Strader*, 89 S. W. 158, 28 Ky. L. Rep. 157 (1905).

5. *California*.—*Lissak v. Crocker Estate Co.*, 119 Cal. 442, 51 Pac. 688 (1897).

Colorado.—*T. & H. Pueblo Bldg. Co. v. Klein*, 5 Colo. App. 348, 38 Pac. 608 (1894).

Illinois.—*Momence Stone Co. v. Groves*, 197 Ill. 88, 64 N. E. 335 (1902).

Massachusetts.—*Leistritz v. American Zylonite Co.*, 154 Mass. 382, 28 N. E. 294 (1891).

Texas.—*City of Austin v. Nichols*, 42 Tex. Civ. App. 5, 94 S. W. 336 (1906).

England.—*Agassiz v. London Tramway Co.*, 27 L. T. Rep. (N. S.) 492, 21 Wkly. Rep. 199 (1873).

6. *Colorado*.—*Union Pac. R. Co. v. Hepner*, 3 Colo. App. 313, 33 Pac. 72 (1893) (letters); *New York, etc., Min. Syndicate, etc. v. Rogers*, 11 Colo. 6, 16 Pac. 719, 7 Am. St. Rep. 198 (1887).

Georgia.—*Columbus, etc., R. Co. v. Kennedy*, 78 Ga. 646, 3 S. E. 267 (1887).

Iowa.—*Mosgrove v. Zimbleman Coal Co.*, 110 Iowa 169, 81 N. W. 227 (1899).

Kansas.—*Western Union Tel. Co. v. Getto-McClung Boot, etc., Co.*, 9 Kan. App. 863, 61 Pac. 504 (1900).

Kentucky.—*Louisville, etc., R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866, 15 Ky. L. Rep. 17 (1893).

Massachusetts.—*Ingledeu v. Northern R. Co.*, 7 Gray 86 (1856).

Michigan.—*Keyser v. Chicago, etc., R. Co.*, 66 Mich. 390, 33 N. W. 867 (1887).

§ 3024. (*Narrative Excluded; Spontaneous Statements by Agents*); Different Meaning of *Res Gestae*.—Amplifying the deductions growing out of the typical statement of the locomotive engineer given in a previous section,¹ at some risk of repetition, it is to be observed how varied are the meanings of the term *res gestae* as applied to the two contentions which the proponent makes for the admissibility of the evidence. Submitting the statement of the engineer as a spontaneous one, i. e., as “part of the *res gestae*” in this connection, the standard to which the extrajudicial declaration is referred is that of causation. The court is asked to determine, as an administrative matter, whether, under the circumstances of the case, the reflective faculties of the speaker may rea-

Mississippi.—Yazoo, etc., R. Co. v. Jones, 73 Miss. 229, 19 So. 91 (1895); Illinois Cent., R. Co. v. Tronstine, 64 Miss. 834, 2 So. 255 (1887).

Nebraska.—Homan v. Boyce, 15 Neb. 545, 19 N. W. 590 (1884).

Pennsylvania.—Union R., etc., Co. v. Riegel, 73 Pa. St. 72 (1873).

Texas.—International, etc., R. Co. v. Bryant, (Civ. App. 1899) 54 S. W. 364.

Washington.—Lambert v. La Connor Trading, etc., Co., 30 Wash. 346, 70 Pac. 960 (1902); Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111 (1902).

Wisconsin.—Robinson v. Superior Rapid Transit R. Co., 94 Wis. 345, 68 N. W. 961, 59 Am. St. Rep. 897, 34 L. R. A. 205 (1896).

United States.—Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492 (1899); Wabash Western R. Co. v. Brow, 65 Fed. 941, 13 C. C. A. 222 (1895), *reversed*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. ed. 431.

7. *Connecticut*.—Morse v. Consolidated Ry. Co., 81 Conn. 395, 71 Atl. 553 (1908).

Illinois.—Turner v. Lovington Coal Mining Co., 156 Ill. App. 60 (1910).

Kentucky.—Martin v. South Covington & C. St. Ry. Co., 92 S. W. 571, 29 Ky. L. Rep. 148 (1906).

Missouri.—Redmon v. Metropolitan St. Ry. Co., 185 Mo. 1, 84 S. W. 26, 105 Am. St. Rep. 558 (1904).

South Carolina.—Nelson v. Georgia, C. & N. Ry., 68 S. C. 462, 47 S. E. 722 (1904).

In an action to recover damages for injuries caused by a runaway horse, declarations of the owner's son who was in charge of the horse on the day of the accident, made after the accident, to the effect that the horse was in the habit of running away, the same not being spontaneous, were not admissible against the owner. Haywood v. Hamm, 77 Conn. 158, 58 Atl. 695 (1904).

A statement of an engineer, regarding the cause of an accident, which is not spontaneous is not admissible against the railroad which employs him. Illinois Cent. R. Co. v. Houchins, 121 Ky. 526, 89 S. W. 530, 28 Ky. Law Rep. 499, 1 L. R. A. (N. S.) 375 (1905).

In an action against a vessel to recover for an injury to a stevedore caused by falling down a hatchway, a remark made by the mate ten minutes after the happening of the accident to the effect that the hatch-covers did not fit was inadmissible, not being spontaneous. The Saranac, 143 Fed. 936 (1904).

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sonably be held to have been inhibited, making way for an instinctive and automatic utterance. Should the *res gestae* of the collision so continue to dominate the mind of the engineer as to make it probable that he has told the truth, because the situation practically forces him to, the statement will be received. On the other hand, should the court feel that the declaration is merely a narrative of a past transaction, it will be rejected.²

Under the second contention of the proponent, treating the extrajudicial statement of the engineer as an admission, the standard by which the admissibility of the statement is determined is a rule in the substantive law of agency. In the particular case mentioned, the preliminary question to be determined is: Has the relation of a locomotive engineer to the company employing him been shown to be such that his extrajudicial declaration, stating a dereliction of duty may reasonably be held so far in the line of his employment as to affect the company as its admission? When this question is put into the form of asking whether it was any part of the *res gestae* of the accident for the engineer to admit his failure to observe, in such a way as to bind the company, it is evident that the phrase *res gestae* is being employed in an entirely different meaning from that used under the first contention, one altogether remote from the idea of spontaneity.

§ 3025. (Narrative Excluded); Remoteness.— It has been settled by authority both in England and in the States of the American Union that there is an important administrative difference between a narrative statement and one which simply relates to a past transaction. In other words, a spontaneous utterance may, and indeed usually does, relate to a fact which is past in point of time. So long as the controlling effect of the *res gestae* or probative fact upon the will of the declarant, has not so far ceased to operate as to make it reasonable to feel that the stage of automatic utterance has been replaced by that of self-consciousness, the statement is not to be regarded as narrative.¹ The question of admitting or excluding the evidence is an administrative one and must be

² Merrill v. Sheffield Co., 169 Ala. 242, 53 So. 219 (1910) (motorman).

§ 3025-1. *Kentucky*.—Ross v. Com. 21 Ky. L. Rep. 1344, 55 S. W. 4 (1900); Galloway v. Com., 5 Ky. L. Rep. 213 (1883).

Minnesota.—State v. Alton, 105 Minn., 410, 117 N. W. 617, 15 Am. & Eng. Ann. Cas. 806 (1908).

Missouri.—State v. Birks, 199 Mo. 233, 97 S. W. 578 (1906).

South Carolina.—State v. Way, 76

decided in view of the facts of each individual case,² as is shown by an examination of the decisions in this connection.³ On the

S. C. 91, 56 S. E. 653 (1907); *State v. Lindsey*, 68 S. C. 276, 47 S. E. 389 (1904).

Texas.—*Rainer v. State*, (Cr. App. 1912) 148 S. W. 735; *Clark v. State*, 56 Tex. Cr. App. 293, 120 S. W. 179 (1909); *Hobbs v. State*, 55 Tex. Cr. App. 299, 117 S. W. 811 (1909); *Lockhart v. State*, 53 Tex. Cr. App. 589, 111 S. W. 1024 (1908); *Freeman v. State*, 40 Tex. Cr. App. 545, 46 S. W. 641, 51 S. W. 230 (1898).

Virginia.—*Andrews v. Com.*, 100 Va. 801, 40 S. E. 835 (1902).

2. *Soto v. Territory*, 12 Ariz. 36, 94 Pac. 1104 (1908); *Carswell v. State*, 10 Ga. App. 30, 72 S. E. 602 (1911); *Hall v. State*, 48 Ga. 607 (1873); *State v. Blanchard*, 108 La. 110, 32 So. 397 (1902); *Wright v. State*, 88 Md. 705, 41 Atl. 1060 (1898).

3. *Instances when admissible*.—In a criminal prosecution for sodomy in which the victim was a boy four years of age, his statements in regard to the assault, made to his mother after his return home, the time which elapsed between the assault and the time of making the statements not being shown more definitely than that the boy was away from home about one and one-half hours, were admitted. The court said: "Where the victim of an assault is of an age to render it improbable that his utterance was deliberate and its effect premeditated in any degree, we do not think it is required that such utterance to be admissible as evidence shall have been so nearly contemporaneous with the event which gave rise to it as in the case of an older person, whose reflective powers are not presumed to be so easily affected or kept in abeyance." *Soto v. Territory*, 12 Ariz. 36, 94 Pac. 1104 (1908). Where a person is shot and he immediately states who shot him,

and, running through the street repeating the same statement, falls to the ground and again repeats the statement to a person coming up thirty seconds after the shooting, such statements are admissible because of their spontaneity. *State v. Robinson*, 52 La. Ann. 541, 27 So. 129 (1900). On a trial for murder, a statement made by the accused to a witness after the latter had run 150 yards to the place of the shooting was properly admitted, but a statement made five minutes later by the accused as the two were standing by the body of the deceased was properly excluded. *State v. Davis*, 104 Tenn. 501, 58 S. W. 122 (1900).

Where the defendant, after shooting deceased, drove his horse at full speed to the residence of his father and in a state of excitement made statements concerning the affair to his father, only about five minutes time having elapsed since the shooting, such statements were part of the *res gestae* under the Texas authorities. *Craven v. State*, 49 Tex. Cr. App. 78, 90 S. W. 311, 122 Am. St. Rep. 799 (1905).

The statement made by one accused of murder by stabbing about five or six minutes after the stabbing, as follows: "I am afraid I have cut him bad. I didn't aim to do it. Lor! what will I do? Won't you go for a doctor for him? I will pay for it. Won't you let me go and see my wife and children?" was properly admitted. *Bateson v. State*, 46 Tex. Cr. App. 34, 80 S. W. 88 (1904).

Statements made by the deceased from thirty to sixty minutes after being stabbed upon recovering from a faint are admissible as spontaneous statements. *Freeman v. State*, 40 Tex. Cr. App. 545, 46 S. W. 641, 51 S. W. 230 (1898).

other hand, if the declaration be narrative, it is properly to be excluded though the fact stated be a recent one.⁴ It is doubtful whether any more definite rule can well be formulated as to the precise point of time or causation at which the so-called "principal fact" can be said to be too remote from the statement offered in evidence, for the latter to be regarded as spontaneous.⁵ The effect

Where the prosecuting witness in a prosecution for robbery had received a blow and was knocked down while out in the street and was dragged in an unconscious condition to the sidewalk, statements made by him a few minutes after when he regained consciousness were part of the *res gestae*. *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036 (1903).

Instances when inadmissible.—Declarations of the defendant as to how he happened to shoot the deceased, made about two minutes after the shooting and after the defendant had gone into a house were properly excluded. *Lunsford v. State*, 2 Ala. App. 38, 56 So. 89 (1911).

Statements made by deceased four, five or ten minutes after being shot are not admissible as spontaneous statements where it is not shown what transpired between the shooting and the time the statements were made, "so as to show that the supervening circumstances, including the statements inquired about, were all the product of, and a part of, the difficulty itself." *Vickery v. State*, 50 Fla. 144, 38 So. 907 (1905).

It was not erroneous to exclude the statements of a man charged with shooting his wife, made to two witnesses who after hearing the shots walked about sixty yards to the house of the accused where said statements were made. *Lyles v. State*, 130 Ga. 294, 60 S. E. 578 (1908).

A statement made by the accused, ten minutes after the murder, that he went to the house of the decedent to get some wearing apparel and while there they quarreled, the decedent cut-

ting the coat of the accused with a razor, and that he shot her to prevent her from killing him, is not receivable as part of the *res gestae*, it not appearing what the accused was doing during the time which elapsed between the murder and the statement. *Ford v. State*, 40 Tex. Cr. App. 280, 50 S. W. 350 (1899).

4. *Alabama*.—*Lunsford v. State*, 2 Ala. App. 38, 56 So. 89 (1911); *Dean v. State*, 105 Ala. 21, 17 So. 28 (1894).

Georgia.—*Carswell v. State*, (App. 1911) 72 S. E. 602; *Park v. State*, 126 Ga. 575, 55 S. E. 489 (1906); *Fink v. Ash*, 99 Ga. 106, 24 S. E. 976 (1896).

Indiana.—*Parker v. State*, 136 Ind. 284, 35 N. E. 1105 (1893).

Louisiana.—*State v. Ramsey*, 48 La. Ann. 1407, 20 So. 904 (1896).

Maryland.—*Baltimore v. Lobe*, 90 Md. 310, 45 Atl. 192 (1900).

Massachusetts.—*Com. v. James*, 99 Mass. 438 (1868).

Michigan.—*Edwards v. Foote*, 129 Mich. 121, 88 N. W. 404 (1901).

New York.—*People v. Davis*, 56 N. Y. 95 (1874).

North Carolina.—*Simon v. Manning*, 99 N. C. 327, 6 S. E. 101 (1888).

Ohio.—*Cleveland, etc., R. Co. v. Mara*, 26 Ohio St. 185 (1875).

Oklahoma.—*Smith v. Territory*, 11 Okla. 669, 69 Pac. 805 (1902).

Pennsylvania.—*Klein v. Commercial Nat. Bank*, 44 Leg. Int. 144 (1887).

Texas.—*McCulloch v. State*, 35 Tex. Cr. App. 268, 33 S. W. 230 (1895).

Vermont.—*Downer v. Strafford*, 47 Vt. 579 (1874).

5. *Soto v. Territory*, 12 Ariz. 36, 94

of the lapse of time upon the admissibility of unsworn statements has been discussed generally elsewhere.⁶ It is clear both upon reason and authority that the time element is a highly important one in this connection.⁷ The length of time between the doing of the principal act and the uttering of the words sought to be shown in evidence as a spontaneous statement must be shown, approximately at least. Where this is not done, the statement is commonly rejected.⁸

§ 3026. Range of Spontaneous Statements; Probative Facts Preceding the *Res Gestae*.—The effect of the modern extension of the term *res gestae* in such a way as to embrace not only the *res gestae*, but also the probative facts, by which, in the absence of direct evidence, it is sought to reproduce, circumstantially, the former or constituent facts, has resulted in depriving the phrase *res gestae* of any very definite meaning. It would seem reasonably clear that the *res gestae* of a given case cannot be a certain set of facts, when their existence is admitted or established by direct evidence, and quite a different one, when it becomes necessary, in the absence of direct evidence to establish the right or liability asserted in the action or proceeding by the use of *probative* rather than constituent facts. In other words, it cannot, in the nature of things, well be that the actual *res gestae* become displaced from their position in the case, as soon as it is no longer possible to establish them by the use of direct evidence. As at present gen-

Pac. 1104 (1908); *State v. Blanchard*, 108 La. 110, 32 So. 397 (1902).

Certainly, comparatively few courts would adopt a rule of the degree of stringency applied in a case in Massachusetts. On an indictment for murder, the testimony showed that a woman had observed two men leaving a particular room in which the body of the deceased was immediately discovered. She at once gave the alarm mentioning the names of the two men. Her statement as to this was rejected. *Com. v. James*, 99 Mass. 438 (1868).

6. §§ 3007-3009.

7. *Rutherford v. Com.*, 76 Ky., (13 Bush) 608 (1878); *Price v. State*, 1

Okla. Cr. App. 358, 98 Pac. 447 (1908).

8. *Arkansas*.—*Mitchell v. State*, 82 Ark. 324, 101 S. W. 763 (1907); *Blair v. State*, 69 Ark. 558, 64 S. W. 948 (1901).

Colorado.—*Herren v. People*, 28 Colo. 23, 62 Pac. 833 (1900).

Delaware.—*State v. Uzzo*, 6 Pennw. 212, 65 Atl. 775 (1907).

Georgia.—*Pool v. Warren County*, 123 Ga. 205, 51 S. E. 328 (1905).

Ohio.—*Wade v. State*, 25 Ohio Cir. Ct. Rep. 279 (1903).

Oregon.—*State v. McCann*, 43 Oreg. 155, 72 Pac. 137 (1903); *State v. Smith*, 43 Oreg. 109, 71 Pac. 973 (1903).

erally used the phrase *res gestae*, in connection with the relevancy of spontaneity now under consideration, is so employed as to cover, not only the *res gestae* or constituent facts, properly so-called,¹ but also, with apparently entire indifference, those which precede and those which follow a period of time at which alone any constituent fact could have occurred. If the expression *res gestae* were not resorted to and the true ground for the admission of the unsworn statement were given in each case, as is now done in some instances, this confusion would disappear. Spontaneity, with which we are at present concerned, as a ground for the admission of extrajudicial statements, does indeed present problems of judicial administration, since it is not always easy to determine its presence or absence in connection with a particular utterance; but its force as a guarantor of the truthfulness of a statement is plainly apparent and no uncertainty or vagueness need accompany the application of the principle.

Judicial administration engulfed in the difficulties of ascertaining the actual facts in the matters presented for determination gladly receives in evidence whatever possesses real probative force. This has naturally resulted in giving a wide range to the admission of spontaneous statements, although in many cases there seems to have been a reluctance to set forth the principle upon which their admission was based. Spontaneity being the ground for admissibility, the nature of the action or proceeding in which the evidence is offered is immaterial, as is likewise the manner in which the spontaneous effect is produced. The time of making the declaration as related to the time of the *res gestae* facts, properly so-called, is likewise immaterial, provided the requisite conditions of spontaneity exist. As would be expected, and as will appear in the following sections, the making of the declarations deemed probative usually follows the period of the *res gestae*, properly so-called. This is, however, by no means necessary. It occasionally happens that the reflective faculties of a person are so numbed and stilled by some danger which is imminent or by dread of something that is clearly about to take place that any statement made at the time may properly be regarded as spontaneous. In other words, the controlling influence of the dominating fact may be exerted upon the statement from the future as well as the past,

rendering the statement admissible in evidence because of its spontaneity.² Thus evidence that the child of deceased said, "Don't shoot pap," just before the fatal shot was fired, was admissible, the child being present at the shooting and a participant to the extent of trying to prevent the accused from shooting his father.³ Likewise, the statement of the deceased, made just before she was shot, tending to show that she recognized the person who was about to kill her, was properly received.⁴ Fear of trouble or danger which appears imminent is most commonly the force which is present in such cases, rendering the utterances free from suspicion of fabrication.⁵ However, not every statement made in the presence of danger can be regarded as spontaneous.⁶

§ 3027. (*Range of Spontaneous Statements*); Probative Facts Subsequent to the Res Gestæ.—Probative facts, the office of which is to throw light backward, as it were, upon the nature of the actual *res gestæ*, are receivable in evidence, upon ordinary principles. Among these may properly be extrajudicial statements, employed either in an independently relevant capacity or as spontaneous utterances. In the first case, the probative effect is produced by reason of the mere existence of the declaration, suitable relevancy being shown. A spontaneous utterance is evidence of the truth of the facts asserted in the declaration. In either event,

2. Shirley v. State, 144 Ala. 35, 40 So. 269 (1906); Means v. State, 10 Tex. App. 16, 38 Am. Rep. 640 (1881); Cox v. State, 8 Tex. App. 254, 34 Am. Rep. 746 (1880). See, also, Flynn v. State, 43 Ark. 289, 293 (1884). Compare, Holland v. State, 162 Ala. 5, 50 So. 215 (1909).

3. Kennedy v. Com., 30 Ky. L. Rep. 1063, 100 S. W. 242 (1907).

4. Trulock v. State, 70 Ark. 558, 69 S. W. 677 (1902).

5. Means v. State, 10 Tex. App. 16, 38 Am. Rep. 640 (1881); Cox v. State, 8 Tex. App. 254, 34 Am. Rep. 746 (1880).

In a prosecution for assault with intent to kill, evidence that as the wife of the victim opened a door at the time of the shooting, her child said "Look! there is Uncle Isaac and

Uncle Jesse going to shoot us!" was properly admitted. Shirley v. State, 144 Ala. 35, 40 So. 269 (1906).

On an inquiry regarding the death of a person, a letter written by him stating an intention to commit suicide has been admitted. Rogers v. Manhattan Ins. L. Co., 138 Cal. 285, 71 Pac. 348 (1903).

6. Where the plaintiff's intestate was thrown in front of a trolley car by a frightened horse which he attempted to hold by the bridle until the car passed, a statement made by him just before the accident in response to a question that the horse was "the biggest fool on earth about a car," was not admissible. Alabama City, G. & A. R. Co. v. Heald, (Ala. 1912) 59 So. 461.

the evidence is primary, the unsworn statement being usually spoken of, by the American courts, as "part of the *res gestae*." Naturally, an almost infinite variety of facts may be classified under this head, no test having been suggested as to what constitutes a permissible interval between the controlling fact and the spontaneous utterance which it dominates, more definite than an administrative one, i. e., that the declaration, under the circumstances of the case, should not have ceased to be spontaneous.¹ Obviously, evidence of this character is equally admissible in criminal² and civil cases. The following are a few illustrative instances of the reception in evidence in civil cases of spontaneous statements made subsequent to the *res gestae* period: the statement of a motorman of a street car, made immediately after an accident;³ of a street car conductor made shortly after a person was thrown while attempting to alight;⁴ of the conductor of a railroad train made about two hours after the derailment of his train;⁵ of a railroad engineer shortly after running over a boy;⁶ of a person struck by a spike thrown by a passing freight train, made four or five minutes after being struck;⁷ of a boy, made immediately after being run over by a street car.⁸ No good purpose could be served by extending this list to any great length as the principle of admissibility is the same in all cases without regard to the nature of the facts; but a few more examples may be of value to show the scope of the application of the rule.⁹ Spon-

§ 3027-1. See § 3025.

2. See § 3028.

3. Bessiere v. Alabama City, G. & A. R. Co., (Ala. 1912) 60 So. 82; Kern v. Des Moines City Ry. Co., 141 Iowa 620, 118 N. W. 451 (1908).

4. Denver City Tramway Co. v. Brumley, 51 Colo. 251, 116 Pac. 1051 (1911).

5. Walters v. Spokane International Ry. Co., 58 Wash. 293, 108 Pac. 593 (1910).

6. Stone v. Campbells Creek R. Co., 66 W. Va. 417, 66 S. E. 521 (1909).

7. Blackshear v. Trinity & B. V. Ry. Co., (Tex. Civ. App. 1910) 131 S. W. 854.

8. Di Prisco v. Wilmington City Ry. Co., 4 Pennw. (Del.) 527, 58 Atl. 906 (1904).

9. In a civil action for assault, evidence of what the assaulted person said upon regaining consciousness after the occurrence was properly admitted. Ritter v. Griswold, 2 Ala. App. 618, 56 So. 860.

In an action for injuries to a child caused by the explosion of gasoline, the statements of her mother as to how the accident occurred, made within ten minutes after the explosion, were admissible as part of the "*res gestae*." Du Bois v. Luthmers, 147 Iowa 315, 126 N. W. 147 (1910).

Declarations of parties at a school meeting, tending to show that they were intimidated and for that reason left the meeting, made under such conditions that they must be regarded as spontaneous, were properly re-

taneous declarations may be shown by the testimony of the declarant¹⁰ as well as by that of another person who heard them.

§ 3028. (*Range of Spontaneous Statements; Probative Facts Subsequent to the Res Gestae*); Criminal Cases.—Criminal cases doubtless furnish the most conspicuous field for the application of the rule admitting spontaneous statements as proof of the facts asserted. The excitement often surrounding the commission of a serious offence, the emotions of anger, revenge or despair which may be present and the physical condition of the injured, together with other matters, tend to furnish with great frequency the conditions which make spontaneous utterances a natural result. The declarations of the victim of murder by shooting, made immediately or a few minutes after being shot;¹ those of a person stabbed, made immediately after the stabbing;² those made by a person about three minutes after being knocked down and robbed;³ and those by a victim of an assault after recovering consciousness have been received as spontaneous statements.⁴ Other illustrative examples are not wanting.⁵ That the statement was made in re-

ceived. *Gering v. School Dist. No. 28, Cass County*, 76 Neb. 219, 107 N. W. 250 (1906).

Where the plaintiff in an action for assault alleged that the defendant ejected her from a house so roughly that she fell and injured her arm, it was proper to receive the plaintiff's declaration, made eight or ten seconds after she fell and before she regained her feet, that the defendant pushed her down. *Robinson v. Stahl*, 74 N. H. 310, 67 Atl. 577 (1907).

On the question of the existence of a marriage, declarations of the parties as to the fact which were spontaneous, and not shown to have been made for self-serving purposes, were admissible. *Schwingle v. Keifer*, (Tex. Cr. App. 1911) 135 S. W. 194.

10. *Gulf, C. & S. F. Ry. Co. v. Hall*, 34 Tex. Civ. App. 535, 80 S. W. 133 (1904).

§ 3028-1. *Alabama*.—*Nelson v. State*, 130 Ala. 83, 30 So. 728 (1901).

Florida.—*Williams v. State*, 58 Fla. 138, 50 So. 749 (1909).

Georgia.—*Cason v. State*, 134 Ga. 786, 68 S. E. 554 (1910).

Idaho.—*State v. Wilmbusse*, 8 Idaho 608, 70 Pac. 849 (1902).

Indiana.—*Green v. State*, 154 Ind. 655, 57 N. E. 637 (1900).

North Carolina.—*State v. Spivey*, 151 N. C. 676, 65 S. E. 995 (1909).

Oklahoma.—*Price v. State*, 1 Okla. Cr. App. 358, 98 Pac. 447 (1908).

Texas.—*Johnson v. State*, (Cr. App. 1912) 149 S. W. 165; *Franklin v. State*, (Cr. App. 1905) 88 S. W. 357.

2. *People v. Gilmore*, 17 Cal. App. 737, 121 Pac. 697 (1912); *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908).

3. *Lambert v. People*, 29 Mich. 71 (1874).

4. *People v. Hennard*, 162 Mich. 225, 127 N. W. 303 (1910).

5. *Alabama*.—*Hall v. State*, 130 Ala. 45, 30 So. 422 (1901).

sponse to a question, not leading or suggestive, is no ground for its exclusion.⁶ As the operative element in the relevancy of this class of evidence is spontaneity, it is not further necessary that the element of self incrimination or personal disadvantage should also be present. Where the declaration may fairly be regarded as spontaneous, it is no ground for its rejection that its effect is self-serving to the declarant.⁷ Thus the statement of one charged with murder by shooting to the effect that he did not intend to shoot, made less than two minutes after the shooting, has been admitted.⁸

In general the prosecution in a criminal case may show statements dominated by facts occurring at a stage subsequent to the *res gestae* which are fairly attributable to a consciousness of guilt, on the part of the accused. It may, for example, show those made

Florida.—Marlow v. State, 49 Fla. 7, 38 So. 653 (1905).

Georgia.—Gaines v. State, 108 Ga. 772, 33 S. E. 632 (1899).

Iowa.—State v. Lewis, 139 Iowa 405, 116 N. W. 606 (1908); State v. Rutledge, 135 Iowa 581, 113 N. W. 461 (1907).

Kentucky.—Selby v. Com., 25 Ky. L. Rep. 2209, 80 S. W. 221 (1904).

Louisiana.—State v. Maxey, 107 La. 799, 32 So. 206 (1902).

Minnesota.—State v. Alton, 105 Minn. 410, 117 N. W. 617, 15 Am. & Eng. Ann. Cas. 806 (1908).

Missouri.—State v. Hudspeth, 150 Mo. 12, 51 S. W. 483 (1899).

New York.—People v. Leonardo, 199 N. Y. 432, 92 N. E. 1060 (1910).

Pennsylvania.—Com. v. Van Horn, 188 Pa. St. 143, 41 Atl. 469 (1898).

Rhode Island.—State v. Harris, 69 Atl. 506 (1908); State v. Epstein, 25 R. I. 131, 55 Atl. 204 (1903).

Texas.—Darter v. State, 39 Tex. Cr. App. 40, 44 S. W. 850 (1898).

Wyoming.—Johnson v. State, 8 Wyo. 494, 58 Pac. 761 (1899).

The prayer of the deceased, made immediately after the shooting, asking forgiveness for the defendant, was properly admitted in evidence. *Herrington v. State*, 130 Ga. 307, 60 S. E. 572 (1908).

The statement, made by the deceased to a police officer, who, after running about 400 feet, found deceased lying in the gutter writhing in pain from a bullet wound, has been received. *State v. Foley*, 113 La. 52, 36 So. 885, 104 Am. St. Rep. 493 (1904).

6. *Cason v. State*, (Ga. 1910) 63 S. E. 554; *State v. Foley*, 113 La. 52, 36 So. 885, 104 Am. St. Rep. 493 (1904); *Johnson v. State*, (Tex. Cr. App. 1912) 149 S. W. 165.

7. *Georgia*.—*Darby v. State*, 9 Ga. App. 700, 72 S. E. 182 (1911).

Iowa.—*State v. Rutledge*, 135 Iowa 581, 113 N. W. 461 (1907).

Kentucky.—*Selby v. Com.* 25 Ky. L. Rep. 2209, 80 S. W. 221 (1904).

Missouri.—*State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315 (1899); *State v. Castor*, 93 Mo. 242, 5 S. W. 906 (1887).

Oklahoma.—*Mitchell v. Territory*, 7 Okla. 527, 54 Pac. 782 (1898).

Texas.—*Humphrey v. State*, (Cr. App. 1909) 116 S. W. 570; *Wakefield v. State*, 50 Tex. Cr. App. 124, 94 S. W. 1046 (1906).

8. *Darby v. State*, 9 Ga. App. 700, 72 S. E. 182 (1911).

9. *Bejarano v. State*, 6 Tex. App. 265 (1879).

during flight, or any attempt at escape.⁹ It may also seek to prove declarations made during concealment or in connection with change of name, or alterations made in personal appearance.¹⁰

§ 3029. (*Range of Spontaneous Statements; Probative Facts Subsequent to the Res Gestae; Criminal Cases*); Explanations.

— Among probative facts subsequent to the *res gestae* which occur most frequently in criminal cases, is the exclamation or explanation¹ made by one accused of crime upon his being apprehended,² or when he first meets some third party after the occurrence. Such an extrajudicial statement may be proof of the facts asserted if made under such circumstances as to present the characteristics of a spontaneous utterance. Where these do not exist, a statement may still be independently relevant, for reasons analogous to those which admit the fresh complaint of a woman in an action of rape or for a similar offence. An immediate explanation may be of the highest value to the accused. For example, one found in the possession of counterfeiting tools may properly ask that his instant explanation of his situation upon its discovery by the officers of the law be placed before the jury.³ Even when used in this independently relevant capacity such declarations are frequently spoken of, in American cases, as part of the *res gestae*; — which, indeed, under certain circumstances, they properly may be.

§ 3030. (*Range of Spontaneous Statements; Probative Facts Subsequent to the Res Gestae; Criminal Cases; Explanations*);

Homicide.— The self-serving explanations of one accused of homicide, if made shortly after the commission of the alleged crime, are frequently admissible in his favor. Thus, for example, if one subsequently accused of felonious homicide at once, upon

10. Such probative facts constitute, at most, parts of an effort to reproduce the *res gestae* or tend to show that a certain reproduction of them, e. g., the theory of the government, is probably correct. No such facts constitute the liability asserted. At best, they merely tend to prove facts which do constitute it, or assist to do so. They throw, as it were, light backward upon the *res gestae* as any set of prior facts, i. e., those arising

at the stage of preparation, tend to throw light forward upon them. *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18 (1890); *Tucker v. Peaslee*, 36 N. H. 167 (1858); *Scott v. Shelor*, 28 Gratt. (Va.) 891 (1877).

§ 3029-1. *Slay v. State*, (Tex. Cr. App. 1907) 99 S. W. 550.

2. See also § 3030.

3. *U. S. v. Craig*, 4 Wash. C. C. 729, 25 Fed. Cas. No. 14,883 (1827).

apprehension by an officer, voluntarily gives an explanation of what has occurred, e. g., that the killing was an accident,¹ the declaration is admissible either as proof of the facts asserted or in an independently relevant capacity.² On the other hand, such statements have sometimes been regarded as mere hearsay and have accordingly been rejected.³ Where the explanations of the accused were made at such a time and under such circumstances that they were clearly spontaneous they are commonly admitted as proof of the facts asserted.⁴ Thus where the accused came running in a breathless, excited condition and stated that he had cut the deceased, but had done it in self-defence, the declaration was admissible.⁵ The explanation when received as a spontaneous utterance as proof of the facts asserted generally tends to show either that the killing was accidental⁶ or that it was done in self-defence.⁷ The spontaneous statement of a person shot exonerating the person

§ 3030-1. *Carwile v. State*, 148 Ala. 576, 39 So. 220 (1905).

2. **Hypnotic suggestion.**—As the legitimate probative influence of such an explanation, viewed either as a spontaneous utterance or as corroborative of present testimony and the like, rests on the fact that it is assumed to be a manifestation of the true mental content of the declarant, the reason for admissibility fails where another mind or volition has controlled or supplanted that of the declarant. A declaration made under the influence of hypnosis has accordingly very properly been excluded. *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049 (1897).

3. *Doston v. State*, 94 Ga. 590, 21 S. E. 603 (1894); *Turner v. Com.*, 86 Pa. 54, 71 (1878). See also *U. S. v. Cross*, 20 D. C. 365, 376 (1891).

4. *Darby v. State*, 9 Ga. App. 700, 72 S. E. 182 (1911); *Selby v. Com.*, 25 Ky. L. Rep. 2209, 80 S. W. 221 (1904); *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315 (1899); *Humphrey v. State*, 55 Tex. Cr. App. 329, 116 S. W. 570 (1909); *Wakefield v. State*, 50 Tex. Cr. App. 124, 94 S. W. 1046 (1906); *Teel v. State*, (Tex. Cr.

App. 1902) 69 S. W. 531; *Griffin v. State*, 40 Tex. Cr. App. 312, 50 S. W. 366, 76 Am. St. Rep. 718 (1899).

5. *State v. Rutledge*, 135 Iowa 581, 113 N. W. 461 (1907).

6. A statement of the defendant: "I did not intend to shoot," made less than two minutes after the shooting, has been admitted. *Darby v. State*, 9 Ga. App. 700, 72 S. E. 182 (1911).

Explanations of the accused that he shot merely to frighten the deceased, made a few moments after the shooting, have been regarded as admissible. *Humphrey v. State*, 55 Tex. Cr. App. 329, 116 S. W. 570 (1909).

7. *State v. Rutledge*, 135 Iowa, 581, 113 N. W. 461 (1907); *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315 (1899).

The statement of the defendant, that he was wounded by the deceased just before the fatal shot was fired as he threw up his arm to ward off a blow of the deceased, made to a physician who was dressing the wound should have been admitted. *Wakefield v. State*, 50 Tex. Cr. App. 124, 94 S. W. 1046 (1906).

doing the shooting is also admissible in evidence.⁸ Statements and explanations, however, made by the accused in his own favor upon his examination before the committing magistrate will not be received on the trial.⁹

§ 3031. (*Range of Spontaneous Statements; Probative Facts Subsequent to the Res Gestae; Criminal Cases; Explanations*); Larceny.—In the same way, the statement of one called upon to account for his possession of goods recently stolen may be received in evidence, either as proof of the facts asserted or by way of independent relevancy.¹ In any case, the statement must be made so nearly after the occurrence and under such circumstances that the suspicion of invention may not exclude the existence of a rational probative force.² Where no evidentiary value appears in

8. *Johnson v. State*, 8 Wyo. 494, 58 Pac. 761 (1899).

9. *State v. Dufour*, 31 La. Ann. 804 (1879); *State v. Tobey*, 31 La. Ann. 756 (1879); *State v. Vandergraff*, 23 La. Ann. 96 (1871).

§ 3031-1. *Alabama*.—*Henderson v. State*, 70 Ala. 23, 45 Am. Rep. 72 (1881); *Crawford v. State*, 44 Ala. 45 (1870) (burglary).

Illinois.—*Bennett v. People*, 96 Ill. 602 (1880). See, also, *Comfort v. People*, 54 Ill. 404 (1870).

Kentucky.—*Tipper v. Com.*, 1 Metc. 6 (1858).

Massachusetts.—*Com. v. Rowe*, 105 Mass. 590 (1870).

Mississippi.—*Payne v. State*, 57 Miss. 348 (1879).

North Carolina.—*State v. Worthington*, 64 N. C. 594 (1870).

Oklahoma.—*Mitchell v. Terr*, 7 Okla. 527, 54 Pac. 782 (1898).

Pennsylvania.—*Rhodes v. Com.*, 48 Pa. 395 (1864).

Texas.—*Taylor v. State*, 49 Tex. Cr. Rep. 7, 90 S. W. 647 (1905); *Sitterlee v. State*, 13 Tex. App. 587 (1883); *McPhail v. State*, 9 Tex. App. 164 (1880).

United States.—*Kansas City Star Co. v. Carlisle*, 108 Fed. 344, 47 C. C. A. 384 (1901).

England.—*Reg. v. Abraham*, 2 Car. & K. 550 (1848); *Reg. v. Smith*, 2 Car. & K. 207 (1845) (burglary); *Reg. v. Crowhurst*, 1 Car. & K. 370 (1844).

2. *Bolling v. State*, 98 Ala. 80, 12 So. 782 (1892); *Golden v. State*, 19 Ark. 590 (1858); *Pool v. State*, 48 Tex. Cr. App. 478, 88 S. W. 350 (1905); *Goens v. State*, 35 Tex. Cr. App. 73, 31 S. W. 656 (1895); *Martin v. State*, 32 Tex. Cr. App. 441, 443, 24 S. W. 512 (1893).

"The court below erred in excluding the testimony of Emile Asher and Frank Quintini as to the conversations, between the appellant and them, respectively, touching the steer whilst being driven into the market. These declarations were made at a time when there was no reason to suppose that they were being manufactured for the purpose of exculpation. They were not self-serving declarations, within the true meaning of that principle of the law. They were explanatory of the custody or possession then had by the appellant whilst driving the steers into market." *Johnston v. State*, (Miss. 1912) 58 So. 97, per Whitfield, J.

Declarations of one discovered in

the statement it will be rejected.³ Spontaneous statements, however, explanatory of possession will, in general, be received.⁴ Nor is it any bar to their admissibility that the declarations are self-serving.⁵ On the other hand, such statements have been rejected

possession of stolen goods are not admissible in his favor where they are clearly a part of his plan of defence. *Mason v. State*, 171 Ind. 78, 85 N. E. 776, 16 Am. & Eng. Ann. Cas. 1212 (1908).

What the defendant said to a policeman, concerning how he came in possession of stolen property, immediately upon being arrested on a charge of larceny, was admissible. *State v. Jacobs*, 133 Mo. App. 182, 113 S. W. 244 (1908).

A declaration by one accused of larceny, made before the commission of the alleged offence tending to show that she took the money in question believing it to be her own was admissible as part of the *res gestae*, the element of spontaneity being present. *State v. Brandon*, 76 Mo. App. 305 (1898).

A statement made by the accused, shortly after he was shot down by the prosecuting witness at the door of the latter's chicken house was admissible as a *res gestae* statement. *Bronson v. State*, 59 Tex. Cr. App. 17, 127 S. W. 175 (1910).

The mere fact that declarations are made in answer to questions will not of itself show such a lack of spontaneity as to render them inadmissible. *Hickman v. State*, (Tex. Cr. App. 1912) 145 S. W. 914.

3. *Granger v. State*, 50 Tex. Cr. App. 488, 98 S. W. 836 (1906).

4. *Alabama*.—*Bryant v. State*, 116 Ala. 445, 23 So. 40 (1898); *Smith v. State*, 103 Ala. 40, 43, 16 So. 12 (1893).

Indiana.—See *Mason v. State*, 171 Ind. 78, 85 N. E. 776, 16 Am. & Eng. Ann. Cas. 1212 (1908).

Iowa.—*State v. Conroy*, 126 Iowa 474, 102 N. W. 417 (1905).

Louisiana.—*State v. Thomas*, 30 La. Ann. 600 (1878).

North Carolina.—*State v. Thomas Jones*, 3 Dev. & B. 122 (1838).

Ohio.—*Leggett v. State*, 15 Ohio 283 (1846).

Texas.—See *Hampton v. State*, 5 Tex. App. 463, 467 (1879).

Vermont.—*State v. Daley*, 53 Vt. 442, 38 Am. Rep. 694 (1881).

England.—*R. v. Abraham*, 3 Cox. Cr. C. 430 (1848) (burglary).

Canada.—*R. v. Ferguson*, 16 N. Br. 612 (1876).

See, also, § 2606.

"At the common law, when stolen goods were discovered in the possession of a party recently after being stolen, what he said in explanation of his possession of the property, immediately upon its discovery with him, and before he had time to concoct a story, is a part of the *res gestae*, and receivable as such. . . . But obviously this principle does not apply to cases where the defendant, with ample time to prepare a self-serving story, comes on the stand as a witness, and makes his explanation." *State v. Moore*, 101 Mo. 313, 331, 14 S. W. 182 (1890), per Sherwood, J.

5. "And what the defendant said in this case immediately upon being charged with the theft, when his trunk was searched, was part of the *res gestae*, was admissible in evidence in his favor as well as adversely to him." *State v. Castor*, 93 Mo. 242, 251, 5 S. W. 906 (1887), per Sherwood, J.

Where a person is arrested in possession of property charged to have been stolen, the statements and declarations made by him at the time of his arrest, and constituting a part

as hearsay, irrespective of the existence of probative force either in an independently relevant or assertive capacity,⁶ or whether made before or after a demand for explanation.⁷

It has been held that the rule admitting spontaneous statements explanatory of the possession of stolen goods in favor of the accused cannot be extended to admit such statements made by the accused at the time of his arrest, if the property has gone out of his possession.⁸ This ruling seems rather arbitrary, as it is not apparent what effect the recent disposal of the property, placing the mules in a pasture in the case cited, could have on the admissibility of the evidence if the conditions of spontaneity were present.

The expression, part of the *res gestae*, as has been heretofore indicated, is used by the courts to denote a variety of conditions which makes the truthfulness of an unsworn statement probable, the most prominent of which is spontaneity. The courts extend the meaning of the expression and use it as a general ground for admitting evidence to avoid, apparently, the mental effort of seeking the true ground of admissibility in cases where the evidence seems, to reasonable minds, proper to be considered by the jury. Better illustrations of this tendency will hardly be found than in decisions in cases of larceny. Thus, where on the trial of one charged with stealing a purse, the state showed that he took the purse home and left it with his wife, it was held that the accused should have been allowed to show by his wife what he said to her at the time of delivering the purse to her, as such statements were a part of the *res gestae* of such delivery.⁹ Likewise, in a prosecution for stealing a sum of money, wherein it appeared that the accused met the prosecuting witness as he was coming out of a bank and induced him to go to another part of the city where the larceny was perpetrated, the conversation had between the two from the time they met until the time of the commission of the

of and relating to the transaction, are part of the *res gestae*, and are admissible in evidence in his behalf. Mitchell v. Territory, 7 Okla. 527, 54 Pac. 782 (1898).

6. Cooper v. State, 63 Ala. 80 (1879); Maynard v. State, 46 Ala. 85 (1871); Taylor v. State, 42 Ala.

529 (1868); State v. Pettis, 63 Me. 124 (1873).

7. State v. Waters, 139 Mo. 539, 41 S. W. 221 (1897).

8. Smith v. Territory, 14 Okla. 518, 79 Pac. 214 (1904).

9. Martin v. State, 44 Tex. Cr. App. 538, 72 S. W. 386 (1903).

crime was held to be a part of the *res gestae*.¹⁰ It is apparent upon an examination of the two cases just mentioned that it is unnecessary to seek for a vague and mysterious reason for the admissibility of the declarations in question. Their truth or falsity was immaterial. They were independently relevant and were admissible to show the *animus* or intent of the accused in doing acts which might be regarded as equivocal unless some light were thrown on them by surrounding circumstances. This looseness of expression happily does not always appear. For example, in a prosecution for larceny where the accused was charged with stealing a team of horses which he had hired, he desired to show that, while the team was in his possession and before he knew that any suspicion attached to him, he had stated that the team was not his own, but was one that he had hired. The trial court excluded the evidence. On appeal the court, holding the declarations admissible, said: "So it is when, as in this case, the vital point is the *intent* with which the respondent obtained possession of the property, his subsequent conduct in respect to his possession thereof is a material fact, and his utterances relative thereto which tend to characterize that possession are admissible in his own behalf."¹¹

§ 3032. (*Range of Spontaneous Statements; Probative Facts Subsequent to the Res Gestae*); Poisoning.—An unusually liberal range of application is given to the term *res gestae* and the statements of the injured person in connection therewith in the special case where the fatal agency is that of *poison*. The prosecution is permitted to show practically everything said by the injured person regarding the administration or operation of the poison from the time it was first introduced into the system of the victim until death ensues.¹ Thus, for example, on a trial for

10. *Viberg v. State*, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22 (1903).

11. *State v. White*, 77 Vt. 241, 243, 59 Atl. 829 (1905), per Powers, J.

§ 3032-1. *Missouri*.—*State v. Thompson*, 132 Mo. 301, 34 S. W. 31 (1895).

New York.—*People v. Benham*, 63 N. Y. Suppl. 923, 30 Misc. 466, 14 N. Y. Cr. Rep. 434 (1900).

North Dakota.—*Puls v. Grand Lodge*, A. O. U. W., 13 N. D. 559, 102 N. W. 165 (1904).

Texas.—*Johnson v. State*, 30 Tex. App. 419, 17 S. W. 1070, 28 Am. St. Rep. 930 (1891).

Virginia.—*Purveyer v. Com.*, 83 Va. 51, 1 S. E. 512 (1887).

United States.—*Jack v. Mutual Reserve Fund L. Assoc.*, 113 Fed. 49, 51 C. C. A. 36 (1902).

murder alleged to have been accomplished by poison contained in a lunch claimed to have been handed deceased by defendant, statements by deceased and a person who partook of the lunch with him as to their physical sufferings and feelings soon after eating it are admissible as part of the "*res gestae*," as are also statements of the deceased to the person eating the lunch with him, made while eating the lunch, in regard to how and from

"It is urged that the court erred in admitting statements made by the deceased as a part of the *res gestae* after he had left the place where the poisoning is alleged to have occurred. We are not certain that we fully grasp this objection for the reason that the deceased never left the church in which he was poisoned nor the presence of the organist who was poisoned by the same lunch, more than a minute; and that was to follow him and with him compare notes of their condition. This brings us to consider what was the *res gestae* of the poisoning. When the organist was on the stand the circuit attorney asked him if he knew how the lunch came there, or who brought it there, and if deceased made any statement, as they went to the lunch or while eating it, as to where it came from. To this defendant objected and the court having sent the jury to their room, the witness answered, 'that while we were eating the lunch deceased was telling me that his lunch had been sent to him; that Mrs. McLean had sent it by her hired man.' The trial court excluded this statement by the deceased, and the state duly excepted. 'The *res gestae* may be, therefore, defined,' says Dr. Wharton, 'as those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist, as we will

see, of sayings and doings of anyone absorbed in the event, whether participant or bystander; they may comprise things left undone as well as things done. . . . In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself.' 1 Wharton's Law of Evidence, sec. 259. This statement of the general rule has received the indorsements of the supreme court of New Jersey in *Hunter v. State*, 40 N. J. L. 495, and of Pennsylvania in *Com. v. Werntz*, 29 Atl. Rep. 272, and by this court in various connections. In the very nature of things the *res gestae* must vary as the facts of each case vary. It is not possible to bring this class of cases within a more specific description, however much judges and law writers criticise the indefinite statement of the principle. The criticisms have proven as unsatisfactory as the texts which they have assailed. The *corpus delicti* in this case consisted of the death of Cunningham by poison, and the criminal agency of defendant in administering it to the deceased. We have no doubt whatever of the admissibility of the statements made by the deceased and the organist concerning their physical sufferings and feelings when they were both suffering from the effects of the poison." *State v. Thompson*, 132 Mo. 301, 321, 34 S. W. 31 (1895), per Gantt, J.

whom he received it.² Likewise, where there was evidence that the defendant gave the deceased a headache powder and then left her and about twenty minutes after the deceased took the powder she was found by the witness to be in apparent pain, it was proper to allow the witness to testify to statements made by the deceased that she had been poisoned by the defendant and desired the witness to "Run for a doctor."³ From this extreme view, there is, however, a vigorous dissent.⁴

§ 3033. (*Range of Spontaneous Statements*); Accusation in Travail.—The presence of an element of spontaneity may affect the probative force of a so-called declaration in travail. It has long been held that the mother of an illegitimate child might accuse the putative father at the time of her travail,¹ and that the statement so made might be received in evidence on affiliation proceed-

2. *State v. Thompson*, 132 Mo. 301, 34 S. W. 31 (1895).

3. *Nordan v. State*, 143 Ala. 13, 39 So. 406 (1905).

4. *Smith v. State*, 53 Ala. 486 (1875); *Graves v. People*, 18 Colo. 170, 32 Pac. 63 (1893); *Hall v. State*, 132 Ind. 317, 31 N. E. 536 (1892); *Field v. State*, 57 Miss. 474, 34 Am. Rep. 476 (1879).

Declarations by the defendant's wife, whom he was charged with poisoning, made at some time after the alleged act of the defendant, the time not being shown, and while she was expecting to recover, in the following language: "I believe I am poisoned. . . . He (meaning her husband) has poisoned me. . . . I didn't think he would do it but he did. . . . Do you think he would do such a thing?" were not admissible as part of the "*res gestae*." *Ehrhardt v. People*, 51 Colo. 205, 117 Pac. 164 (1911).

A statement made by deceased while she was ill and being examined by a physician, tending to show the guilt of the accused, was not admissible where the accused immediately

denied it and the evidence showed that part of the statement was untrue. *State v. Swenson*, 26 S. D. 589, 129 N. W. 119 (1910).

Declaration must be one of fact.—A declaration to be admissible must be one of fact, a mere opinion cannot be received. *Orner v. State*, (Tex. Cr. App. 1912) 143 S. W. 935.

Should the evidence be so indefinite as to the interval between the alleged poisoning and the declaration in question that the spontaneity of the latter, its being part of the *res gestae*, cannot reasonably be assumed, the statement will be rejected as proof of the facts asserted. *Com. v. Griffith*, (Ky. 1912) 149 S. W. 825.

§ 3033-1. The time of travail, as this phrase is employed by the legislature has been held to mean the period of labor-pain prior to the birth of the child. *Bacon v. Harrington*, 5 Pick. (Mass.) 63 (1827); *Com. v. Cole*, 5 Mass. 517 (1809). See, also, *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871 (1891); *Tacey v. Noyes*, 143 Mass. 449, 9 N. E. 830 (1887); *Long v. Dow*, 17 N. H. 470 (1845).

ings as proof of the fact asserted.² Probably such a rule was in accordance with ancient practice. The practice itself, however, rested upon an administrative necessity, which latter, while especially marked at a time before interested parties could testify as witnesses, has still continued to be impressive by reason of the conflict of testimony frequently arising where both the interested persons testify and there is little to create a balance of probability. The present law is largely statutory and in certain jurisdictions simply receives the accusation in travail in evidence,³ and in others requires that it should have been made at the time in order that the affiliation or bastardy proceeding should be maintained at all.⁴

Since the disqualification of witnesses on the ground of interest has been in general abolished, this form of extrajudicial declarations continues, as a rule, to be received,⁵ in certain jurisdictions, pursuant to statute.⁶ Other jurisdictions regard the matter as governed entirely by the rules relating to other extrajudicial statements,⁷ and where, under the general rules of evidence, procedural or administrative, the declaration would not be admissible, it is rejected.⁸

2. *Bacon v. Harrington*, 5 Pick. (Mass.) 63 (1827); *Com. v. Cole*, 5 Mass. 517 (1809); *Bishop of Lincoln's Trial*, 3 How. St. Tr. 769, 773 (1637).

3. *Leonard v. Bolton*, 148 Mass. 66, 18 N. E. 879 (1888); *Ray v. Coffin*, 123 Mass. 365 (1874); *Gallary v. Holland*, 81 Mass. 50 (1860).

The assertion need not be in response to questions. *Bailey v. Chesley*, 10 Cush. (Mass.) 284 (1852).

4. *Booth v. Hart*, 43 Conn. 480, 485 (1876); *Judson v. Blanchard*, 4 Conn. 557, 565 (1832); *Chaplin v. Hartshorne*, 6 Conn. 41, 44 (1825); *Palmer v. McDonald*, 92 Me. 125, 42 Atl. 315 (1898); *Wilson v. Woodside*, 57 Me. 489 (1870); *Totman v. Forsaith*, 55 Me. 360 (1868); *Burgess v. Bosworth*, 23 Me. 573 (1844); *Rodimon v. Reding*, 18 N. H. 431, 435 (1846); *Long v. Dow*, 17 N. H. 470 (1845); *Railroad v. J. M.*, 3 N. H. 135, 140 (1825).

This was the early law in Massa-

chusetts. *Drowne v. Stimpson*, 2 Mass. 441 (1807). It has, however, been subsequently modified. *Ray v. Coffin*, 123 Mass. 365 (1874).

5. *Robbins v. Smith*, 47 Conn. 182, 189 (1879); *Leonard v. Bolton*, 148 Mass. 66, 18 N. E. 879 (1888); *Johnson v. Walker*, 86 Miss. 757, 39 So. 49, 1 L. R. A. (N. S.) 470, 109 Am. St. Rep. 733 (1905); *Easley v. Com.*, (Pa. 1887) 11 Atl. 220.

The particulars of the occurrence, as stated by the mother at the time of travail, may be received. *Benton v. Starr*, 58 Conn. 285, 290, 20 Atl. 450 (1890).

6. *Reed v. Haskins*, 116 Mass. 198 (1874). See, also, *Ray v. Coffin*, 123 Mass. 365 (1874).

7. *Sidelinger v. Bucklin*, 64 Me. 371 (1874); *Johnson v. Walker*, 86 Miss. 757, 39 So. 49, 1 L. R. A. (N. S.) 470, 109 Am. St. Rep. 733 (1905).

8. *Iowa*.—*State v. Hussey*, 7 Iowa 409 (1858).

§ 3034. (*Range of Spontaneous Statements*); Declarations of Complainant in Rape.—Criminal proceedings to punish for rape, attempts at rape, indecent assault and the like present peculiar problems of judicial administration, which have been recognized since early times. The peculiar nature of the offence, the circumstances which usually surround its commission, the sex of the injured party, and her natural reticence to speak of it tend to make proof difficult and lead to a relaxation of strict rules of evidence. The result has been the development of a unique rule,¹ or perhaps what would better be termed a principle, as there can hardly be said to exist a settled rule, at least, a uniform rule. The courts have all recognized the principle that, notwithstanding the general rule that a party's self-serving declarations may not be introduced in evidence by him, in this instance there should be an exception. They have differed in the manner of applying this principle and in the latitude to be given to the exception.

The mere fact that the injured party had made a complaint to a proper person in seasonable time is all that has been allowed in many cases. This was permitted to be shown by both the complaint and by the person to whom the complaint was made.² The details of the statement, including the name of the offender, were not allowed to be given. The witness was simply asked whether a complaint had been made and was required to answer by a simple "yes" or "no." This evidence was admitted as an independently relevant circumstance bearing upon the credibility of the testimony of the prosecutrix. It is apparent that no real exception is involved in thus proving the fact of the complaint. In these cases this was, apparently, shown as part of the prosecution's original case.

Minnesota.—*State v. Spencer*, 73 Minn. 101, 75 N. W. 893 (1898).

Montana.—*State v. Tipton*, 15 Mont. 74, 39 Pac. 222 (1894).

Nebraska.—*Stoppert v. Nierle*, 45 Nebr. 105, 63 N. W. 382 (1895).

Texas.—*Poyner v. State*, 40 Tex. Cr. App. 640, 51 S. W. 376 (1899).

Wisconsin.—*Richmond v. State*, 19 Wis. 307 (1865).

§ 3034-1. For some statement of the historical basis upon which the

anomalous rule with regard to rape rests, see article of Prof. J. B. Thayer on Bedingfield's case in 14 Amer. Law Rev. at page 830.

2. "In *R. v. Stroner*, 1 C. & K. 650, (1845) the prosecution was compelled by the court to call the woman to whom the complaint was made, although she was at the time in attendance as a witness for the accused." 14 Amer. Law Rev. p. 830 n. 1.

In other cases, the fact of the complaint and the particulars thereof have been shown as part of the case-in-chief of the prosecution; but the particulars were not admitted as proof of the facts complained of. They were purely for the purpose of corroborating the prosecutrix in anticipation of impeachment; or for the purpose of determining the conflict of veracity frequently arising in such cases between the complaining witness and the accused; or to anticipate the adverse inference upon which the defendant would rely, if no proof of a complaint by his accuser were offered.

A rule which has been adhered to in many cases allows the fact that a complaint was made to be shown in the case-in-chief of the prosecution; and, if any attempt is made by the defence to impeach the credibility of the prosecutrix, then the particulars of the complaint may be shown. Here, again, the particulars are admitted solely for corroborative purposes. They are not considered any proof of the facts asserted by them. The question of the extent to which the impeachment of the prosecutrix must go before the particulars of the complaint are admissible seems not to have been very clearly indicated by the authorities.

Lastly, the fact of the complaint, together with its details, are frequently admitted as spontaneous statements under a true exception to the hearsay rule. The entire evidence is given as part of the case-in-chief of the prosecution. The particulars of the complaint are received as proof of the facts complained of, the element of spontaneity being considered a sufficient guarantee of their truthfulness to make them worthy of consideration by a judicial tribunal. The courts commonly say, in such cases, that the evidence is admissible as part of the *res gestae*. It is necessary to have regard to the jurisdiction in stating the rule to be applied in any given case. In the succeeding sections, the rules obtaining at present in the various jurisdictions will be indicated, therefore, the citation of authorities is unnecessary here.

Sodomy.—Upon principle it would seem that the rules of evidence applicable in rape cases would be equally applicable in sodomy cases, where the victim does not consent. This has in effect been held in a case where the victim was a boy four years of age.³

3. *Soto v. Territory*, 12 Ariz. 36, 94 Pac. 1104 (1908).

§ 3035. (*Range of Spontaneous Statements; Declarations of Complainant in Rape*); English Rule.—The earlier English decisions allowed the fact that the alleged outraged woman had made a complaint to be shown, but excluded the particulars of such complaint.¹ The later decisions modified this view and the present rule in England admits both the fact of the complaint and its particulars;² but the latter are not admitted as proof of the facts complained of. They are received solely for the purpose of showing consistent conduct on the part of the prosecutrix and to corroborate her testimony.³ The particulars of the complaint are admitted on the examination-in-chief of the witnesses for the prosecution.⁴ In this respect, the practice differs from that in the majority of American courts.⁵ The rule is the same in cases of indecent assault, assault with attempt to commit rape and rape.⁶ Where the complaint was in response to a question, the nature of the question not being mentioned, evidence of the particulars of the complaint have been held inadmissible;⁷ but, where the question which prompted the complaint was not leading and suggestive, the particulars of the complaint have been received.⁸ The view of the English courts thus expressed clearly has no close relation to the question of the admissibility of spontaneous statements as proof of the facts asserted therein, as in none of the cases cited does it appear that the complaint was spontaneous. What position would be taken on the question of admitting as proof of the

§ 3035-1. *Rev. v. Mercer*, 6 Jur. 243 (1842); *Reg. v. Osborne*, Car. & M. 622 (1842); *Reg. v. Walker*, 2 M. & Rob. 212 (1839); *Rex v. Clarke*, 2 Stark. 241 (1817).

2. *Rex v. Osborne*, 74 L. J. K. B. 311, 1 K. B. 551, 92 L. T. 393, 53 W. R. 494, 69 J. P. 189, 21 L. T. R. 288 (1905); *Rex v. Kiddle*, 19 Cox Cr. C. 77 (1898); *Reg. v. Lillyman*, 65 L. J. M. C. 195, Q. B. 167 (1896); *Reg. v. Wood*, 14 Cox Cr. C. 46 (1877); *Reg. v. Eyre*, 2 F. & F. 579 (1860).

3. *Rex v. Osborne*, 74 L. J. K. B. 311, 1 K. B. 551, 92 L. T. 393, 53 W. R. 494, 69 J. P. 189, 21 L. T. R. 288 (1905); *Reg. v. Lillyman*, 65 L. J. M. C. 195, 2 Q. B. 167

(1896); *Reg. v. Megson*, 9 C. & P. 420 (1840).

4. *Rex v. Osborne*, 74 L. J. K. B. 311, 1 K. B. 551, 92 L. T. 393, 53 W. R. 494, 69 J. P. 189, 21 L. T. R. 288 (1905); *Reg. v. Lillyman*, 65 L. J. M. C. 195, 2 Q. B. 167 (1896).

5. §§ 3038, 3039.

6. *Reg. v. Osborne*, 74 L. J. K. B. 311, 1 K. B. 551, 92 L. T. 393, 53 W. R. 494, 69 J. P. 189, 21 L. T. R. 288 (1905); *Reg. v. Lillyman*, 65 L. J. M. C. 195, 2 Q. B. 167 (1896).

7. *Reg. v. Merry*, 19 Cox Cr. C. 442 (1900).

8. *Rex v. Osborne*, 74 L. J. K. B. 311, 1 K. B. 551, 92 L. T. 393, 53 W. R. 494, 69 J. P. 189, 21 L. T. R. 288 (1905).

facts asserted, a clearly spontaneous statement of the alleged outraged woman, such as an exclamation made during the progress of the outrage, is problematical; but it would seem that such a statement would be admitted, if extrinsic proof of the assault were first offered.

*The rule in Canada conforms to the English rule.*⁹

§ 3036. (*Range of Spontaneous Statements; Declarations of Complainant in Rape*); American Rule.—The various courts of the United States are not all in harmony in their attitude toward the admissibility of the declarations of the complainant in a case of rape. The mere fact that a complaint was made to a proper person within a reasonable time is uniformly held to be admissible as part of the case-in-chief of the prosecution for the purpose, it is commonly said, of corroborating the prosecutrix.¹ As to whether the particulars of the complaint can be shown as part of the case-in-chief of the prosecution, there is a clear and marked division of opinion. In the large majority of the jurisdictions, the details or particulars of the complaint cannot be shown in the first instance,² while in a few jurisdictions the modern English rule is followed and both the fact that a complaint was made and its full details are admitted upon the direct examination of the witnesses for the prosecution.³ The defence may draw out the particulars of the complaint upon the cross-examination of the people's witnesses.⁴ Apparently, no objection has ever been raised to such a course in any jurisdiction. Obviously, there can be no logical objection. Thus far, there is no difficulty in analyzing the decisions of the American courts. However, in some jurisdictions, where the details of the complaint are rejected in the first instance, it has been held that, if the defense attempts to impair the credibility of the prosecutrix, the full details may be shown by way of rebuttal for the purpose of corroborating her.⁵ These decisions are for the most part characterized by such a vagueness and generalness of expression that one who attempts to sum them up and state the result in the form of a rule is in danger of laying himself open to a charge of inaccuracy in

9. *Reg. v. Riendeau*, 9 Quebec Q. B. 147, affirmed 10 Quebec K. B. 584 (1901).

§ 3036-1. § 3037, see cases cited.

2. See cases cited, § 3038.

3. See cases cited, § 3039.

4. See cases cited, § 3038.

5. See cases cited, § 3039.

case a particular court should later make explanation of its former decisions. How far the defence must go in the direction of impeaching the prosecutrix before the details of the complaint may be shown is a matter which, apparently, has been left to the discretion of the trial judge.

The effect of the element of spontaneity upon the admissibility of the extrajudicial statements of the injured party in a case of rape has been clearly recognized by the American courts. It is to be doubted whether any exception to the hearsay rule need be involved in the admission of the fact of a complaint or its details for the sole purpose of corroboration if such admissions were confined within logical limits. However, where the particulars of the complaint are admitted as proof of the facts complained of, we have a true exception to the hearsay rule. Such an exception is well established as an administrative rule in the United States, and where the element of spontaneity is clearly present in the declarations of the outraged female in a case of rape, such declarations are admitted as proof of the facts asserted.⁶ The court, desirous of receiving all possible light on the truth or falsity of the alleged facts, admits the declarations because of the probability of their trustworthiness arising from their spontaneity.⁷ In the

6. *District of Columbia*.—Snowden v. U. S., 2 App. D. C. 89 (1893).

Georgia.—McMath v. State, 55 Ga. 303 (1875).

Iowa.—State v. Novak, 151 Iowa 536, 132 N. W. 26 (1911).

Louisiana.—See State v. Langford, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277 (1893).

Michigan.—See People v. Marrs, 125 Mich. 376, 84 N. W. 284 (1900); People v. Gage, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854 (1886).

Rhode Island.—State v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766 (1893).

Utah.—State v. Neel, 21 Utah 151, 60 Pac. 510 (1900).

7. "We think the declarations were made at such time and under such circumstances that they appeared to be the result of the excitement produced by the assault upon the

prosecutrix and her flight to a place of safety, and they were, therefore, admissible under what is generally, although somewhat inaccurately described as the *res gestae* rule." State v. Novak, 151 Iowa 536, 539, 132 N. W. 26 (1911), per McClain, J.

"Moreover, we think the declaration was admissible as part of the *res gestae*. It was made but a few moments after the alleged ravishment had been accomplished, and while declarant was under the influence of the mental excitement which it produced. It was made within such time after the act to which it referred, and under such circumstances, as to preclude the element of premeditation." McMurrin v. Rigby, 80 Iowa 322, 325, 45 N. W. 877 (1890), per Robinson, J.

"We think the better rule is that such proof may be admissible as

absence of evidence that the declarations are spontaneous, or, as is commonly said, were part of the *res gestae*, the details of a complaint are not admissible as proof of the facts asserted.⁸

§ 3037. (*Range of Spontaneous Statements; Declarations of Complainant in Rape*); Independent Relevancy; Corroboration.

— The fact of a complaint may be received at the stage of corroboration, not as evidence of the truth of what was said but to sustain the good faith of the prosecutrix.¹ In alleged offences of this nature, a serious administrative difficulty is apt to present itself. The position of the defendant in matters of this kind is either that nothing of the kind occurred or else that the prosecuting witness fully consented. As a rule, he testifies to one effect or the other. As against the testimony of the prosecutrix, there is, therefore, a balance created which judicial administration must in some way determine if possible. The fact of complaint if reasonably speedy assists the prosecution, a failure to complain within a reasonable length of time aids the defendant. It was at all times confessedly proper for the defendant in rape or similar offences, to show that the woman who had suffered the alleged injury had made no complaint as to it.² To rebut this inference of self-contradiction from failure to do that which would have been natural were the facts such as the prosecutrix claims them to have been, the prosecution is at liberty to show, as part of its original case, that the woman did, as a matter of fact, complain

part of the *res gestae*, if the statement was made immediately following the commission of the crime, in which event the particulars of the complaint may be proved as part of the state's case in chief, the same as any facts which are part of the *res gestae*." *State v. Werner*, 16 N. D. 83, 91, 112 N. W. 60 (1907), per Fisk, J.

"Where the complaint is so recent and of such a character as to be a part of the *res gestae*, the particulars or details thereof are also admissible." *State v. Neel*, 21 Utah 151, 156, 60 Pac. 510 (1900), per Bartch, J.

Sodomy.—The details of a statement by a boy four years old who had been the victim of sodomy, made

to his mother while he was still in a state of excitement because of the assault have been received. *Soto v. Territory*, 12 Ariz. 36, 94 Pac. 1104 (1908).

8. *Calliham v. State*, (Tex. Cr. App. 1912) 150 S. W. 617 (aggravated assault).

§ 3037-1. "Hence the fact that she did immediately make complaint has generally been held to be original evidence, corroborating her testimony that the act of the defendant was against her will." *People v. Wilmot*, 139 Cal. 103, 105, 72 Pac. 838 (1903), per Angellotti, J.

2. *State v. Wolfe*, 118 Iowa 564, 92 N. W. 673 (1902).

of the wrong that had been inflicted upon her. In the American courts³ this rule is clearly universal and the fact that complaint

3. Alabama.—Oakley v. State, 135 Ala. 15, 33 So. 23 (1902); Bray v. State, 131 Ala. 46, 31 So. 107 (1901); Lacy v. State, 45 Ala. 80 (1871).

Arkansas.—Sexton v. State, 91 Ark. 589, 121 S. W. 1075 (1909); Skaggs v. State, 88 Ark. 62, 113 S. W. 346, 16 Am. & Eng. Ann. Cas. 622 (1908).

California.—People v. Wilmot, 139 Cal. 103, 72 Pac. 838 (1903); People v. Figueroa, 134 Cal. 159, 66 Pac. 202 (1901). See, also, People v. Baldwin, 117 Cal. 244, 49 Pac. 186 (1897); People v. Graham, 21 Cal. 261 (1862).

Connecticut.—State v. Byrne, 47 Conn. 465 (1880); State v. Kinney, 44 Conn. 153, 26 Am. Rep. 436 (1876); State v. De Wolf, 8 Conn. 92, 20 Am. Dec. 90 (1830).

Georgia.—Huey v. State, 7 Ga. App. 398, 66 S. E. 1023 (1910); Lowe v. State, 97 Ga. 792, 25 S. E. 676 (1895); Stephen v. State, 11 Ga. 225, 233 (1852).

Hawaii.—Terr. v. Schilling, 17 Hawaii 249 (1906).

Idaho.—State v. Fowler, 13 Idaho 317, 89 Pac. 757 (1907).

Illinois.—People v. Weston, 236 Ill. 104, 86 N. E. 188 (1908).

Indiana.—Cross v. State, 132 Ind. 65, 31 N. E. 473 (1892); Weldon v. State, 32 Ind. 81 (1869).

Iowa.—State v. Symens, 138 Iowa 113, 115 N. W. 878 (1908); State v. Andrews, 130 Iowa 609, 105 N. W. 215 (1905); State v. Bebb, 125 Iowa 494, 101 N. W. 189 (1904); State v. Carpenter, 124 Iowa 5, 98 N. W. 775 (1904).

Kansas.—State v. Hoskinson, 78 Kan. 183, 96 Pac. 138 (1908); State v. Daugherty, 63 Kan. 473, 65 Pac. 695 (1901).

Maryland.—Legore v. State, 87 Md. 735, 41 Atl. 60 (1898).

Michigan.—People v. Rich, 133 Mich. 14, 94 N. W. 375, 10 Detroit

Leg. N. 87 (1903); Maillet v. People, 42 Mich. 262, 3 N. W. 854 (1879); People v. Lynch, 29 Mich. 274 (1874); Strang v. People, 24 Mich. 1 (1871).

Minnesota.—State v. Shettleworth, 18 Minn. 208 (1872).

Mississippi.—Frost v. State, 57 So. 221 (1912); Ashford v. State, 81 Miss. 414, 33 So. 174 (1902).

Missouri.—State v. Bateman, 198 Mo. 212, 94 S. W. 843 (1906); State v. Warner, 74 Mo. 83 (1881); State v. Jones, 61 Mo. 232 (1875).

Nebraska.—Henderson v. State, 85 Neb. 444, 123 N. W. 459, 26 L. R. A. (N. S.) 1149 n. (1909); Welsh v. State, 60 Neb. 101, 82 N. W. 368 (1900). See, also, Oleson v. State, 11 Neb. 276, 9 N. W. 38, 38 Am. Rep. 366 (1881).

New Hampshire.—State v. Knapp, 45 N. H. 148 (1863).

New Mexico.—Territory v. Maldonado, 9 N. M. 629, 58 Pac. 350 (1899).

New York.—People v. Friedman, 139 App. Div. 795, 124 N. Y. Suppl. 521 (1910); People v. Bowles, 3 N. Y. Cr. Rep. 447 (1884); Baccio v. People, 41 N. Y. 265 (1869).

North Carolina.—State v. Stines, 138 N. C. 686, 50 S. E. 851 (1905); State v. Parker, 134 N. C. 209, 46 S. E. 511 (1904); State v. Marshall, Phillips Law, 61 N. C. 49 (1866).

Ohio.—McCombs v. State, 8 Ohio St. 643 (1858); Johnson v. State, 17 Ohio 593 (1848).

Oklahoma.—Harmon v. Territory, 9 Okla. 313, 60 Pac. 115 (1900), *affirming* 5 Okla. 368, 49 Pac. 55 (1897).

Oregon.—State v. Sargent, 32 Or. 110, 49 Pac. 889 (1897).

South Carolina.—State v. Dawson, 88 S. C. 225, 70 S. E. 721 (1911).

Tennessee.—Hill v. State, 5 Lea 725 (1880); Benstine v. State, 2 Lea 169, 175, 31 Am. Rep. 593 (1879);

was made may be shown by the prosecution in the first instance. It is, of course, proper in this connection for the prosecution to show when and to whom the complaint was made.⁴ Both the injured female and the person to whom she made complaint may testify as to the fact of complaint.⁵

Such fact is admissible not only in cases of rape or attempts at rape⁶ but also in cases generally in which the offence charged is of a somewhat similar nature.⁷

Phillips v. State, 9 Humph. 246 (1848).

Texas.—*Pefferling v. State*, 40 Tex. 486 (1874).

Utah.—*State v. Neel*, 21 Utah 151, 60 Pac. 510 (1900).

Vermont.—*State v. Willett*, 78 Vt. 157, 62 Atl. 48 (1905); *State v. Niles*, 47 Vt. 82 (1874).

Virginia.—*Brogy v. Com.*, 10 Gratt. 722 (1853).

Washington.—*State v. Hunter*, 18 Wash. 670, 52 Pac. 247 (1898).

Wisconsin.—*Smits v. State*, 145 Wis. 601, 130 N. W. 525 (1911); *Hannon v. State*, 70 Wis. 448, 36 N. W. 1 (1888).

"If a female testifies, that such an outrage has been committed on her person, an inquiry is, at once, suggested, why it was not communicated to her female friends. To satisfy such inquiry, it is reasonable that she should be heard in her declarations, that she did so communicate it, and, that testimony should be received to confirm her story." *State v. De Wolf*, 8 Conn. 93, 100, 20 Am. Dec. 90 (1830), per Daggett, J.

"The exception in cases of rape is made upon the idea that outraged virtue will proclaim her wrong, and therefore silence might be considered as raising a suspicion of consent." *Anderson v. State*, 82 Miss. 784, 788, 35 So. 202 (1903), per Truly, J.

"It may be suggested, perhaps, that it is so natural as to be almost inevitable, that a female, upon whom the crime has been committed, will make immediate complaint

thereof to her mother or other confidential friend; and, inasmuch as her failure to do so, would be strong evidence that her affirmation on the subject, when examined as a witness, was false, that the prosecution may anticipate such a claim by affirmative proof that complaint was made." *Baccio v. People*, 41 N. Y. 265, 268 (1869), per Woodruff, J.

"The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest opportunity, to the relative or friend who naturally has the deepest interest in her welfare, and the absence of such a disclosure tends to discredit her as a witness, and may raise an inference against the truth of the charge. To avoid such discredit and inference it is competent for the prosecution to anticipate any claim as to effects, and show, by affirmative proof of the victim and of her relative or friends to whom she narrated the circumstances of the outrage, that complaint was made recently after its commission." *State v. Neel*, 21 Utah 151, 155, 60 Pac. 510 (1900), per Barch, J.

4. *State v. Ogden*, 39 Oreg. 195, 65 Pac. 449 (1901).

5. *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838 (1904).

6. *State v. Neil*, 13 Idaho 539, 90 Pac. 860 (1907), rehearing denied, 13 Idaho 539, 91 Pac. 318 (1907); *Rogers v. State*, (Tex. Cr. App. 1912) 143 S. W. 631.

7. *Alabama*.—*Bray v. State*, 131

Where there is no claim by the prosecution that the crime was committed by force, as in a case of statutory rape where the female consents, she being of sufficient age to understand the nature of the act,⁸ or in a case of sodomy where both parties consent,⁹ the accused is not allowed to show a failure to complain on the part of the other party. This principle has, apparently, been extended to cover all cases of statutory rape without regard to the consent or non-consent of the female.¹⁰ Such an extension is manifestly illogical since a consenting child would be most unlikely to complain while a forcibly ravished child would be as likely to make complaint as an adult. A logical rule would seem to require that whenever the prosecutrix charges forcible ravishment, the defence may show a failure to complain. This has been judicially recognized.¹¹

The converse of the extended rule mentioned, i. e., that in cases of statutory rape the prosecution may not show the fact of complaint, has apparently never been applied. The fact that a complaint was made is admitted, as would be expected, in a case of statutory rape where the female charges that force was employed.¹² It is also said to be admissible where the female fully and freely consents.¹³ The logical rule is admirably indicated in the follow-

Ala. 46, 31 So. 107 (1901) (assault with intent to rape); *Scott v. State*, 48 *Ala.* 420 (1872) (assault with intent to ravish).

California.—*People v. Swist*, 136 *Cal.* 520, 69 *Pac.* 223 (1902) (sodomy on a child); *People v. Graham*, 21 *Cal.* 261 (1862) (assault with intent to rape).

Michigan.—*People v. Hicks*, 98 *Mich.* 86, 56 *N. W.* 1102 (1893) (indecent assault).

Minnesota.—*Gardner v. Kellogg*, 23 *Minn.* 463 (1877) (indecent assault).

Utah.—*State v. Imlay*, 22 *Utah* 156, 61 *Pac.* 557 (1900) (assault with intent to rape).

See *contra*, *People v. Scattura*, 238 *Ill.* 313, 87 *N. E.* 332 (1909).

8. *Levy v. Territory*, 13 *Ariz.* 425, 115 *Pac.* 415 (1911) (about sixteen years old).

9. *Honselman v. People*, 168 *Ill.* 172, 48 *N. E.* 304 (1897).

10. *People v. Jacobs*, 16 *Cal. App.* 478, 117 *Pac.* 615 (1911); *People v. Lee*, 119 *Cal.* 84, 51 *Pac.* 22 (1897); *State v. Birchard*, 35 *Oreg.* 484, 59 *Pac.* 468 (1899).

11. See *State v. Daugherty*, 63 *Kan.* 473, 65 *Pac.* 695 (1901).

12. *State v. Daugherty*, 63 *Kan.* 473, 65 *Pac.* 695 (1901).

13. *People v. Wilmot*, 139 *Cal.* 103, 105, 72 *Pac.* 838 (1904), per Angelotti, J. The court recognizing the unreasonableness of such a ruling in the following language: "The reason for the rule admitting such testimony would appear to be wanting in the case where the act is accomplished with a female who fully understands the nature thereof, and freely and voluntarily submits thereto."

ing language: "The respondent suggests that, inasmuch as this is a charge of statutory rape and the question of force not material, the rules we have been discussing do not apply. If this had been a case of voluntary intercourse on the part of the prosecuting witness, it is difficult to understand how the question of complaint of the outrage could enter into the case, as that human instinct which impels the woman to complain of an outrage of this kind when accompanied by force, impels her with the same unerring certainty to conceal her shame where the intercourse is voluntary. The prosecuting witness testified to a case of forcible rape. The complaint is admissible in such cases because it is the natural instinct of a woman to complain of an outrage of this kind at the first opportunity, and a law changing the age of consent does not work a corresponding change in human nature itself."¹⁴ The failure in some cases to perceive the true reason for admitting proof of the fact of complaint is shown by the following extract from a judicial opinion: "Others give as a reason of the rule that the failure to complain of the outrage is a circumstance indicating that the female was a consenting party to the act. The latter reason does not appeal to us with much force; for, if such is the reason upon which the rule is based, then such a rule could not well apply to a case such as this, where the outraged female is but eight years of age, and hence below the age of consent. If the rule is to apply at all, we think it certainly should apply in a case of this kind."¹⁵ It is obvious that the fact that a penal statute declares that he who has sexual intercourse with a female under a certain age is guilty of the crime of rape, without regard to the consent of the female, cannot affect the influence upon a reasonable mind of the conduct of the female, as shown by the circumstances of her making or not making a complaint.

§ 3038. (*Range of Spontaneous Statements; Declarations of Complainant in Rape; Independent Relevancy*); *Details Rejected*.—Where the statement is an independently relevant fact, i. e., not as evidence of the truth of anything stated, but as proof of the simple fact that a complaint of rape was actually made, it necessarily follows that the details of the occurrence are not re-

14. *State v. Griffin*, 43 Wash. 591, 600, 86 Pac. 951, 11 Am. & Eng. Ann. Cas. 95 (1906), per Rudkin, J.

15. *State v. Werner*, 16 N. D. 83, 91, 112 N. W. 60 (1907), per Fisk, J.

quired. The particulars of the complaining statement are, under these circumstances, valuable only upon cross-examination should the defendant's counsel seek to establish at that stage either such a conflict between the statements of the complainant and the evidence of the witness as may savor of self-contradiction; or such a marked similarity in the two forms of narrative as may suggest invention. A rather remarkable failure of very eminent English judges to distinguish between the necessity for details when the utterance is used in its independently relevant capacity and as hearsay spontaneous statements, has led them to experience considerable difficulty in ascertaining the rational basis, if any, of the original rule of procedure or practice which limited the proponent of the evidence to eliciting, in the first instance, the mere fact that such a statement had been made. The great majority of the American courts reject the details of the complaint, upon the direct examination of the witnesses sworn in the case-in-chief of the prosecution.¹ Details which are considered inadmissible

§ 3038-1 *Alabama*.—*Gaines v. State*, 167 Ala. 70, 52 So. 643 (1910); *Posey v. State*, 143 Ala. 54, 38 So. 1019 (1905); *Oakley v. State*, 135 Ala. 15, 33 So. 23 (1902); *Bray v. State*, 131 Ala. 46, 31 So. 107 (1901). *Compare, Sanders v. State*, 148 Ala. 603, 41 So. 466 (1906).

Arkansas.—*Sexton v. State*, 91 Ark. 589, 121 S. W. 1075 (1909); *Skaggs v. State*, 88 Ark. 62, 113 S. W. 346, 16 Am. & Eng. Ann. Cas. 622 (1908); *Pleasant v. State*, 15 Ark. 624, 649 (1855).

California.—*People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098 (1904); *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838 (1903); *People v. Lambert*, 120 Cal. 170, 52 Pac. 307 (1903); *People v. Barney*, 114 Cal. 554, 47 Pac. 41 (1896); *People v. Stewart*, 97 Cal. 238, 32 Pac. 8 (1893).

Georgia.—*Iluey v. State*, 7 Ga. App. 398, 66 S. E. 1023 (1910); *Lowe v. State*, 97 Ga. 792, 25 S. E. 676 (1896); *Stephen v. State*, 11 Ga. 225 (1852).

Idaho.—*State v. Fowler*, 13 Idaho 317, 89 Pac. 757 (1907).

Illinois.—*People v. Weston*, 236 Ill. 104, 86 N. E. 188 (1908).

Indiana.—*Polson v. State*, 137 Ind. 519, 35 N. E. 907 (1893); *Cross v. State*, 132 Ind. 65, 31 N. E. 473 (1892); *Thompson v. State*, 38 Ind. 39 (1871); *Weldon v. State*, 32 Ind. 81 (1869).

Iowa.—*State v. Symens*, 138 Iowa 113, 115 N. W. 878 (1908); *State v. Andrews*, 130 Iowa 609, 105 N. W. 215 (1905).

Kansas.—*State v. Hoskinson*, 78 Kan. 183, 96 Pac. 138 (1908); *State v. Daugherty*, 63 Kan. 473, 65 Pac. 695 (1901).

Louisiana.—*State v. McCoy*, 109 La. 682, 33 So. 730 (1903); *State v. Langford*, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277 (1893).

Maine.—*State v. Mulkern*, 85 Me. 106, 107, 26 Atl. 1017 (1892).

Maryland.—See *Legore v. State*, 87 Md. 735, 41 Atl. 60 (1898).

Michigan.—*People v. Marrs*, 125 Mich. 376, 84 N. W. 284 (1900); *People v. Bernor*, 115 Mich. 692, 74 N. W. 184 (1898).

under this view may be, for example, that the accused tore the complainant's clothing² or a statement as to the place where the assault was committed.³ Statements having reference to the complainant's physical condition as to pains, etc., are held not to be details of the complaint to be excluded under the rule.⁴ Under this practice, the defendant is at liberty on cross-examination to draw out the details if he sees fit.⁵

In a few of the jurisdictions in which the details of the complaint are not admitted in the first instance, the name of the person accused by the complainant may nevertheless be shown.⁶ That part of the complaint is rather illogically considered not a

Minnesota.—State v. Shettleworth, 18 Minn. 208 (1872).

Mississippi.—Frost v. State, 100 Miss. 796, 57 So. 221 (1912); Dickey v. State, 86 Miss. 525, 38 So. 776 (1905); Anderson v. State, 82 Miss. 784, 35 So. 202 (1904); Ashford v. State, 81 Miss. 414, 33 So. 174 (1902).

Missouri.—State v. Bateman, 198 Mo. 212, 94 S. W. 843 (1906); State v. Jones, 61 Mo. 232 (1875).

Nebraska.—Henderson v. State, 85 Neb. 444, 123 N. W. 459, 26 L. R. A. (N. S.) 1149 n. (1909); Oleson v. State, 11 Neb. 276, 9 N. W. 38, 38 Am. Rep. 366 (1881).

New Hampshire.—State v. Knapp, 45 N. H. 148 (1863).

New Mexico.—Territory v. Maldonado, 9 N. M. 629, 58 Pac. 350 (1899).

New York.—People v. Friedman, 139 App. Div. 795, 124 N. Y. Suppl. 521 (1910); Baccio v. People, 41 N. Y. 265 (1869).

North Carolina.—State v. Brown, 125 N. C. 606, 34 S. E. 105 (1899).

Oklahoma.—Harmon v. Territory, 9 Okla. 313, 60 Pac. 115 (1900).

Oregon.—State v. Sargent, 32 Ore. 110, 49 Pac. 889 (1897).

South Carolina.—State v. Dawson, 88 S. C. 225, 70 S. E. 721 (1911). See, also, State v. Sudduth, 52 S. C. 488, 30 S. E. 408 (1898).

Texas.—Pefferling v. State, 40 Tex. 486 (1874).

Utah.—State v. Neel, 21 Utah 151, 60 Pac. 510 (1900).

Vermont.—State v. Niles, 47 Vt. 82 (1874). See, also, State v. Willett, 78 Vt. 157, 62 Atl. 48 (1905).

Virginia.—Brogy v. Com., 10 Gratt. 722 (1853).

Washington.—State v. Griffin, 43 Wash. 591, 86 Pac. 951, 11 Am. & Eng. Ann. Cas. 95 (1907); State v. Hunter, 18 Wash. 670, 52 Pac. 247 (1898).

Wisconsin.—Smits v. State, 145 Wis. 601, 130 N. W. 525 (1911); Bannen v. State, 115 Wis. 317, 91 N. W. 107, 965 (1902); Hannon v. State, 70 Wis. 448, 36 N. W. 1 (1888).

2. State v. Barkley, 129 Iowa 484, 105 N. W. 506 (1905).

3. State v. Carroll, 67 Vt. 477, 32 Atl. 235 (1895).

4. State v. Baker, 105 Iowa 99, 76 N. W. 509 (1898).

5. *Alabama*.—Griffin v. State, 76 Ala. 29 (1889).

Arkansas.—Williams v. State, 66 Ark. 264, 50 S. W. 517 (1899).

Georgia.—Huey v. State, 7 Ga. App. 398, 66 S. E. 1023 (1910).

Louisiana.—State v. McCoy, 109 La. 682, 33 So. 730 (1903).

Nebraska.—Henderson v. State, 85 Neb. 444, 123 N. W. 459, 26 L. R. A. (N. S.) 1149 n. (1909).

6. *Iowa*.—State v. Andrews, 130 Iowa 609, 105 N. W. 215 (1905); State v. Barkley, 129 Iowa 484, 105

detail of it. Such a practice entirely overlooks the reason for the rule admitting proof of the fact that a complaint was made.

In *Michigan*, the complaint with its full details is received on the direct examination of the people's witness in cases where the injured female is of tender years.⁷ In view of the discussion in the opinion of the leading case in that state⁸ there may be some doubt as to whether this can be regarded as a settled rule in that jurisdiction, as there is language in that opinion which tends to show that the court thought the details admissible because conditions of spontaneity existed at the time of their utterance.

The decisions in a number of jurisdictions seem to indicate that in those jurisdictions the details are never regarded as admissible for any purpose,⁹ not even for that of corroboration after impeach-

N. W. 506 (1905); *State v. Wheeler*, 116 Iowa 212, 89 N. W. 978, 93 Am. St. Rep. 236 (1902); *State v. Petersen*, 110 Iowa 647, 82 N. W. 329 (1900); *McMurrin v. Rigby*, 80 Iowa 322, 325, 45 N. W. 877 (1890). See, also, *State v. McGhuey*, 153 Iowa 308, 133 N. W. 678 (1911).

Nebraska.—*Welsh v. State*, 60 Neb. 101, 82 N. W. 368 (1900).

Oklahoma.—*Harman v. Terr.*, 9 Okla. 313, 60 Pac. 115 (1900).

Texas.—*Bader v. State*, 57 Tex. Cr. App. 293, 122 S. W. 555 (1909); *Roberson v. State*, (Cr. App. 1899) 49 S. W. 398.

Vermont.—*State v. Carroll*, 67 Vt. 477, 32 Atl. 235 (1895).

In *Arkansas* it has been decided that an officer who arrests one charged with rape may not testify that the prosecutrix described the accused to him and that he identified and arrested the accused upon such description. *Davis v. State*, 63 Ark. 470, 39 S. W. 356 (1897).

7. *People v. Glover*, 71 Mich. 303, 38 N. W. 874 (1888); *People v. Gage*, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854 (1886). See, also, *People v. Marrs*, 125 Mich. 376, 84 N. W. 284 (1900).

8. *People v. Gage*, 62 Mich. 271, 28

N. W. 835, 4 Am. St. Rep. 854 (1886).

9. *California*.—*People v. Scalapio*, 143 Cal. 343, 76 Pac. 1098 (1904); *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838 (1903); *People v. Lambert*, 120 Cal. 170, 52 Pac. 307 (1898); *People v. Barney*, 114 Cal. 554, 47 Pac. 41 (1896); *People v. Stewart*, 97 Cal. 238, 32 Pac. 8 (1893).

Georgia.—*Huey v. State*, 7 Ga. App. 398, 66 S. E. 1023 (1910); *Lowe v. State*, 97 Ga. 792, 25 S. E. 676 (1896); *Stephen v. State*, 11 Ga. 225 (1852).

Illinois.—*People v. Weston*, 236 Ill. 104, 86 N. E. 188 (1908).

Kansas.—*State v. Hoskinson*, 78 Kan. 183, 96 Pac. 138 (1908); *State v. Daugherty*, 63 Kan. 473, 65 Pac. 695 (1901).

Mississippi.—*Frost v. State*, 100 Miss. 796, 57 So. 221 (1912); *Frost v. State*, 94 Miss. 104, 47 So. 898 (1909); *Dickey v. State*, 86 Miss. 525, 38 So. 776 (1905); *Anderson v. State*, 82 Miss. 784, 35 So. 202 (1903); *Ashford v. State*, 81 Miss. 414, 33 So. 174 (1902).

New York.—*People v. Friedman*, 139 App. Div. 795, 124 N. Y. Suppl.

ment.¹⁰ This is not, however, laid down as a rule. All that can be said is that there is nothing in those authorities to indicate that the details are ever admissible, unless it be the quoted language from text-book authorities incidentally used in certain opinions.

§ 3039. (*Range of Spontaneous Statements; Declarations of Complainant in Rape; Independent Relevancy*); Details Admitted.—In a few American jurisdictions the modern English rule prevails, and the prosecution is allowed to show, as a part of its case-in-chief, the particulars of the complaint as well as the fact that a complaint was made.¹ The details are not received as any proof of the facts asserted. They are commonly said to be admitted for the purpose of corroborating the prosecutrix, or to show consistency on her part, but the reason for their admission is not extensively nor clearly discussed in judicial opinions. The true reason may be that the courts, recognizing that the fact of complaint is a circumstance, independently relevant, tending to show the truth of the charges made by the prosecutrix, have regarded the introduction of the details as an aid to the jury in judging the naturalness of the conduct of the prosecutrix in making complaint. There is some indication of this in language found in the opinion of a Connecticut case.² This minority rule is a

521 (1910). But see language in *People v. McGee*, 1 Den. 19 (1845).

Oklahoma.—*Harmon v. Territory*, 9 Okla. 313, 60 Pac. 115 (1900).

Oregon.—*State v. Sargent*, 32 Oreg. 110, 49 Pac. 889 (1897).

South Carolina.—*State v. Dawson*, 88 S. C. 225, 70 S. E. 721 (1911).

Vermont.—*State v. Niles*, 47 Vt. 82 (1874). See, also, *State v. Willett*, 78 Vt. 157, 62 Atl. 48 (1905).

Virginia.—*Brogy v. Com.*, 10 Gratt. 722 (1853).

Washington.—*State v. Griffin*, 43 Wash. 591, 86 Pac. 951, 11 Am. & Eng. Ann. Cas. 95 (1907); *State v. Hunter*, 18 Wash. 670, 52 Pac. 247 (1898).

Wisconsin.—*Smits v. State*, 145 Wis. 601, 130 N. W. 525 (1911); *Hannon v. State*, 70 Wis. 448, 36 N. W. 1 (1888).

10. See § 3039.

§ 3039-1. *State v. Byrne*, 47 Conn. 465 (1880); *State v. Kinney*, 44 Conn. 153, 26 Am. Rep. 436 (1876); *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90 (1830); *Terr. v. Schilling*, 17 Hawaii 249 (1906); *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608 (1879); *Burt v. State*, 23 Ohio St. 344, 394 (1872); *McCombs v. State*, 8 Ohio St. 643 (1858); *Laughlin v. State*, 18 Ohio 99, 51 Am. Dec. 444 (1849); *Johnson v. State*, 17 Ohio 593 (1848); *Hill v. State*, 5 Lea (Tenn.) 725 (1880); *Benstine v. State*, 2 Lea (Tenn.) 169, 175, 31 Am. Rep. 593 (1879); *Phillips v. State*, 9 Humph. (Tenn.) 246, 49 Am. Dec. 709 (1848).

2. "Why has the rule been adopted that in prosecutions for rape, and for attempts to commit rape, the

dangerous one, as the recital of the details, particularly the name of the person complained of, obviously will have some weight with the jury as tending to prove the facts asserted, even though the court expressly charges that no such use is to be made of the evidence. Further, it can hardly find support in logic.

Details admitted for corroboration after impeachment.—In many American jurisdictions where the details of the complaint are rejected in the case-in-chief of the prosecution, the courts have said and, in rare instances, held that the details may be introduced to corroborate the prosecutrix after an attempt to impeach her has been made by the defence.³ The details are admitted, not

public prosecutor may show that the woman on whom the assault was made complained of it to her friends? It is simply because such a course would be natural if the crime had been committed, but very unnatural if it had not been. But her natural impulses would prompt her to tell all the details of the transaction. Why, on the same principle, ought not her statement of the details to be evidence? If her story were untrue, the greater would be the opportunity for detection, and the accused would be helped in his defense. If her story were true, the evidence would show constancy in the charge even to the details, and the truth would the more clearly appear." *State v. Kinney*, 44 Conn. 153, 156, 26 Am. Rep. 433 (1876), per Park, C. J.

3. *Alabama*.—*Gaines v. State*, 167 Ala. 70, 52 So. 643 (1910); *Oakley v. State*, 135 Ala. 15, 33 So. 23 (1902); *Bray v. State*, 131 Ala. 46, 31 So. 107 (1901); *Griffin v. State*, 76 Ala. 29, (1884); *Scott v. State*, 48 Ala. 420 (1872).

Arkansas.—*Hamer v. State*, 150 S. W. 142 (1912); *Sexton v. State*, 91 Ark. 589, 121 S. W. 1075 (1909); *Skaggs v. State*, 88 Ark. 62, 113 S. W. 346, 16 Am. & Eng. Ann. Cas. 622 (1908); *Williams v. State*, 66 Ark. 264, 50 S. W. 517 (1899); *Pleasant v. State*, 15 Ark. 624 (1855).

Idaho.—*State v. Fowler*, 13 Idaho 317, 89 Pac. 757 (1907).

Indiana.—*Pulley v. State*, 174 Ind. 542, 92 N. E. 550 (1910); *Thompson v. State*, 38 Ind. 39 (1871); *Weldon v. State*, 32 Ind. 81 (1869).

Iowa.—*State v. Clark*, 69 Iowa 294, 28 N. W. 606 (1886).

Louisiana.—*State v. Langford*, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277 (1893).

Maryland.—See, *Legore v. State*, 87 Md. 735, 41 Atl. 60 (1898).

Missouri.—*State v. Bateman*, 198 Mo. 212, 94 S. W. 843 (1906); *State v. Jones*, 61 Mo. 232 (1875).

Nebraska.—See, *Oleson v. State*, 11 Nebr. 276, 279, 9 N. W. 38, 38 Am. Rep. 366 (1881).

New Mexico.—*Territory v. Maldonado*, 9 N. M. 629, 58 Pac. 350 (1899).

North Carolina.—*State v. Parker*, 134 N. C. 209, 46 S. E. 511 (1903); *State v. Brown*, 125 N. C. 606, 34 S. E. 105 (1899); *State v. Marshall*, *Phillips Law* 49, 51 (1866).

North Dakota.—*State v. Werner*, 16 N. D. 83, 112 N. W. 60 (1907).

Texas.—*Pefferling v. State*, 40 Tex. 486 (1874).

Utah.—*State v. Neel*, 21 Utah 151, 60 Pac. 510 (1900).

"It seems to be well settled by the adjudications that after the particular testimony of the prosecutrix has been attacked, or her credibility

as proof of the facts asserted in them, but purely for the purpose of corroboration; and the trial judge must, of his own motion, so instruct the jury.⁴ Any attempt to definitely outline the scope of the rule suggested by the cases cited must necessarily be unsatisfactory because of the lack of definiteness in the language of the courts. What is meant by the word impeachment is largely left to speculation. Does it mean the formal impeachment commonly undertaken to show that the reputation of a witness for truth and veracity is bad and that he is not to be believed under oath, or does it mean simply any attack on the testimony of the prosecutrix by offering contradictory testimony, by showing bias or inconsistent statements or by some other method? The best that can be said is that the point at which the details may be introduced must be determined by the trial judge in his administrative capacity. A strenuous cross-examination has been held a sufficient impeachment,⁵ as has also proof by the defence of a prior inconsistent statement.⁶ Although the cases indicate that the details of the complaint may be shown fully after any sufficient attack on the credibility of the testimony of the prosecutrix, it is difficult to assign a reason for so broad a rule. The mere fact that a person has made, at an earlier time, a statement consistent with his testimony on the witness stand, except where such statement was made under the influence of some shock which numbed the reflective faculties, has little weight with a reasonable mind as tending to prove the truth of the testimony. Solid ground for admitting the details under certain circumstances has been indicated judicially.⁷ The details are also clearly admissible in a case where

questioned by the defense, the state may prove the particulars of such statement, either by her or by the person to whom such statement was made." *State v. Werner*, 16 N. D. 83, 92, 112 N. W. 60 (1907), per Fisk, J.

4. *State v. Parker*, 134 N. C. 209, 46 S. E. 511 (1903).

5. *State v. Werner*, 16 N. D. 83, 112 N. W. 60 (1907).

6. "The testimony of this witness was introduced in rebuttal, the defendant having proved by Will Cox that the prosecutrix had made statements to him to the effect that it was not true that her father had ever

raped or attempted to rape her. The evidence of England, under this state of the case was clearly admissible for the purpose of sustaining the testimony of the prosecutrix." *Cox v. State*, (Tex. Cr. App. 1898) 44 S. W. 157, per Hurt, P. J.

7. "Of course, if the defendant desires to draw out the facts on cross-examination of the witness, he may do so, and in that event the ordinary rules governing the redirect examination of witnesses will apply." *Henderson v. State*, 85 Neb. 444, 448, 123 N. W. 459, 26 L. R. A. (N. S.) 1149 n. (1909), per Root, J.

the prosecution shows the fact of a complaint, the time when it was made and the person to whom it was made; and the defence seeks to show that on the occasion in question a complaint of rape was not made at all but rather some other conversation took place.⁸

§ 3040. (*Range of Spontaneous Statements; Declarations of Complainant in Rape; Independent Relevancy*); Failure to Complain.— So natural is the spontaneous impulse to disclose the fact and nature of the injury in this class of cases that any delay in making such a complaint not shown to be due to the presence of some adequate cause will almost inevitably suggest the inference of subsequent fabrication and invention. A forensic necessity, therefore rests upon the prosecution to explain, to the satisfaction of the jury, the reason for any delay which might otherwise seem unreasonable.¹ Satisfactory reasons for even a considerable interval are numerous.² A delay may, however, render subsequent

8. "If the defendant denies that the prosecuting witness made a complaint and undertakes to impeach the testimony upon that point, then the particular facts stated by her may be proved by the prosecution in order to confirm her testimony that she made complaint." *Williams v. State*, 66 Ark. 264, 268, 50 S. W. 517 (1899), per Riddick, J.

"We are of the opinion that it was not error for the trial court, under the facts disclosed by the record, to permit the mother to testify to the particulars of such complaint; the defence having on cross-examination of the little girl, brought out a portion thereof and sought by such cross-examination to elicit facts tending to discredit and impeach the child's testimony in reference thereto." *State v. Werner*, 16 N. D. 83, 92, 112 N. W. 60 (1907), per Fisk, J.

§ 3040-1. *Georgia*.— *Bennett v. State*, 102 Ga. 656, 29 S. E. 918 (1897).

Indiana.— *Polson v. State*, 137 Ind. 519, 35 N. E. 907 (1893).

Iowa.— *State v. Bebb*, 125 Iowa 494, 101 N. W. 189 (1904).

Maryland.— *Legore v. State*, 87 Md. 735, 41 Atl. 60 (1898).

Massachusetts.— *Com. v. Rollo*, 203 Mass. 354, 89 N. E. 556 (1909).

Michigan.— *People v. Marrs*, 125 Mich. 376, 84 N. W. 284 (1900).

New Hampshire.— *State v. Knapp*, 45 N. H. 148 (1863).

New York.— *People v. Bowles*, 3 N. Y. Cr. Rep. 447 (1884).

Texas.— *Salazar v. State*, 55 Tex. Cr. App. 307, 116 S. W. 819 (1909).

2. *State v. Petersen*, 110 Iowa 647, 82 N. W. 329 (1900) (house full of company); *People v. Eggo*, 104 Mich. 341, 62 N. W. 407 (1895) (threats to kill prosecutrix); *State v. Shettleworth*, 18 Minn. 208 (1872); *State v. Knapp*, 45 N. H. 148 (1863) (a week or ten days; parents in poor health).

"If such testimony were admissible solely because part of the *res gestae*, this contention would be of much merit. Such complaint, however, is admissible, not solely because it is part of the *res gestae*, but because it is a fact tending to corroborate the evidence of the prosecutrix." *State v. Peterson*, 110 Iowa 647, 649, 82 N. W. 329 (1900), per Decmer, J.

complaint so devoid of evidentiary value that a jury could not reasonably act upon it.³ Failure to complain is, of course, irrelevant where the intercourse was confessedly with consent. No apparent reason exists, in the nature of things, why the fact of complaints subsequent to the original one should not be received in evidence. They have, however, been rejected.⁴

§ 3041. (*Range of Spontaneous Statements; Declarations of Complainant in Rape; Independent Relevancy; Failure to Complain*); Statement Must be Voluntary.—It is obvious from what has been said that the administrative reasons which permit the independently relevant fact of a complaint to be received in evidence require not only that the statement should be freshly made but also that it should be *voluntary*. Where the condition of the complainant is such as to compel explanation, or the explanation is demanded by interested persons in the form of questions¹ there is no such voluntary complaint as tends to negative the inference of consent which has arisen from previous silence. However, in view of the peculiar nature of the crime of rape and the situation of the injured party after its commission, the complaint is not under all circumstances excluded because made in response to questions.² The circumstances, however, surrounding the disclosure and the form of question used must be considered in passing upon the admissibility of the evidence.³

“Upon a disclosure of all the circumstances the jury might properly find that the delay was neither unreasonable nor inconsistent with the testimony of the prosecutrix.” *State v. Knapp*, 45 N. H. 148, 155 (1863), per Bellows, J.

3. *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73 (1900).

4. *Lowe v. State*, 97 Ga. 792, 25 S. E. 676 (1895).

§ 3041-1. “When the complaint is made, not as a spontaneous act of the prosecutrix, but in response to questions put to her . . . the complaint . . . has but little, if any, probative force as evidence.” *Cunningham v. People*, 210 Ill. 410, 413, 71 N. E. 389 (1904), per Hand, J.

2. The fact that the statements of

the prosecutrix were made in response to questions did not necessarily rob them of their character as complaints. *State v. Dudley*, 147 Iowa 645, 126 N. W. 812 (1910).

3. That prosecutrix made complaint to her teacher who found her crying only after the latter had urged her to tell the cause of her trouble did not as a matter of law deprive the complaint of its voluntary nature. *State v. Peres*, 27 Mont. 358, 71 Pac. 162 (1903).

“Questions of a suggestive or leading character will, indeed, have that effect and will render it inadmissible; but a question such as this, put by the mother or other person, ‘What is the matter?’ or ‘Why are you crying?’ will not do so. These are

§ 3042. (*Range of Spontaneous Statements; Declarations of Complainant in Rape*); The Element of Time; Independent Relevancy.—The early English law requiring “hue-and-cry” was designed to afford immediate notice to the community of the commission of a crime that instant pursuit might be made and the offender apprehended. In rape, as in other crimes, a *fresh* complaint was demanded; i. e., only a short interval could be permitted to elapse between the doing of the deed and the making of the complaint. So far as the fact of complaint is one of independent relevancy, the same strictness of requirement as to length of time between offence and complaint is not made under the modern rule.¹ The use of the fact of complaint is, in this connection, a corroborative one, operating by the removal of the infirmative explanation of subsequent invention. To be relevant in this respect, a complaint must have been made within such a time after the occurrence that it may reasonably be held to negative in some degree the alternative theory of fabrication.² In other words, if motives such as revenge or desire to blackmail and the like, which may prompt causing the arrest of the accused, were operative at the time of the complaint, the making of the latter might add nothing by way of corroboration. Thus, the statement of a child made to a police officer for the purpose of enabling him to formulate a complaint is not admissible.³ Nevertheless, it is within the

natural questions which a person in charge will be likely to put. On the other hand, if she were asked, ‘Did so and so (naming the prisoner) assault you?’ ‘Did he do this and that to you?’ then the result would be different, and the statement ought to be rejected.” *Rex v. Osborne*, 74 L. J. K. B. 311, 314, 1 K. B. 551, 92 L. T. 393, 53 W. R. 494, 69 J. P. 189, 21 L. T. R. 288 (1905), per Ridley, J.

§ 3042-1. “The law takes note that within common experience, when an outrage of the character here in question has been committed, the instincts and emotions of womanly nature will prompt an outcry against the wrong committed and the perpetrator thereof, not only as an expression of grief, indignation, or re-

sentment, but as calling for sympathy and assistance. Further, the law recognizes that in some instances it is possible that through timidity or fear a wronged woman may fail to make prompt disclosure. The law indulges, therefore, in the generous supposition that in the ordinary course of things a woman thus wronged will complain thereof as soon as opportunity offers, or at least when no longer controlled by conditions of restraint.” *State v. Bebb*, 125 Iowa 494, 496, 101 N. W. 189 (1904), per Bishop, J.

2. *State v. Bebb*, 125 Iowa 494, 101 N. W. 189 (1904); *Cowles v. State*, 51 Tex. Cr. App. 498, 102 S. W. 1128 (1907) (after defendant’s arrest).

3. *State v. Hoskinson*, 78 Kan. 183, 96 Pac. 138 (1908).

administrative function of the presiding judge to admit, in the case of a statutory rape, the declaration of the alleged injured person made at the time of a subsequent miscarriage said to result from the assault.⁴

Administrative Rulings.—In connection with proof of corroboration a delay of ten days⁵ not satisfactorily explained, has been held sufficient to exclude the evidence. *A fortiori*, one of eleven months⁶ will be regarded as unreasonably long. On the other hand, failure to complain for a period of nineteen months has been held not to exclude the statement when offered for corroboration.⁷ The variability in circumstance between different cases makes any rule but that of administrative reasoning unworkable.⁸ The decisions, if viewed without this idea in mind, present an appearance of inconsistency.⁹ Some decisions lay down a broad

4. *State v. Sebastian*, 81 Conn. 1, 69 Atl. 1054 (1908).

5. *Dunn v. State*, 45 Ohio St. 249, 12 N. E. 826 (1887).

6. *People v. O'Sullivan*, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530 (1887).

7. *State v. Byrne*, 47 Conn. 465 (1880).

8. *State v. Marcks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095 (1897); *State v. Peres*, 27 Mont. 358, 71 Pac. 162 (1903); *State v. Sudduth*, 52 S. C. 488, 30 S. E. 408 (1898); *Robberson v. State*, 3 Tex. App. 502, 49 S. W. 398 (1899).

9. *California*.—*People v. Gonzalez*, 6 Cal. App. 255, 91 Pac. 1013 (1907) (a month and a half, rejected).

District of Columbia.—*Lyles v. United States*, 20 App. D. C. 559 (1902) (statement to physician over four weeks after, rejected).

Georgia.—*Huey v. State*, 7 Ga. App. 398, 66 S. E. 1023 (1910) (three days, admitted).

Idaho.—*State v. Neil*, 13 Idaho 539, 90 Pac. 860 (1907), rehearing denied 13 Idaho 539, 91 Pac. 318 (within less than an hour, admitted).

Iowa.—*State v. Snider*, 119 Iowa 15, 91 N. W. 762 (1902) (three hours, admitted); *State v. Petersen*,

110 Iowa 647, 82 N. W. 329 (1900) (next morning, admitted).

Maine.—*State v. Mulkern*, 85 Me. 106, 26 Atl. 1017 (1892) (one day, admitted).

Maryland.—*Legore v. State*, 87 Md. 735, 41 Atl. 60 (1898) (evening of the same day, admitted).

Massachusetts.—*Com. v. Cleary*, 172 Mass. 175, 51 N. E. 746 (1898) (the next morning, admitted).

Nebraska.—*Welsh v. State*, 60 Neb. 101, 82 N. W. 368 (1900) (the morning after, admitted).

New York.—*People v. O'Sullivan*, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530 (1887) (eleven months, rejected).

North Dakota.—*State v. Werner*, 16 N. D. 83, 112 N. W. 60 (1907) (three days, admitted).

South Carolina.—*State v. Sudduth*, 52 S. C. 488, 30 S. E. 408 (1898) (twenty hours, admitted).

Texas.—*Pettus v. State*, (Cr. App. 1910) 126 S. W. 868 (ten days, admitted); *Cowles v. State*, 51 Tex. Cr. App. 498, 102 S. W. 1128 (1907) ("months after," rejected).

Washington.—*State v. Griffin*, 43 Wash. 591, 86 Pac. 951, 11 Am. & Eng. Ann. Cas. 95 (1906) (six months, rejected).

rule, and hold that lapse of time before making complaint goes only to its weight with the jury and not to its competency.¹⁰ This view seems logical, but the attitude of the majority of the courts clearly is that the presiding judge at a trial should exercise discretion and not allow the fact of complaint to be shown to the jury where in his opinion it is devoid of any probative value.¹¹ The fact that the person injured was of tender years may well justify a more extended time than would be reasonable in case of an older person.¹² Threats by the accused that he would kill her if she told anyone have also been considered a sufficient excuse for a delay by the prosecutrix of ten days in making a complaint.¹³

§ 3043. (*Range of Spontaneous Statements; Declarations of Complainant in Rape; The Element of Time*); Spontaneous Utterances.—Where the detailed statements of the complainant are used in their hearsay capacity as primary evidence of the facts asserted the same requirement of immediate complaint is made, but the reason for it is entirely different. Fresh complaint is required, not for the purpose of securing pursuit and apprehension of the offender nor even for the later and still common purpose of corroboration;¹ but in order that the resulting statement may be *spontaneous* and, accordingly furnish evidence of the facts declared in it. While, as in other connections of the use of spontaneous statements, the element of time is not necessarily a con-

England.—Reg. v. Kiddle, 19 Cox Cr. C. 77 (1898) (three or four hours, admitted); Reg. v. Mercer, 6 Jur. 243 (1842) (three days, admitted).

Canada.—Reg. v. Reindeau, 9 Quebec Q. B. 147, *affirmed* 10 Quebec K. B. 584 (1901) (seven days, admitted).

10. State v. Snider, 119 Iowa 15, 91 N. W. 762 (1902); State v. Mul-kern, 85 Me. 106, 26 Atl. 1017 (1892); Legore v. State, 87 Md. 735, 41 Atl. 60 (1898). Compare Com. v. Cleary, 172 Mass. 175, 51 N. E. 746 (1898).

"It has never been understood that mere lapse of time could be made the test upon which the admissibility of such evidence depended. The time that intervenes between the commission of the crime and the making of the complaint, is a sub-

ject for the jury to consider in passing upon the weight that should be given to the evidence." State v. Niles, 47 Vt. 82, 86 (1874), per Royce, J. See, also, Conger v. State, (Tex. Cr. App. 1911) 140 S. W. 1112; Sentell v. State, 34 Tex. Cr. App. 260, 30 S. W. 226 (1895).

11. See cases cited *infra*.

"The time of the complaint was material to the determination of the question of law affecting the admissibility of the evidence." People v. Gonzalez, 6 Cal. App. 255, 260, 91 Pac. 1013 (1907), per Taggart, J.

12. People v. Bianchino, 5 Cal. App. 633, 91 Pac. 112 (1907) (5 years).

13. Pettus v. State, (Tex. Cr. App. 1910) 126 S. W. 868.

§ 3043-1. § 3037.

trolling one, it still is a consideration of great importance. After how long an interval the force of an occurrence may still dominate the will of a declarant, numbing his reflective faculties to an extent which leaves them part of the automatic uniformity of nature plainly presents a question of administration. No special time can be stated beyond which the evidence will be rejected. After numerous short intervals, e. g., shortly after² even "the day after"³ the statement has been received. On the other hand, where a considerable length of time has elapsed⁴ the statement is properly regarded as mere narrative possessing no spontaneous quality. The complaint has been regarded as not spontaneous when made fifteen minutes after the assault,⁵ and also when made as soon as the prosecutrix reached her mother who was in the city block where the assault was committed.⁶ The question for administrative determination is, were the circumstances surrounding the making of the declarations, the condition of the declarant and the form of the declarations such as to guarantee their truthfulness and to negative the idea of a concocted story, i. e., were the declarations spontaneous. If so, they are properly received in evidence.⁷ For example, where the prosecutrix immediately after the assault ran to a policeman and in an excited and tearful condition related the occurrence to him, it was proper to allow the

2. *Rogers v. State*, (Tex. Cr. App. 1912) 143 S. W. 631 (assault with intent to rape); *Croomes v. State*, 40 Tex. Cr. App. 672, 51 S. W. 924, 53 S. W. 882 (1899).

3. *Adams v. State*, 52 Tex. Cr. App. 13, 105 S. W. 197 (1907).

To the contrary effect see *Jefferies v. State*, 89 Miss. 643, 42 So. 801 (1907).

4. *People v. Row*, 135 Mich. 505, 98 N. W. 13, 10 Detroit Leg. N. 841 (1904) (three months).

5. *Williams v. State*, 66 Ark. 264, 50 S. W. 517 (1899).

6. *State v. Sargent*, 32 Oreg. 110, 49 Pac. 889 (1897).

7. *State v. Novak*, 151 Iowa 536, 132 N. W. 25 (1911); *State v. Ingraham*, (Minn. 1912) 136 N. W. 258; *Jacobs v. State*, (Tex. Cr. App. 1912) 146 S. W. 558. See, also, *Conger v.*

State, (Tex. Cr. App. 1911) 140 S. W. 1112.

"We think the better rule is that such proof may be admissible as part of the *res gestae*, if the statement was made immediately following the commission of the crime, in which event the particulars of the complaint may be proved as part of the state's case in chief, the same as any facts which are part of the *res gestae*. We think such testimony is also admissible in corroboration of the testimony of the prosecutrix, in which event it is unnecessary that the statements should have been made so recently after the commission of the offence as to make it a part of the *res gestae*." *State v. Werner*, 16 N. D. 83, 91, 112 N. W. 60 (1907), per Fisk, J.

latter to testify in regard to what the prosecutrix said to him.⁸

Various considerations, modifying the influence of time, may properly be regarded by the court. Absence from home, or inability to find proper confidants,⁹ may well have the effect of extending the period of spontaneous utterance, the matter not being one forming a natural subject of correspondence. Nevertheless, failure to communicate with a mother for a period of six weeks until the injured person should return home has been held to exclude the statement.¹⁰ A considerable interval, coupled with continued friendly relations with the alleged assailant, may remove any inference of spontaneity.¹¹ That the declarant is so young as to be adjudged incompetent to testify on the ground of incapacity to understand the nature and obligation of an oath, furnishes no sufficient ground for rejecting a statement fairly to be regarded as spontaneous.¹²

§ 3044. (*Range of Spontaneous Statements*); Declarations of Owner on Discovering Larceny, etc.—Worthy of note among spontaneous utterances which follow the general rule now under consideration are the declarations of owners of property made shortly after it has been taken from their possession, by violence or otherwise. Where the conditions of spontaneity are present, these extrajudicial statements may be received as proof of the facts asserted.¹ The exclamations made while in active pursuit of a

8. *Rogers v. State*, (Tex. Cr. App. 1912) 143 S. W. 631 (assault with intent to rape).

9. See *People v. O'Sullivan*, 104 N. Y. 481, 490, 10 N. E. 880, 68 Am. Rep. 530 (1887).

10. *People v. Gonzalez*, 6 Cal. App. 255, 91 Pac. 1013 (1907).

11. *Kearse v. State*, (Tex. Cr. App. 1905) 88 S. W. 363.

12. *Croomes v. State*, 40 Tex. Cr. App. 672, 51 S. W. 924, 53 S. W. 882 (1899).

§ 3044-1. *Illinois*.—*Goon Bow v. People*, 160 Ill. 438, 43 N. E. 593 (1896).

Michigan.—*Driscoll v. People*, 47 Mich. 413, 416, 11 N. W. 221 (1882); *Lambert v. People*, 29 Mich. 71 (1874).

Mississippi.—*Lampley v. Scott*, 24 Miss. 528, 534 (1852).

Missouri.—*State v. Moore, alias Hall*, 117 Mo. 395, 22 S. W. 1086 (1893).

Nevada.—*State v. Ah Loi*, 5 Nev. 99 (1869).

Washington.—*State v. Smith*, 26 Wash. 354, 67 Pac. 70 (1901).

England.—*Reg. v. Lunny*, 6 Cox Cr. C. 477 (1854).

Compare, *Shoecraft v. State*, 137 Ind. 433, 36 N. E. 1113 (1893); *Pope v. Hall*, 14 La. Ann. 324 (1859).

"The weight of authority in this country is in favor of allowing evidence of the declarations or statements of the injured party, touching the cause or circumstances of the injury, made so soon after the

robber² while seeking to effect his arrest,³ or the like, may properly be regarded as spontaneous hearsay utterances and primary proof of the facts stated.⁴ However, where conditions of spontaneity did not exist at the time of making the declarations, caused by the lapse of time or otherwise, the declarations will be rejected.⁵

Independent Relevancy.—Such statements, however, may be used in another capacity, i. e., one of independent relevancy. Should it be claimed, for example, by the defense that the present position of the prosecutor is an after thought or is due to personal hostility or some other improper motive, the person whose good faith is thus assailed may show as a fact that on an earlier occasion a precisely similar statement was made by him. On the other hand, a failure to complain with reasonable promptness may well afford ground for a doubt as to the good faith of a present

event, and under such circumstances, as to warrant the trial court in presuming that they grew out of and were dependent upon it, and could not have been devised or contrived by the declarant for his own purposes." State v. Horan, 32 Minn. 394, 396, 20 N. W. 905, 50 Am. Rep. 583 (1884) (robbery), per Vanderburgh, J.

Self-serving statements of this nature are said to be received on account of the necessity of the case no other evidence being procurable. Lampley v. Scott, 24 Miss. 528, 534 (1852).

Dying declarations of the party robbed are not admissible on the trial of an indictment for the robbery. Rex v. Lloyd, 4 Car. & P. 233 (1830).

2. Goon Bow v. People, 160 Ill. 438, 43 N. E. 593 (1896); Nelson v. State, 48 Tex. Cr. App. 471, 88 S. W. 807 (1905).

3. State v. Driscoll, 72 Iowa 583, 34 N. W. 428 (1887); Driscoll v. People, 47 Mich. 413, 11 N. W. 221 (1882); State v. Horan, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583 (1884).

4. Where the complaining witness was awakened early in the morning, saw the defendant fumbling about the wardrobe in her room, saw him

leave the room and she then sprang to a window, screamed and related what occurred to an officer who almost immediately appeared, her statements to the officer were properly admitted. State v. Moore, alias Hall, 117 Mo. 395, 22 S. W. 1086 (1893).

"The statement made by the prosecuting witness, that she had been robbed—a very few minutes after the crime was committed, and while she was still weeping because of the loss of the money taken from her—was undoubtedly admissible as part of the *res gestae*." State v. Ah Loi, 5 Nev. 99, 100 (1869), per Lewis, C. J.

5. Smith v. People, 39 Colo. 202, 88 Pac. 1072 (1907); Tucker v. Hood, 2 Bush. (Ky.) 85 (1867); Haynes v. Com., 28 Gratt. (Va.) 942 (1877).

A statement by a person, who was knocked insensible and robbed, that the defendant was the person who robbed him, made shortly after recovering his senses has been rejected. Rogers v. State, 88 Ark. 451, 115 S. W. 156, 41 L. R. A. (N. S.) 857 n. (1908).

charge.⁶ Such evidence may be introduced at any time by the prosecution, even after the close of defendant's case.⁷ In other words, the uses, in evidence, of complaint by an owner of property are closely analogous to those made of the complainant's statement on a proceeding for rape or a similar offence.⁸

Where no complaint is actually made the prosecution is at liberty, for obvious reasons, to explain the failure. Thus, it may be shown that a female owner was instructed by her husband to keep silent, he being afraid of further injury in case of disclosure.⁹

§ 3045. (*Range of Spontaneous Statements*); Personal Injuries.—A common application of the rules relating to the use of unsworn spontaneous statements as proof of the facts asserted is found in those cases where action is brought to recover damages for personal injuries.¹ In a typical case, the attendant excite-

6. "The conduct of a party complaining of a crime is often of considerable importance in determining his honesty." *People v. Morrigan*, 29 Mich. 4, 6 (1874), per Campbell, J.

"Evidence ought to have been received of the hue and cry immediately after the discovery; his assiduous and indefatigable pursuit, and strict search, both at the inn and the steamboat. If he had made no complaint, or no inquiry, remained with his arms folded and mouth shut, this would have afforded strong evidence of his delinquency; and though it has been said that this would have been the course of a guilty man, yet it was one which an innocent man would naturally take, and which, if he did not take, all would condemn him." *Tompkins v. Saltmarsh*, 14 Serg. & R. (Pa.) 275, 280 (1826), per Duncan, J.

As this inference is one which may be drawn by the jury without assistance from the defendant, the prosecution is fairly entitled to negative in advance this adverse inference by showing that complaint was actually made.

7. *Com. v. Kelly*, 186 Mass. 403, 71 N. E. 807 (1904).

In this latter connection, it would seem proper that the fact of the complaint without the statement of details should be received in evidence.

Alabama.—*Bolling v. State*, 98 Ala. 80, 12 So. 782 (1892).

California.—*People v. McCrea*, 32 Cal. 98 (1867).

Georgia.—*Brooks v. State*, 98 Ga. 353, 23 S. E. 413 (1895).

Virginia.—*Jones v. Com.*, 86 Va. 740, 743, 10 S. E. 1004 (1890).

England.—*Rex v. Wink*, 6 C. & P. 397 (1834).

8. § 3034.

9. *Reg. v. Gandfield*, 2 Cox Cr. C. 43 (1846).

§ 3045-1. *Alabama*.—*Bessiere v. Alabama City, G. & A. R. Co.*, 60 So. 82 (1912).

California.—*Zipperlin v. Southern Pac. Co.*, 7 Cal. App. 206, 93 Pac. 1049 (1908).

Colorado.—*Denver City Tramway Co. v. Brumley*, 51 Colo. 251, 116 Pac. 1051 (1911).

Delaware.—*Di Prisco v. Wilmington City Ry. Co.*, 4 Pennw. 527, 57 Atl. 906 (1904).

Georgia.—*Southern Ry. Co. v. Brown*, 121 Ga. 1, 54 S. E. 911 (1906).

ment, the bodily pain or mental anguish consequent upon the in-

Idaho.—Anderson v. Great Northern Ry. Co., 15 Idaho 513, 99 Pac. 91 (1908).

Illinois.—Muren Coal & Ice Co. v. Howell, 217 Ill. 190, 75 N. E. 469 (1905).

Iowa.—Gordon v. Chicago, R. I. & P. Ry. Co., 154 Iowa 449, 134 N. W. 1057 (1912); Spevack v. Coaldale Fuel Co., 152 Iowa 90, 131 N. W. 653 (1911); Kern v. Des Moines City Ry. Co., 141 Iowa 620, 118 N. W. 451 (1908).

Kentucky.—Kington Coal Co. v. Aaron, 147 Ky. 480, 144 S. W. 371 (1912); Louisville & N. R. Co. v. Lee, 140 Ky. 91, 130 S. W. 813 (1910); Fidelity & Casualty Co. of New York v. Cooper, 137 Ky. 544, 126 S. W. 111 (1910); Louisville Ry. Co. v. Johnson's Adm'r, 131 Ky. 277, 115 S. W. 207, 20 L. R. A. (N. S.) 133 n. (1909).

Maryland.—United Rys. & Electric Co. v. Cloman, 107 Md. 681, 69 Atl. 379 (1908).

Michigan.—Gilbert v. Ann Arbor R. Co., 161 Mich. 73, 125 N. W. 745 (1910).

Minnesota.—Hyvonen v. Hector Iron Co., 103 Minn. 331, 123 Am. St. Rep. 332, 115 N. W. 167 (1908).

Nebraska.—Union Pac. R. Co. v. Edmondson, 77 Neb. 682, 110 N. W. 650 (1906).

New Hampshire.—Dorr v. Atlantic Shore Line Ry., 76 N. H. 160, 80 Atl. 336 (1911); Robinson v. Stahl, 74 N. H. 310, 67 Atl. 577 (1907).

Oregon.—Moulton v. St. Johns Lumber Co., 61 Oreg. 62, 120 Pac. 1057 (1912).

South Carolina.—Williams v. Southern Ry., 68 S. C. 369, 47 S. E. 706 (1903).

Texas.—Galveston, H. & S. A. Ry. Co. v. Mitchell, 48 Tex. Civ. App. 381, 107 S. W. 374 (1908); Gulf, C. & S. F. Ry. Co. v. Willoughby, (Civ. App. 1904) 81 S. W. 829.

Washington.—Swanson v. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795 (1910); Walters v. Spokane International Ry. Co., 58 Wash. 293, 108 Pac. 593 (1910).

West Virginia.—Stone v. Campbells Creek R. Co., 66 W. Va. 417, 66 S. E. 521 (1909).

Wisconsin.—Zoesch v. Flambeau Paper Co., 134 Wis. 270, 114 N. W. 485 (1908).

United States.—American Mfg. Co. v. Bigelow, 188 Fed. 34, 110 C. C. A. 77 (1911).

Instances.—Declarations by a decedent, an osteopath, that he had accidentally strained his back while treating a patient made within half an hour after commencing such treatment are admissible in an action on an accident insurance policy. Patterson v. Ocean Accident & Guarantee Corp., 25 App. D. C. 46 (1905). In an action for injuries received by the plaintiff when attempting to alight from a street car, evidence that just after she fell she exclaimed: "Yes, let the steps down after I fall!" was received. Hutcheis v. Cedar Rapids & M. C. Ry. Co., 128 Iowa 279, 103 N. W. 779 (1905). Where the plaintiff claimed to have been struck in the eye by a piece of steel which flew from a defective cleaver which was being used to cut a steel rail, the statement of the man who was striking the cleaver that the piece of steel came from the cleaver, made immediately after the plaintiff was struck was admitted. Allen v. Cincinnati, N. O. & T. P. Ry. Co., 143 Ky. 723, 137 S. W. 230 (1911). Where the intestate was killed by an electric shock, exclamation made by him as he fell from the wire and expired were admissible as "*res gestae*." Harrington v. Town of Wadesboro, 153 N. C. 437, 69 S. E. 399 (1910). In an action to recover damages for an insult to plaintiff's wife by a ser-

jury, the unwonted importance temporarily attaching to the injured person himself constitute a combination of influences calculated to drive from the mind of a sufferer thoughts of premeditation or invention. As was said by the supreme court of New Hampshire: "When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically, it may be said, the act speaks through him and discloses its character."² After an interval, however, of greater or less duration according to the circumstances of the case, the question is sure to occur to the victim of the accident. Who is responsible for this pain which I am suffering; who will recompense me for my other injuries? With this, or some similar act of introspection, the state of deliberated utterance may be assumed to begin. To determine with accuracy the length of this period of spontaneity, to admit what is said during it, excluding whatever is said after it is over presents a problem in psychology to the presiding judge which is often one of difficulty and nicety. The questions relating to the effect of the lapse of time on spontaneity have been discussed elsewhere,³ and need not be treated in this connection. The same is true concerning the question of the effect on spontaneity of the various other circumstances which are considered by judicial administration.⁴ The declarations may be those of the person injured⁵ or those of

vant of a railroad, it was held that exclamations of the plaintiff's child, made while the said servant was uttering the abusive language complained of, should be received. *Gulf, C. & S. F. Ry. Co. v. Luther*, 40 Tex. Civ. App. 517, 90 S. W. 44 (1905). Statements by an intestate made immediately after he was run over by defendant's train to the effect that it was his own fault, have also been admitted against his administrator in an action to recover damages for his death. *Chicago, M. & St. P. Ry. Co. v. Clarkson*, 147 Fed. 397, 77 C. C. A. 575 (1906). And where the death of the deceased was due to scalding received by falling into a vat of hot tanning liquid, it was proper to show his exclamations describing how the acci-

dent happened, made after he ran into a boiler house about seventy feet away. *Scheir v. Quirin*, 77 App. Div. 624, 78 N. Y. Suppl. 956, affirmed 177 N. Y. 568, 69 N. E. 1130 (1904).

2. *Murray v. Boston & M. R. Co.*, 72 N. H. 32, 37, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 650 (1903), per Walker, J.

3. §§ 3007 and 3025.

4. See §§ 3010-3020.

5. *Colorado*.—*Denver City Tramway Co. v. Brumley*, 51 Colo. 251, 116 Pac. 1051 (1911).

Delaware.—*Di Prisco v. Wilmington City R. Co.*, 4 Pennw. 527, 57 Atl. 906 (1904).

District of Columbia.—*Patterson v. Ocean Accident & Guarantee Corp.*, 25 App. D. C. 46 (1905).

the party sought to be held liable or his agent, employee or representative.⁶ In some instances the declarations of third parties or bystanders have been received.⁷ Thus, in an action for the

Georgia.—Southern Ry. Co. v. Brown, 121 Ga. 1, 54 S. E. 911 (1906).

Illinois.—Muren Coal & Ice Co. v. Howell, 217 Ill. 190, 75 N. E. 469 (1905).

Iowa.—Gordon v. Chicago, R. I. & P. Ry. Co., 154 Iowa 449, 134 N. W. 1057 (1912).

Kentucky.—Kingston Coal Co. v. Aaron, 147 Ky. 480, 144 S. W. 371 (1912).

Michigan.—Gilbert v. Ann Arbor R. Co., 161 Mich. 73, 125 N. W. 745 (1910).

New Hampshire.—Dorr v. Atlantic Shore Line Ry., 76 N. H. 160, 80 Atl. 336 (1911); Robinson v. Stahl, 74 N. H. 310, 67 Atl. 577 (1907).

North Carolina.—Harrington v. Town of Wadesboro, 153 N. C. 437, 69 S. E. 399 (1910).

Oregon.—Moulton v. St. Johns Lumber Co., 61 Oreg. 62, 120 Pac. 1057 (1912).

South Carolina.—Williams v. Southern Ry., 68 S. C. 369, 47 S. E. 706 (1903).

Texas.—Galveston, H. & S. A. Ry. Co. v. Mitchell, 48 Tex. Civ. 381, 107 S. W. 374 (1908).

Washington.—Swanson v. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795 (1910).

Wisconsin.—Zoesch v. Flambeau Paper Co., 134 Wis. 270, 114 N. W. 485 (1908).

United States.—Chicago, M. & St. P. Ry. Co. v. Clarkson, 147 Fed. 397, 77 C. C. A. 575 (1906).

6. *Alabama*.—Bessiere v. Alabama City, G. & A. R. Co., 60 So. 82 (1912).

California.—Zipperlein v. Southern Pac. Co., 7 Cal. App. 206, 93 Pac. 1049 (1908).

Colorado.—Denver City Tramway Co. v. Brumley, 51 Colo. 251, 116 Pac. 1051 (1911).

Idaho.—Anderson v. Great Northern Ry. Co., 15 Idaho 513, 99 Pac. 91 (1908).

Indiana.—Cincinnati, L. & A. Electric St. R. Co. v. Stahl, 37 Ind. App. 539, 76 N. E. 551 (1905).

Iowa.—Douda v. Chicago, R. I. & P. Ry. Co., 141 Iowa 82, 119 N. W. 272 (1909).

Kentucky.—Louisville & L. R. Co. v. Lee, 140 Ky. 91, 130 S. W. 813 (1910); Louisville Ry. Co. v. Johnson's Adm'r, 131 Ky. 277, 115 S. W. 207, 20 L. R. A. (N. S.) 133 n. (1909).

Maryland.—United Rys. & Electric Co. v. Cloman, 107 Md. 681, 69 Atl. 379 (1908).

Minnesota.—Hyvonen v. Hector Iron Co., 103 Minn. 331, 115 N. W. 167, 123 Am. St. Rep. 332 (1908).

Nebraska.—Union Pac. R. Co. v. Edmondson, 77 Neb. 682, 110 N. W. 650 (1906).

Texas.—City of Austin v. Nichols, 42 Tex. Civ. App. 5, 94 S. W. 336 (1906).

Washington.—Walters v. Spokane International Ry. Co., 58 Wash. 293, 108 Pac. 593 (1910).

West Virginia.—Stone v. Campbells Creek R. Co., 66 W. Va. 417, 66 S. E. 521 (1909).

United States.—American Mfg. Co. v. Bigelow, 188 Fed. 34, 110 C. C. A. 77 (1911).

7. Beal-Doyle Dry Goods Co. v. Carr, 85 Ark. 479, 108 S. W. 1053, 14 Am. & Eng. Ann. Cas. 48 (1908); Citizens' Ry. Co. v. Farley, (Tex. Civ. App. 1911) 136 S. W. 94; Gulf, C. & S. F. Ry. Co. v. Luther, 40 Tex. Civ. App. 517, 90 S. W. 44 (1905); Cromeenes v. San Pedro, L. A. & S. L. R. Co., 37 Utah 475, 109 Pac. 10, 24 Am. & Eng. Ann. Cas. 307 (1910); Britton v. Washington

death of a boy killed by a train running in a city street, the statement of a witness to the accident, made to the engineer after the witness had walked the length of "a car or two" after seeing the accident was admitted as a spontaneous utterance.⁸ However, the elements of spontaneity must be clearly present to render the declarations of a person, not a participant, to some extent at least, in the main transaction, admissible.⁹

§ 3046. (*Range of Spontaneous Statements; Personal Injuries*); Employment of Element of Inference or Reasoning not Fatal to Admissibility.—That an unsworn statement made under such circumstances as render it spontaneous reveals an apparent element of inference on the part of the speaker¹ does not necessarily furnish ground for rejecting the declaration. If the evidence were to be excluded on such grounds, it is apparent that objection could properly be raised to all statements in which the declarant characterized an act. Written statements would also in many instances be open to objection.

§ 3047. (*Range of Spontaneous Statements; Personal Injuries*); Statements to Physicians.—It scarcely need be said that, if the elements of spontaneity were present in the making of an unsworn statement, the fact that it was made to a physician cannot affect its admissibility, the statement being received, in accordance with the general rule, as proof of the facts therein stated. Thus, where the first utterances made by an injured person after recovering consciousness¹ are made to a physician, everything said may be introduced in evidence as direct proof of the facts asserted, including the cause of the injury and the like. However, statements and exclamations to physicians, indicative of pain, suffer-

Motor Power Co., 59 Wash. 440, 110 Pac. 20, 33 L. R. A. (N. S.) 109 n. (1910)

See, also, cases cited in § 2983.

8. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 37 Utah 475, 109 Pac. 10, 24 Am. & Eng. Ann. Cas. 307 (1910).

9. See § 3015.

§ 3046-1. *State v. Morrison*, 64 Kan. 669, 68 Pac. 48 (1902); *Wilson v. State*, 49 Tex. Cr. App. 50,

90 S. W. 312 (1905). See, also, *State v. Baldwin*, 79 Iowa 714, 721, 45 N. W. 297 (1890); *State v. Mace*, 118 N. C. 1244, 24 S. E. 798 (1896) ("murdered me for nothing in the world").

§ 3047-1. *Christopherson v. Chicago, M. & St. P. R. Co.*, 135 Iowa 409, 109 N. W. 1077 (1906). *Compare Gebus v. Minneapolis, St. P. & S. S. M. Ry. Co.*, (N. D. 1911) 132 N. W. 227.

ing and physical condition, present a peculiarity which needs to be especially noted, as such extrajudicial utterances are received in evidence under circumstances which would mark statements to persons other than physicians as pure narrative hearsay and inadmissible. While it is possible to regard such utterances, particularly those in the nature of groans, shrieks and other exclamations, as independently relevant circumstantial evidence of a bodily state or condition,² it is equally permissible to consider them, particularly the articulate expressions, as partaking of the nature of spontaneous statements and to receive them in evidence as direct proof of the facts asserted. It is a well-settled general rule that statements to a physician concerning present pain, suffering and physical condition generally, made with a view to obtaining treatment and relief are admissible in evidence as proof of the patient's condition at the time the statements were made.³ For example, it may be shown that the patient told the physician that he was suffering from sleeplessness, loss of appetite, nausea, vomiting and exhaustion,⁴ or, where a woman claimed to have received injuries to her hand in attempting to board a street car, that she was unable to use two of her fingers.⁵ This rule is sometimes given

2. § 2635.

3. Alabama.—Grasselli Chemical Co. v. Davis, 166 Ala. 471, 52 So. 35 (1910); Gregory v. State, 148 Ala. 566, 42 So. 829 (1906). See, also, Birmingham Ry., Light & Power Co. v. Moore, 151 Ala. 327, 43 So. 841 (1907).

Connecticut.—Gilmore v. American Tube & Stamping Co., 79 Conn. 498, 66 Atl. 4 (1907).

Georgia.—Georgia Ry. & Electric Co. v. Gilleland, 133 Ga. 621, 66 S. E. 944 (1909).

Illinois.—Chicago City Ry. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28 (1904). See, also, Maxey v. City of East St. Louis, 158 Ill. App. 627 (1910).

Michigan.—Marshall v. Saginaw Valley Traction Co., 157 Mich. 541, 122 N. W. 131, 16 Detroit Leg. N. 357 (1909); Heddle v. City Electric R. Co., 112 Mich. 547, 70 N. W. 1096 (1897).

Missouri.—Richardson v. Metro-

politan St. Ry. Co., (App. 1912) 147 S. W. 1126; Brown v. Springfield Traction Co., 141 Mo. App. 382, 125 S. W. 236 (1910).

Nebraska.—Albrecht v. Morris, 91 Neb. 442, 136 N. W. 48 (1912).

New York.—Orlando v. Syracuse Rapid Transit Ry. Co., 109 App. Div. 356, 95 N. Y. Suppl. 898 (1905).

Oregon.—Vuilleumier v. Oregon Water Power & Ry. Co., 55 Ore. 129, 105 Pac. 706 (1909).

Texas.—El Paso & S. W. R. Co. v. Polk, 49 Tex. Civ. App. 269, 108 S. W. 761 (1908); Dublin Gas & Electric Co. v. Frazier, 46 Tex. Civ. App. 288, 103 S. W. 197 (1907); Wheeler v. Tyler South Eastern R. Co., 91 Tex. 356, 43 S. W. 876 (1898).

4. Orlando v. Syracuse Rapid Transit Ry. Co., 109 N. Y. App. Div. 356, 95 N. Y. Suppl. 898 (1905).

5. Brown v. Springfield Traction Co., 141 Mo. App. 382, 125 S. W. 236 (1910).

a very strict construction.⁶ Such statements are regarded as sufficiently trustworthy to be considered by the jury "because it is believed that the motive for telling the doctor the truth as to his sensations of pain, suffering, or history of his ailment, so as to enable the doctor to relieve the suffering, or save the life of the patient, is greater than could be the motives of making a merely self-serving statement to be used in his behalf by the man in some other affair."⁷

The facts shown by the articulate utterances of the patient should be those reasonably essential to a proper diagnosis of his state or condition.⁸ Collateral matters⁹ such as the name of an assailant¹⁰ or an assertion as to the instrument with which an assault was committed¹¹ not being regarded as properly included. A statement in regard to the manner of an accident,¹² the circumstances of an assault,¹³ the cause of an injury¹⁴ or the like, made

6. "The declaration of the plaintiff, made to a physician, that he felt no sensation of pain resulting from sticking a needle into his finger, does not fall within any of the exceptions to the rule as to hearsay, and was properly excluded." *Goodwyn v. Central of Georgia Ry. Co.*, 2 Ga. App. 470, 58 S. E. 688 (1907), per Hill, C. J.

7. *Chesapeake & O. Ry. Co. v. Wiley*, 134 Ky. 461, 481, 121 S. W. 402, 408 (1909), per O'Rear, J.

8. Statements of third persons are not deemed proper constituents upon which to base the diagnosis of a physician. *Atchison, etc., R. Co. v. Frazier*, 27 Kan. 463 (1882) (husband); *Heald v. Thing*, 45 Me. 392 (1858) (wife).

9. *Richards v. Com.*, 107 Va. 881, 59 S. E. 1104 (1908).

10. *People v. O'Brien*, 92 Mich. 17, 52 N. W. 84 (1892).

11. *Collins v. Waters*, 54 Ill. 485 (1870); *People v. O'Brien*, 92 Mich. 17, 52 N. W. 84 (1892); *Denton v. State*, 1 Swan (Tenn.) 279 (1851).

12. *Fordyce v. McCants*, 51 Ark. 509, 11 S. W. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296 (1889); *Missouri*,

K. & T. Ry. Co. of Texas v. Smith, (Tex. Civ. App. 1904) 82 S. W. 787.

13. *Morrissey v. Ingham*, 111 Mass. 63 (1872).

14. *Illinois*.—*City of Aurora v. Plummer*, 122 Ill. App. 143 (1905); *Collins v. Waters*, 54 Ill. 485 (1870); *Illinois, etc., R. Co. v. Sutton*, 42 Ill. 438, 92 Am. Dec. 81 (1867).

Kentucky.—*Chesapeake & Ohio R. Co. v. Wiley*, 134 Ky. 461, 121 S. W. 402 (1909); *Shade's Adm'r v. Covington-Cincinnati Elevated R., etc., Co.*, 119 Ky. 592, 84 S. W. 733, 27 Ky. L. Rep. 224 (1905).

Massachusetts.—*Roosa v. Boston Loan Co.*, 132 Mass. 439 (1882).

South Dakota.—*Fallon v. Rapid City*, 17 S. D. 570, 97 N. W. 1009 (1904).

Tennessee.—*Denton v. State*, 1 Swan 279 (1851).

"To permit a party to prove what he himself stated to his physician, not in regard to the character and manifestations of his malady, but in reference to its specific cause, when that is one of the issues before the jury, would be carrying an acknowledged departure from the ordinary rules of evidence, having its

after the transaction itself is fully ended is mere narrative and excluded as such. Statements as to past bodily or mental condition cannot be regarded as admissible under the present rule.¹⁵ It has, however, been decided that statements of past pain and suffering made to a physician, when necessary to a correct diagnosis, may be testified to by the physician;¹⁶ but that they must not be considered by the jury as evidence tending to show the fact of such pain and suffering.¹⁷ The wisdom of such a rule may be doubted as its application by the court and jury must clearly be difficult.

Statements made to a physician for the purpose of enabling the latter to testify as an expert in favor of the declarant are usually excluded for administrative reasons.¹⁸ In the absence of evidence

origin in necessity, to a most dangerous extent." *Illinois, etc., R. Co. v. Sutton*, 42 Ill. 438, 440, 92 Am. Dec. 81 (1867), per Lawrence, J., citing state of Vermont v. Davidson, 30 Vt. 377 (1858).

15. *Georgia*.—*Atlanta, K. & N. Ry. Co. v. Gardner*, 122 Ga. 82, 49 S. E. 518 (1905).

Missouri.—*Brady v. Springfield Traction Co.*, 140 Mo. App. 421, 124 S. W. 1070 (1910); *Gibler v. Quincy, O. & K. C. R. Co.*, 129 Mo. App. 93, 107 S. W. 1021 (1908).

New York.—*Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573 (1892); *People v. Hawkins*, 109 N. Y. 408, 17 N. E. 371 (1888).

South Carolina.—*State v. Belcher*, 13 S. C. 459 (1880).

Texas.—*Rogers v. Crain*, 30 Tex. 284 (1867).

Vermont.—*Knox v. Wheelock*, 54 Vt. 150 (1881).

United States.—*Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 15 Sup. Ct. 840, 30 L. ed. 977 (1895).

"The prisoner's declaration in November as to his condition in September was not competent as evidence of his actual condition at that time, nor could it be the basis of a scientific opinion as to whether he was sane or insane at that period. Had the question related to his con-

dition at the time of the interview, the result might be quite different. Everything said or done at a given period serves to disclose the mental state of the actor, but his narration as to what he said or did, or of his feelings or bodily ailments upon a former occasion, furnishes no foundation for an opinion as to his actual state or condition at that time. It is of no higher grade than the declarations of third persons as to a past transaction, and in like manner is inadmissible." *People v. Hawkins*, 109 N. Y. 408, 410, 17 N. E. 371 (1888), per Danforth, J.

See, also, § 2647.

16. A statement by a slave to his attending physician that he had been ill for the past three weeks was received as proof of that fact. *Yeatman v. Hart*, 6 Humphr. (Tenn.) 374 (1845). See, also, *Looper v. Bell*, 1 Head (Tenn.) 373 (1858).

17. *Wilkins v. Brock*, 81 Vt. 332, 70 Atl. 572 (1908); *Acme Cement Plaster Co. v. Westman*, (Wyo. 1912) 122 Pac. 89.

18. *Greinke v. Chicago City Ry. Co.*, 234 Ill. 564, 85 N. E. 327 (1908); *Shaughnessy v. Holt*, 236 Ill. 485, 86 N. E. 256, 21 L. R. A. (N. S.) 826 n. (1908). See *Chesapeake & Ohio R. Co. v. Wiley*, 134 Ky. 461, 121 S. W. 402 (1909); *O'Dea v.*

to the contrary, it will be presumed that statements made to a physician were made in order that the physician might properly treat the patient and not with a view to providing expert testimony to be used on a future trial.¹⁹

Lapse of time between receiving the injuries and making the statements is immaterial on the question of admissibility.²⁰ Nor does the fact that the statements were made *post litem motam* affect their admissibility; it merely affects their weight with the jury.²¹

§ 3048. Probative Weight of Spontaneous Statements.—The probative force of a spontaneous utterance clearly lies in the elimination of any controlling motive to misrepresent the truth. The

Michigan Cent. R. Co., 142 Mich. 265, 105 N. W. 746, 12 Detroit Leg. N. 718 (1905); *Comstock v. Georgetown Tp.*, 137 Mich. 541, 100 N. W. 788, 11 Detroit Leg. N. 379 (1904); *St. Louis Southwestern Ry. Co. v. Demsey*, 40 Tex. Civ. App. 398, 89 S. W. 786 (1905); *Tyler, etc., R. Co. v. Wheeler*, (Tex. Civ. App. 1897) 41 S. W. 517, *modified* 91 Tex. 356, 43 S. W. 876 (1897).

"The law admits in evidence the declarations of the injured party as to the physical condition given to a physician during treatment because it is presumed that the injured person will not falsify in his statements made to the physician, when he expects and hopes to receive medical aid, but no such presumption arises when he is examined by an expert for the purpose of giving evidence in a case about to be tried." *Shaughnessy v. Holt*, 236 Ill. 485, 489, 86 N. E. 256, 21 L. R. A. (N. S.) 826 n. (1908), per Carter, J.

See, also, § 2635.

Where the attending physician is also the medical expert for trial.—In an action for personal injuries, physicians who examined the plaintiff for the purpose of testifying at the trial, one of them being the plaintiff's regular attending physician, were properly allowed to testify to

the plaintiff's exclamations and wincing, showing pain where pressure was applied to certain parts of his body. *Ft. Worth & D. C. Ry. Co. v. Hays*, (Tex. Civ. App. 1910) 131 S. W. 416.

19. *Gilmore v. American Tube & Stamping Co.*, 79 Conn. 498, 66 Atl. 4 (1907).

20. *El Paso & S. W. R. Co. v. Polk*, 49 Tex. Civ. App. 269, 108 S. W. 761 (1908).

21. "This class of testimony [expressions of existing pain] is competent, and its admissibility does not depend upon the statements being made before suit is begun. The ground of this objection might be considered in weighing such testimony, but not in determining its admissibility." *Indianapolis Southern R. Co. v. Tucker*, (Ind. App. 1912) 98 N. E. 431, 437, per Felt, C. J.

An apparent contrary view.—"The accident occurred December 29, 1904. These statements were two days later, and this action was not commenced until January 31, 1905. In view of these facts, the evidence was competent and admissible." *Orlando v. Syracuse Rapid Transit Ry. Co.*, 109 N. Y. App. Div. 356, 358, 95 N. Y. Suppl. 898, 899 (1905), per Williams, J.

operation of the reflective faculties, with their possible perversions of self-interest, has been replaced by the mentally automatic, closely analogous to the exactness of natural law. This judicial administration trusts, it being assumed that the declarant has stated the truth as it appears to him.¹ That the statement is self-serving does not constitute a necessary ground for its rejection,² and one against the interest of the declarant in the nature of a confession need not be shown to have been voluntary as that term is commonly used in connection with alleged confessions by those accused of crime,³ its admissibility resting upon an entirely different basis. In like manner, the spontaneous statement of a person about to die may take the place of a dying declaration, properly so-called,⁴ even in a civil case.⁵

§ 3049. (*Probative Weight of Spontaneous Statements*); Statements to Physicians.—A strictly spontaneous statement,

§ 3048-1. "The admissibility of the evidence depended upon whether the statement was a natural emanation from the occurrence, made spontaneously and so nearly contemporaneously as to be in the presence of the occurrence and under such circumstances as to exclude the idea of design and deliberation." Cincinnati, L. & A. Electric St. R. Co. v. Stahle, 37 Ind. App. 539, 545, 76 N. E. 551 (1905), per Roby, C. J.

"The admission of the declaration depends upon its being so connected in time and circumstances with the principal act that the assailed appears to be the spontaneous spokesman of the act and not the deliberate utterer of an afterthought." Green v. State, 154 Ind. 655, 658, 57 N. E. 637 (1900), per Baker, C. J.

"She [the declarant] was in no state of mind to reflect and plan a false story, and her condition and manner of expression were not consistent with the attitude of one who was telling the story of a past event." State v. Alton, 105 Minn. 410, 417, 117 N. W. 617, 15 Am. & Eng. Ann. Cas. 806 (1908), per Lewis, J.

"We think the declaration made by Scheir to the engineer in the engine room, stating that he was scalded was competent. This engine room was sixty or seventy feet from the vat, and Scheir ran there in intense pain and spontaneously cried out as stated. This was closely connected with the transaction and was the natural exclamation of a man in great agony and suffering and we think it may be said to be part of the *res gestae*." Scheir v. Quirin, 77 N. Y. App. Div. 624, 628, 78 N. Y. Suppl. 956, affirmed 177 N. Y. 568, 69 N. E. 1130 (1904), per Spring, J.

2. See cases cited, § 2994.

3. Allen v. State, 60 Ala. 19 (1877); Head v. State, 44 Miss. 731 (1870); Miller v. State, 31 Tex. Cr. App. 609, 21 S. W. 925, 37 Am. St. Rep. 836 (1893).

4. State v. Morrison, 64 Kan. 669, 68 Pac. 48 (1902); People v. Del Vermo, 192 N. Y. 470, 85 N. E. 590 (1908).

5. Brownell v. Pacific R. Co., 47 Mo. 239 (1871) (negligence); Jack v. Mutual, etc., Life Assn., 113 Fed. 49, 51 C. C. A. 36 (1902).

i. e., one made while the reflective powers of the declarant are numbed and stilled by some severe external shock, obviously has the same probative force when made to a physician as when made to any other person, the probative weight depending upon the automatic and non-deliberative nature of the utterance.¹ The probative force of a statement to a physician concerning present pain, suffering or physical condition, made with a view to receiving treatment, is derived from the fact that it is to be reasonably expected that a person, suffering with pain or bodily ailment and looking to a physician for relief, will tell the physician the exact truth in order that the latter may be able to determine what must be done in the way of effecting a cure.² It has been held that such exclamations and other expressions of pain as may be properly shown by any person who hears them are entitled to greater weight when made to a physician or medical attendant than when made to another person.³ The logical basis for this view is apparently the natural tendency of a person seeking medical relief to be more careful to have his exclamations and statements show his true condition than would be the case if he had no such purpose in mind. Where a physician is not in attendance in his professional capacity statements made to him as to the declarant's present bodily condition stand in the same administrative position as if made to a non-professional witness.⁴ The use by a medical witness of leading questions in eliciting the unsworn statement made to him tends to diminish the probative force of the utterance.⁵

§ 3049-1. § 3048.

2. § 3047.

3. *Johnson v. State*, 17 Ala. 618 (1850); *Central Railroad v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31 (1886); *Newman v. Dodson*, 61 Tex. 91 (1884); *Rogers v. Crain*, 30 Tex. 284 (1867); *Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 15 Sup. Ct. 840, 30 L. ed. 977 (1895).

"The rule is, in some respects, different where the declarations are made to a physician who is examining the injured party, in that the physician in certain cases is competent to give an opinion as an expert as to whether a given injury would cause pain, when a person not

a physician could not give his opinion on the question." *Western Steel Car & Foundry Co. v. Bean*, 163 Ala. 255, 262, 50 So. 1012 (1909), per Mayfield, J.

"If [the declarations of present pain, etc., are] made to a medical attendant they are of more weight than if made to another person." *Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 275, 15 Sup. Ct. 840, 39 L. ed. 977 (1894), per Mr. Justice Shiras.

4. *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644 (1882).

5. *Chapman v. State*, 43 Tex. Cr. App. 328, 65 S. W. 1098, 96 Am. St. Rep. 874 (1901).

§ 3050. Who Are Competent Declarants.—Determining the admissibility of extrajudicial statements from the standpoint of the competency of the declarant to make the particular statements in question has often taxed administrative judgment. The competency of the declarant may be affected by his age, mental capacity, knowledge of the subject-matter, relation to the main transaction, and the like. It may be laid down as a broad general rule from which there is little dissent and from which, on principle, there can be dissent only in cases where the circumstances are unusual, that a spontaneous declaration is admissible in and of itself without regard to the person making it. This necessarily follows as a result of the basis of admissibility, such declarations being received because of their automatic unpremeditated character. Therefore, the spontaneous declarations of a child too young to be sworn as a witness,¹ an agent or representative of one of the parties,² a bystander who witnessed the main transaction,³

§ 3050-1. *Alabama*.—*Bessiere v. Alabama City*, G. & A. R. Co., 60 So. 82 (1912).

Arizona.—*Soto v. Territory*, 12 Ariz. 36, 94 Pac. 1104 (1908).

Arkansas.—*Beale-Doyle Dry Goods Co. v. Carr*, 85 Ark. 479, 108 S. W. 1053, 14 Am. & Eng. Ann. Cas. 48 (1908).

Georgia.—*Grant v. State*, 124 Ga. 757, 53 S. E. 334 (1906).

Texas.—*Thomas v. State*, 47 Tex. Cr. App. 534, 84 S. W. 823, 122 Am. St. Rep. 712 (1905); *Kenney v. State*, (Cr. App. 1903) 79 S. W. 817, 65 L. R. A. 316; *Croomes v. State*, 40 Tex. Cr. App. 672, 51 S. W. 924 (1899).

"We cannot agree with counsel that permitting the witness to testify to the words of a little child, too young to be brought into court as a witness, was equivalent to permitting the child itself to testify. It appears from the evidence that the witness Colbert, at the sound of the shots which slew the deceased, ran immediately from an adjoining room into the one where the homicide was committed, and said twice to the defendant, 'Have you shot Mary?'

The defendant made no answer, but the child, as the defendant silently left the room, uttered the words, 'Huss, you have shot Mama.' These words spoken by a little child immediately after the shocking occurrence, were clearly admissible as part of the *res gestae*. No declaration could have been freer 'from all suspicion of device or afterthought,' and it was, in point of time, almost concurrent with the act to which it referred. It was the very deed itself speaking through the mouth of a babe." *Grant v. State*, 124 Ga. 757, 53 S. E. 334 (1906), per Beck, J.

2. *California*.—*Durkee v. Central Pac. R. Co.*, 9 Pac. 99 (1885), *reversed* in banc 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562 (1886).

Colorado.—*Trumbull v. Donahue*, 18 Colo. App. 460, 72 Pac. 684 (1903).

Delaware.—*Baldwin v. Peoples R. Co.*, 7 Pennw. 81, 76 Atl. 1088 (1909).

Idaho.—*Anderson v. Great Northern Ry. Co.*, 15 Idaho 513, 99 Pac. 91 (1908).

Indiana.—*Ft. Wayne & W. V. Traction Co. v. Roudebush*, 173 Ind. 57,

particularly when related to or having a special interest in one of the parties,⁴ or an adult person of sound mind who is not sworn as a witness because of incompetency⁵ or otherwise are ordinarily received as evidence of the facts declared. It has even been indicated that the spontaneous declarations of an insane person are

88 N. E. 676 (1909); *Cincinnati, L. & A. Electric St. R. Co. v. Stahle*, 37 Ind. App. 539, 76 N. E. 551, 77 N. E. 363 (1905).

Iowa.—*Alseyer v. Minneapolis, etc., R. Co.*, 115 Iowa 338, 88 N. W. 841, 56 L. R. A. 748 (1902).

Kentucky.—*Louisville & N. R. Co. v. Lee*, 140 Ky. 91, 130 S. W. 813 (1910); *McLeod v. Ginther's Adm'x*, 80 Ky. 399, 4 Ky. L. Rep. 276 (1882).

Maryland.—*United Rys. & Electric Co. v. Cloman*, 107 Md. 681, 69 Atl. 379 (1908).

Michigan.—*Ensley v. Detroit United R. Co.*, 134 Mich. 195, 96 N. W. 34 (1903).

Minnesota.—*O'Connor v. Chicago, etc., R. Co.*, 27 Minn. 166, 6 N. W. 481, 38 Am. Rep. 288 (1880).

Nebraska.—*Union Pac. R. Co. v. Edmondson*, 77 Neb. 682, 110 N. W. 650 (1906); *Union Pac. R. Co. v. Elliott*, 54 Neb. 299, 74 N. W. 627 (1898).

North Dakota.—*Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305 (1903).

Texas.—*City of Austin v. Nuchols*, 42 Tex. Civ. App. 5, 94 S. W. 336 (1906); *Gulf, etc., R. Co. v. Milner*, 28 Tex. Civ. App. 86, 66 S. W. 574 (1902).

Washington.—*Lambert v. La Conner Trading, etc., Co.*, 30 Wash. 346, 70 Pac. 960 (1902); *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111 (1902).

Wisconsin.—*Hermes v. Chicago, etc., R. Co.*, 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69 (1891); *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437 (1877).

United States.—*American Mfg. Co.*

v. Bigelow, 188 Fed. 34, 110 C. C. A. 77 (1911); *Kansas City Southern R. Co. v. Moles*, 121 Fed. 351, 58 C. C. A. 29 (1903).

See, also, § 3023.

3. *District of Columbia*.—See *McUin v. United States*, 17 App. D. C. 323 (1900).

Georgia.—*Smith v. State*, 10 Ga. App. 36, 72 S. E. 527 (1911). See, also, *Knight v. State*, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17 (1901).

Missouri.—*State v. Kaiser*, 124 Mo. 651, 28 S. W. 182 (1894).

North Carolina.—*State v. McCoury*, 128 N. C. 594, 38 S. E. 883 (1901).

Tennessee.—See *Cooper v. State*, 138 S. W. 826 (1911).

Texas.—*Pettis v. State*, (Civ. App. 1912) 150 S. W. 790; *Kinney v. State*, (Cr. App. 1912) 144 S. W. 257.

See, also, § 2983.

4. *Dunham v. State*, 8 Ga. App. 668, 70 S. E. 111 (1911); *Grant v. State*, 124 Ga. 757, 53 S. E. 334 (1906) (child of woman murdered); *People v. McArron*, 121 Mich. 1, 79 N. W. 944 (1899) (mother of accused); *Redman v. State*, (Tex. Cr. App. 1912) 149 S. W. 670 (wife and child of murdered man).

A statement to the effect that the defendant shot the deceased and herself made by the mother of the deceased, who was mortally wounded at the time, a few minutes after the shooting was properly received. *State v. Williams*, 96 Minn. 351, 105 N. W. 265 (1905).

5. *Dunham v. State*, 8 Ga. App. 668, 70 S. E. 111 (1911) (wife of accused, incompetent); *Flores v. State*, (Tex. Cr. App. 1904) 79 S. W. 808 (convict).

admissible.⁶ This no doubt is a sound view where it does not appear that the person was insane when the declarations were made, although he is insane at the time of the trial.⁷ Obviously, however, sound administration must sometimes exclude what is apparently a truly spontaneous utterance because of attendant circumstances which make the evidence unreliable, as, for example, the mental incapacity of the declarant⁸ or the admitted physical conditions under which the declaration was made.⁹

In rape cases, and those of similar nature, there is an apparent confusion among the authorities as to the competency of the injured female to make a statement of complaint which is receivable in evidence. This is partly due to the lack of uniformity in the practice as to admitting such statements among the various jurisdictions¹⁰ and partly a meager statement of the facts and law in many judicial opinions treating the subject. Even in such cases it is clear that a strictly spontaneous statement is practically al-

6. *Wilson v. State*, 49 Tex. Cr. App. 50, 90 S. W. 312 (1905).

7. The fact that the prosecuting witness in a case of robbery was insane, and, therefore, incompetent as a witness, at the time of trial which took place more than two months after the robbery, is no ground for excluding his spontaneous declarations made shortly after the robbery. *State v. Smith*, 26 Wash. 354, 67 Pac. 70 (1901).

8. Where a child three and one-half years of age witnessed a homicide and at the trial, nearly two years later, proved not to be possessed of sufficient comprehension and intelligence to be competent to testify, its exclamations and utterances at the time of the homicide, although they may have been spontaneous, were inadmissible upon the ground that a child of such tender years, so lacking in intelligence and discrimination cannot comprehend passing events with sufficient accuracy to render his exclamations or observations at all reliable. *Adams v. State*, 34 Fla. 185, 15 So. 905 (1894).

9. Where, in the trial of a person charged with the crime of murder, it is shown that he was shot from ambush by some person about 175 yards distant, and shortly after the shooting the deceased said to his brother, who was present at the shooting, "Do you know who did this?" and the brother, answering, stated, "One of them was Will Regnier," and the deceased replied, "Yes, and the other was John Labrier," such conversation was not admissible as part of the *res gestae*. The court said: "It is not shown that he had seen his assailants, who were hid 175 yards distant, and we cannot assume that he could recognize them, if he had seen them, at that distance. It is a matter of common knowledge that the human features are not clearly distinguishable at that distance, and only the upper part of the person firing the shot is shown to have been at all visible." *Regnier v. Territory*, 15 Okla. 652, 660, 82 Pac. 509 (1905), per Gillette, J.

10. See §§ 3034-3041.

ways admissible both upon reason and authority. For example, the evidence has been received where the injured party was a child too young to testify.¹¹ However, when the fact that a complaint was made or both the fact of the complaint and the particulars thereof are admitted as independently relevant for the purpose of corroboration, there is real difficulty in harmonizing the decisions. The fact that a complaint was made has been received where the injured party was a child too young to testify;¹² on the other hand, both the fact of complaint and the details have been rejected,¹³ or the latter have been rejected without discussing the admissibility of the former.¹⁴ The fact of complaint has, however, been received, the details being rejected, where the prosecutrix was dead at the time of the trial.¹⁵ Under like circumstances, both the fact that a complaint was made and its particulars have been held inadmissible.¹⁶ Finally, there are decisions which apparently indicate that where the prosecutrix, for any reason, does not testify, no evidence can be given of either the fact of complaint or its details.¹⁷ The ground for excluding the evidence, where the prose-

11. *Thomas v. State*, 47 Tex. Cr. App. 534, 84 S. W. 823, 122 Am. St. Rep. 712 (1905) (assault with intent to rape child of six years); *Kenney v. State*, (Tex. Cr. App. 1903) 79 S. W. 817, 65 L. R. A. 316 (rape, child three and one-half years of age); *Croomes v. State*, 40 Tex. Cr. App. 672, 51 S. W. 924, 53 S. W. 882 (1899) (assault with intent to rape).

The statement of a child, made to his mother after an assault of which he was the victim, with respect to the assault, may be received in evidence notwithstanding the fact that he is too young to be competent to testify. *Soto v. Territory*, 12 Ariz. 36, 94 Pac. 1104 (1908).

12. *People v. Bianchino*, 5 Cal. App. 633, 91 Pac. 112 (1907); *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202 (1901).

13. *Reg. v. Nicholas*, 2 Car. & K. 246, 61 E. C. L. 246 (1846).

14. *Weldon v. State*, 32 Ind. 81 (1869).

15. *Messel v. State*, 176 Ind. 214, 95 N. E. 565 (1911); *Reg. v. Megson*, 9 C. & P. 420 (1840).

16. *People v. Lewis*, 252 Ill. 281, 96 N. E. 1005 (1911).

17. *Indiana*.—*Thompson v. State*, 38 Ind. 39 (1871).

Nebraska.—*State v. Meyers*, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423 (1895).

New York.—*People v. McGee*, 1 Den. 19 (1847).

Ohio.—*Dunn v. State*, 45 Ohio St. 249, 12 N. E. 826 (1887).

Tennessee.—*Phillips v. State*, 9 Humph. 246, 49 Am. Dec. 709 (1848).

England.—*Reg. v. Guttridge*, 9 C. & P. 471 (1840).

In an action for assault with intent to commit rape on the person of a female, who, by reason of being an imbecile, was incompetent to testify, the declarations of such female made after the assault are inadmissible. *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608 (1879).

cutrix is not sworn, is generally said to be that, as the evidence, when received, is received only for the purpose of corroborating or confirming the testimony of the prosecutrix, the reason for receiving it entirely fails when she is not sworn, as there is nothing to corroborate. A reasonable rule which would avoid all uncertainty seems easy to formulate. The bare fact that a complaint was made is an independently relevant circumstance and does not depend for its probative force upon whether or not the complainant is sworn as a witness. Such fact, without the details of the complaint, should be shown to the jury in all cases, except possibly in cases where the length of time which elapsed before the complaint was made clearly justifies the trial judge in regarding the evidence as worthless. Where the complaint was spontaneous, the details should, of course, be received also.

CHAPTER XLV.

HEARSAY AS PRIMARY EVIDENCE; RELEVANCY OF REGULARITY.

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§ 3051. Shop Book Rule.—The rule which, aside from statute, may be said to be recognized in the various courts of the United States is that the account books of a party, supported by his suppletory oath are, subject to certain limitations or modifications,¹

§ 3051-1. "The extent to which such evidence was admissible has not been marked with entire uniformity in the different States of the Union, but each has adopted its own system." *Harwood v. Mulry*, 8 Gray (Mass.) 250 (1857), per Dewey, J.

admissible in evidence to show a sale and delivery of goods or the performance of services.² The early use of the shop book in evi-

2. Alabama.—McGrath v. Stein, 148 Ala. 370, 42 So. 454 (1906); Alabama Constr. Co. v. Wagnon Bros., 137 Ala. 388, 34 So. 352 (1902); Bol-ling v. Fannin, 97 Ala. 619, 12 So. 59 (1893); McDonald v. Carnes, 90 Ala. 147, 7 So. 919 (1890); Dismukes & Patrick v. Tolson & Barrett, 67 Ala. 386 (1880). *Compare* Halliday v. Butt, 40 Ala. 178 (1866); Nolley v. Holmes, 3 Ala. 642 (1842); Moore v. Andrews, 5 Port. 107 (1837).

California.—Idol v. San Francisco Constr. Co., 1 Cal. App. 92, 81 Pac. 665 (1905); White v. Whitney, 82 Cal. 163, 22 Pac. 1138 (1889); Roche v. Ware, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539 (1886); Carroll v. Storck, 57 Cal. 366 (1881); Caldwell v. McDermit, 17 Cal. 464 (1861); Caulfield v. Sanders, 17 Cal. 569 (1861); Landis v. Turner, 14 Cal. 573 (1860). *Compare* Ross v. Brusie, 10 Pac. 121 (1886).

Colorado.—Kipp v. Miller, 47 Colo. 598, 108 Pac. 164 (1910).

Connecticut.—Smith v. Law, 47 Conn. 431 (1880); Bradley v. Good-year, 1 Day 104 (1803).

Delaware.—Baker Mach. Co. v. Jedel, 80 Atl. 635 (1911); Cannon v. Kinney, 3 Harr. 317 (1841).

Florida.—Dunbar v. Wright's Adm'r, 20 Fla. 446 (1884); Robinson v. Dibble's Adm'r, 17 Fla. 457 (1880); Grady v. Thigpin, 6 Fla. 668 (1856); Hooker v. Johnson, 6 Fla. 730 (1856). *Compare* Higgs v. Shehee, 4 Fla. 382 (1852), decided prior to statute making books of account admissible.

Georgia.—Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459 (1907); Gray v. Joiner, 127 Ga. 544, 56 S. E. 752 (1907); Blackshear v. Dekle, 120 Ga. 766, 48 S. E. 311 (1904); Martin v. Fyffe, Dudley 16 (1831).

Illinois.—Telford v. Howell, 119 Ill. App. 83 (1905), *affirmed*, 220 Ill.

52, 77 N. E. 82 (1906); F. H. Hill Co. v. Sommer, 55 Ill. App. 345 (1894); New Boston Presby. Church v. Emerson, 66 Ill. 269 (1872); Boyer v. Sweet, 4 Ill. 120 (1841).

Indiana.—State v. Central States Bridge Co., (App. 1912) 97 N. E. 803; Place v. Baugher, 159 Ind. 232, 64 N. E. 852 (1902).

Iowa.—Porter v. Madrid State Bank, 136 N. W. 666 (1912); Kuhl v. Chamberlain, 140 Iowa 546, 118 N. W. 776 (1908); Milhollen v. McDon-ald & Morrison Mfg. Co., 137 Iowa 114, 112 N. W. 812 (1907).

Kansas.—Richolson v. Ferguson, 87 Kan. 411, 124 Pac. 360 (1912); Hastie v. Burrage, 69 Kan. 560, 77 Pac. 268 (1904).

Kentucky.—Gailbraith v. Hill, 122 Ky. 681, 92 S. W. 924, 29 Ky. L. Rep. 201 (1906).

Louisiana.—Hill v. Hill, 115 La. 490, 39 So. 503 (1905).

Maine.—Clark v. Perry, 17 Me. 175 (1840).

Massachusetts.—Pratt v. White, 132 Mass. 477 (1882); Mathes v. Rob-inson, 8 Metc. 269, 41 Am. Dec. 505 (1844); Faxon v. Hollis, 13 Mass. 427 (1816); Prince v. Smith, 4 Mass. 455 (1808); Cogswell v. Dolliver, 2 Mass. 217, 3 Am. Dec. 45 (1806).

Michigan.—Nolan v. Garrison, 151 Mich. 138, 115 N. W. 58, 14 Detroit Leg. N. 915 (1908); Baxter v. Reyn-olds, 112 Mich. 471, 70 N. W. 1039 (1897); Seventh-Day Adventist Pub. Assoc. v. Fisher, 95 Mich. 274, 54 N. W. 759 (1893); Montague v. Dougan, 68 Mich. 98, 35 N. W. 840 (1888).

Minnesota.—Coleman v. Retail Lumbermen's Ins. Assoc., 77 Minn. 31, 79 N. W. 588 (1899); Johnson v. Morsted, 63 Minn. 397, 65 N. W. 721 (1896).

Missouri.—Gardner v. Springfield, Gas & Electric Co., 154 Mo. App. 666,

dence may, to a great extent, be attributed to necessity. It frequently happened that in the case of a small tradesman no clerk had been employed and that the entries had been made by the

135 S. W. 1023 (1911); *Wagoner Undertaking Co. v. Jones*, 134 Mo. App. 101, 114 S. W. 1049 (1908); *Bader v. Ferguson*, 118 Mo. App. 34, 94 S. W. 836 (1906); *Britian v. Fender*, 116 Mo. App. 93, 92 S. W. 179 (1906). See *Robinson v. Smith*, 111 Mo. 205, 20 S. W. 29, 33 Am. St. Rep. 510 (1892); *Anchor Milling Co. v. Walsh*, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600 (1891), *distinguishing* *Hissrick v. McPherson*, 20 Mo. 310, where a different rule was laid down on common-law principles; *Compare* *Nipper v. Jones*, 27 Mo. App. 538 (1887); *Hensgen v. Donnelly*, 24 Mo. App. 398 (1887).

Nebraska.—*Armstrong Clothing Co. v. Boggs*, 90 Neb. 499, 133 N. W. 1122 (1912); *Sheridan Coal Co. v. Hull Co.*, 87 Neb. 117, 127 N. W. 218 (1910).

New Hampshire.—*Sheehan v. Hennessy*, 65 N. H. 101, 18 Atl. 652 (1889); *Bailey v. Harvey*, 60 N. H. 152 (1880); *Snell v. Parsons*, 59 N. H. 521 (1880); *Dodge v. Morse*, 3 N. H. 232 (1825); *Eastman v. Moulton*, 3 N. H. 156 (1825).

New Jersey.—*City of Bayonne v. Standard Oil Co.*, 81 N. J. L. 717, 78 Atl. 146 (1910); *Schlicher v. Whyte*, 71 Atl. 337 (1908); *Corkran v. Rutter*, 76 N. J. L. 375, 69 Atl. 954 (1908); *Rush v. Hance*, 3 N. J. L. 860 (1811).

New Mexico.—See *Di Palma v. Weinman*, 16 N. M. 302, 121 Pac. 38 (1911).

New York.—*Curry v. Lanning*, 94 N. Y. Suppl. 535, 106 App. Div. 615 (1905); *Hodnett v. Gault*, 64 N. Y. App. Div. 163, 71 N. Y. Suppl. 831 (1901); *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138 (1892); *Young v. Luce*, 66 Hun 631, 21 N. Y. Suppl. 225, 50 N. Y. St. Rep. 253 (1892); *Burke v. Wolfe*, 38 N.

Y. Super. Ct. 263 (1874); *Vosburgh v. Thayer*, 12 Johns. 461 (1815).

North Carolina.—See *Bland v. Warren*, 65 N. C. 372 (1871).

Ohio.—*Kugler v. Wiseman*, 20 Ohio 361 (1851).

Oregon.—*McLeod v. Despaigne*, 49 Oreg. 536, 92 Pac. 1088, 90 Pac. 492 (1907).

Pennsylvania.—*Gillingham's Estate*, 220 Pa. 353, 69 Atl. 809 (1908); *Curren v. Crawford*, 4 Serg. & R. 3 (1818); *Poultney v. Ross*, 1 Dall. 238, 1 L. ed. 117 (1788).

Rhode Island.—*Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214 (1893).

South Carolina.—*Seaboard Air L. Ry. v. Railroad Comm'rs*, 86 S. C. 91, 67 S. E. 1069, 138 Am. St. Rep. 1028 (1910); *Crossland Co. v. Pearson*, 86 S. C. 313, 68 S. E. 625 (1910); *Thomson v. Porter*, 4 Strobb. Eq. 58, 53 Am. Dec. 653 (1849); *Thomas v. Dyott*, 1 Nott & McCord 186 (1818); *Lamb v. Hart*, 2 Bay 362, 1 Brev. 105 (1802); *Spence v. Sanders*, 1 Bay 119 (1790); *Foster v. Sinkler*, 1 Bay 40 (1786).

Texas.—*Atchison, T. & S. F. Ry. Co. v. Williams*, 38 Tex. Civ. App. 405, 86 S. W. 38 (1905); *Burleson v. Goodman*, 32 Tex. 229 (1869).

Vermont.—*Taplin & Rowell v. Marcy*, 81 Vt. 428, 71 Atl. 72 (1908). See *Gleason v. Kinney*, 65 Vt. 560, 27 Atl. 208 (1893); *Goddard v. Orcutt*, 44 Vt. 54 (1871); *Hunter v. Kittredge*, 41 Vt. 359 (1868); *Bell v. McLeran*, 3 Vt. 185 (1831). *Compare* *Houghton v. Paine's Estate*, 29 Vt. 57 (1856); *Chase v. Smith*, 5 Vt. 556 (1833); *Burnham v. Adams*, 5 Vt. 313 (1833).

Virginia.—*Downer & Co. v. Morrison*, 2 Gratt. 250 (1845).

Washington.—*Cascade Lumber Co. v. Aetna Indem. Co.*, 56 Wash. 503, 106 Pac. 158 (1910).

tradesman himself. It was, therefore, in many cases difficult, if not impossible, to prove a sale of goods or merchandise owing to the rule which prevailed that a party could not be a witness in his own behalf.³ The fact that the entries were made in the regular routine of business contemporaneous with the transactions which they recorded, coupled with other facts such as the ordinary desire to record them truthfully, rather than misrepresent them, tended to establish a belief in their accuracy and trustworthiness. The entries under such circumstances were to be regarded, in a way, as the automatic act of the entrant in following out a regular habit or course of business. It is in these various elements that we may find the basis of the relevancy of regularity. The frequent difficulty of proving accounts caused the courts to take into consideration the many factors which controlled in connection with the making of such entries and to look with favor upon the admission of shop books into evidence hedged about with certain conditions and restrictions. The rule permitting the introduction of such books as legal evidence in favor of the party making the entries is said to be one which under proper limitations, is not calculated to excite alarm or to produce injurious consequences.⁴

§ 3052. English Rule.—In England the first indication of the reception of the shop book in evidence was the appearance in the early part of the seventeenth century of a custom to receive shop

Wisconsin.—*Betts v. Stevens*, 6 Wis. 400 (1858).

Wyoming.—*Lewis v. England*, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A. (N. S.) 401 (1905). See *Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581 (1896).

United States.—*Barber Asphalt Co. v. Forty Second, etc., R. Co.*, 180 Fed. 648, 103 C. C. A. 614 (1910); *Reyburn v. Queen City Sav. B. & T. Co.*, 171 Fed. 609, 96 C. C. A. 373 (1909). See *Bates v. Preble*, 151 U. S. 149, 14 Sup. Ct. 277, 38 L. ed. 106 (1893). Compare *Jeffrey v. Schlasinger*, 13 Fed. Cas. No. 7,253a, Hempst. 12 (1822); *Bennett v. Wilson*, 3 Fed. Cas. No. 1,326, 1 Cranch C. C. 446 (1807).

Canada.—*Miller v. White*, 16 Can. Sup. Ct. 445 (1888).

Compare *Burr v. Byers*, 10 Ark. 398, 52 Am. Dec. 239 (1850); *Lyons v. Teal*, 28 La. Ann. 592 (1876); *Flower v. Downs*, 6 La. Ann. 538 (1851); *Kendall v. Bean*, 12 Rob. (La.) 407 (1846); *Gill v. Staylor*, 93 Md. 453, 49 Atl. 650 (1901); *Stallings v. Gottschalk*, 77 Md. 429, 26 Atl. 524 (1893); *Atwell v. Miller*, 6 Md. 10, 61 Am. Dec. 294 (1854); *Whiteford v. Burckmyer*, 1 Gill (Md.) 127, 39 Am. Dec. 640 (1843).

3. *Conklin v. Stamler*, 8 Abb. Prac. (N. Y.) 395, 2 Hilt. 422, 17 How. Prac. 399 (1859); *Cole v. Dial*, 8 Tex. 347 (1852).

4. *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461 (1815).

books "of divers men and handicraftsmen" in evidence of "the particulars and certainty of the wares delivered." The question whether the party himself or his clerk kept the books was regarded as immaterial, as was also the fact whether the one who made the entry was alive or not. In 1609 an act was passed in England, St. 7 Jac. 1, c. 12, 1 Eng. Rev. Stats. 691, which recited that entries in books of account kept by tradesmen and artisans were then received by the courts and enacted that thereafter such entries should not be received in evidence if made more than a year prior to the beginning of an action for the recovery of the account. This enactment was construed by the courts with the exception perhaps of those whose jurisdiction was limited to controversies involving small sums, to exclude all such books when offered by a party after the lapse of a year.¹ Subsequently, also, Lord Chief Justice Holt, in passing upon the admissibility of a shop book, declared in 1698 that this act did not render such a book evidence of itself within the year without something more.² This act more than two hundred and fifty years thereafter was "recognized and made perpetual" by an act passed in 1863.³

§ 3053. (*English Rule*); Later Developments.—Near the beginning of the eighteenth century decisions began to appear which authorized the reception in evidence of entries made by deceased clerks. In one of the early decisions of about that date it was said by Lord Chief Justice Holt that a shop book "has been allowed to be evidence on proof that the servant who writ the book was dead and this was his hand and that he accustomed to make the entries and in such case no proof was required of the delivery of the goods."¹ In another case, decided about the same time by Lord Holt, in which an action had been brought for beer sold and delivered, a book was offered in evidence containing an account of the beer delivered by the plaintiff's draymen, and which it was the duty of the draymen to sign daily. The drayman who had

§ 3052-1. *Lefebure v. Worden*, 2 Ves. 54, 28 Eng. Reprint 36 (1750); *Glynn v. Bank of England*, 2 Ves. 38, 28 Eng. Reprint 26 (1750); *Smith v. Williams*, Comb. 247 (1694); *Crouch v. Drury*, 1 Keb. 27 (1661).

2. *Pitman v. Maddox*, Holt N. P.

298, 2 Salk. 690, 2 Ld. Raym. 732 (1698).

3. 26 & 27 Vict. c. 125, 2 Taylor on Evidence (Chamberlayne's ed.) §§ 709-710.

§ 3053-1. *Pitman v. Maddox*, Holt N. P. 298, 2 Salk. 690, 2 Ld. Raym. 732 (1698).

signed the account of beer delivered to the defendant being dead, the book was admitted on proof of his handwriting.² This conclusion has been followed in many cases since,³ the exception being extended so as to cover not only entries made by a deceased clerk but "by a person since deceased." Thus it was declared in 1832 that an entry "made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that that fact occurred, is admissible in evidence."⁴ Again in 1883 it was provided by rule of court that the court or a judge may at any stage of the proceedings in a cause or matter direct any necessary accounts to be taken and "may, either by the judgment or order directing the account to be taken, or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched; and in particular may direct that, in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."⁵

§ 3054. American Modifications; New England States.—The English shop book rule, upon being introduced into America, underwent modification to some extent. Various restrictions, having reference to the nature of the business and of the transaction in question, appeared,¹ hampering to a marked degree the use of the evidence, while the time limitation which formed such an important feature of the English rule was generally removed, a change tending in the opposite direction. The practice of receiving shop books as evidence in New England is presumed to have

2. Price v. Earl of Torrington, Holt N. P. 300, 1 Salk. 285, 2 Ld. Raym. 873 (1703).

3. Hagedorn v. Reid, 3 Camp. 377 (1813); Pritt v. Fairclough, 3 Camp. 305 (1812); Sutton v. Gregory, Peake's Ad. Cas. 150 (1797); Woodnoth v. Lord Cobham, Bunbury 180 (1724).

4. Doe v. Turford, 3 B. & Ad. 890, 898 (1832), per Taunton, J.

5. Ord. xxxiii, r. r. 2, 3; 2 Taylor on Evidence (Chamberlayne's ed.), § 711.

§ 3054-1. Terrill v. Beecher, 9 Conn. 344 (1832); Davis v. Sanford, 9 Allen (Mass.) 216 (1864); Bustin v. Rogers, 11 Cush. (Mass.) 346 (1853); Henshaw v. Davis, 5 Cush. (Mass.) 145 (1849); Wilson v. Wilson, 6 N. J. L. 95 (1822); Vosburg v. Thayer, 12 Johns. (N. Y.) 461 (1815).

been introduced by the English colonists from Holland who settled in those states.² In regard to their adoption of this practice it is said that they very wisely retained the feature of the supplementary oath of the party substantiating the truth of the entries in connection with the admission of such books as evidence, which, in the absence of statute, is established by long usage.³ The rule subject in some cases to certain restrictions was therefore early adopted in the New England states and such books were admitted in evidence when supported by the suppletory oath.⁴

2. *Beach v. Mills*, 5 Conn. 493, 496 (1825); *Taggart v. Fox*, 11 Daly (N. Y.) 159 (1882); *Conklin v. Stamler*, 8 Abb. Prac. (N. Y.) 395; 2 Hilt. 422; 17 How. Prac. 399 (1859).

The rule is "co-eval with the government." *Terrill v. Beecher*, 9 Conn. 344 (1832).

3. *Conklin v. Stamler*, 2 Hilt. (N. Y.) 422 (1859).

4. *Connecticut*.—*Smith v. Law*, 47 Conn. 431 (1880); *Terrill v. Beecher*, 9 Conn. 344 (1832); *Beach v. Mills*, 5 Conn. 493, 496 (1825); *Bradley v. Goodyear*, 1 Day (Conn.) 104 (1803).

Massachusetts.—*Pratt v. White*, 132 Mass. 477 (1882); *Ball v. Gates*, 12 Metc. 491 (1847); *Mathes v. Robinson*, 8 Metc. 269, 41 Am. Dec. 505 (1844); *Frye v. Barker*, 2 Pick. 65 (1823); *Faxon v. Hollis*, 13 Mass. 427 (1816); *Prince v. Smith*, 4 Mass. 455 (1808).

New Hampshire.—*Sheehan v. Hennessey*, 65 N. H. 101, 18 Atl. 652 (1889); *Bailey v. Harvey*, 60 N. H. 152 (1880); *Snell v. Parsons*, 59 N. H. 521 (1880); *Dodge v. Morse*, 3 N. H. 232 (1825); *Eastman v. Moulton*, 3 N. H. 156 (1825).

Rhode Island.—*Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214 (1893).

Vermont.—See *Gleason v. Kinney's Adm'r*, 65 Vt. 560, 27 Atl. 208 (1893); *Golding v. Orcutt*, 44 Vt. 54 (1871); *Hunter v. Kittredge's Estate*, 41 Vt. 359 (1868); *Bell v. McLeran*, 3 Vt. 185 (1831).

Compare *Houghton v. Paine's Es-*

tate, 29 Vt. 57 (1856); *Chase v. Smith*, 5 Vt. 556 (1833); *Burnham v. Adams*, 5 Vt. 313 (1833).

"The rule in Massachusetts is, and ever has been, to admit in evidence books of accounts, kept in the daybook or ledger form; as to the sale and delivery of goods; as to the payments of sums of money not exceeding \$6.67; and as to labor performed; with these restrictions, that the original entries or first charges be produced to the court and jury. The creditor must swear, if the charge was made by himself, that he made it at, or very near the time the thing was done; and that it is true, and, if required, that it has not been paid. If a clerk made the charge, he must swear to like facts; and if the person who made the charge be dead, his handwriting must be proved; and if a clerk, etc., that he was usually intrusted by the creditor to make such entries in his books, and that the books produced in evidence are or were the plaintiff's account-books. A book account annexed to the writ or filed in, is the thing to be proved, and by the party using this kind of evidence; and as this is evidence from the interested party himself, and repugnant to the general rules of evidence, though perhaps of necessity, it is to be admitted under every guard and security the nature of the case admits of; and therefore it is one of the best precautions to require the party,

§ 3055. (*American Modifications*); New York, New Jersey, etc.—The practice of admitting tradesmen's books in evidence in favor of the party making the entries was early recognized as a usage in the courts of New York.¹ It came into use with early Dutch colonists. "Merchants or traders might always exhibit their books in evidence, where it was acknowledged or proved that there had been a dealing between the parties, or that the article had been delivered, provided they were regularly kept with the proper distinction of persons, things, year, month and day—a practice which, in the states of New Jersey and New York, survived these Dutch tribunals, and has, at the present day, with certain qualifications or restrictions, extended to nearly every state in the union."² The suppletory oath was not adopted in New York,³ which feature is said to be one peculiar to that state and to New Jersey.⁴ The rule is stated in an early case in the former jurisdiction that such books are admissible subject to the following conditions and limitations.⁵ "They are not evidence in the case of a single charge, because there exists, in such case, no regular dealing between the parties. They ought not to be admitted where there are several charges, unless a foundation is first laid for their admission by proving that the party had no clerk, that some of the articles charged have been delivered, that the books produced are the account books of the party, and that he keeps fair and honest accounts, and this by those who have dealt and settled with him."⁶

so proving his account, to file, in the case, all the items of it, as early as he must have his writ served, or his account, if defendant, filed in, in order to give the opposite party reasonable time to prepare to meet them; and so has been our practice arising from ancient statutes revised and included in the Act of Oct. 30, 1784, and of Feb. 27, 1794." 3 Dane's Abr. Ch. 81, Art. 4, p. 318.

§ 3055-1. Case v. Potter, 8 Johns. (N. Y.) 211 (1811).

2. History of the Court and of the Judicial Organization of the State.

1 E. D. Smith (N. Y.) xxx (1855). See also Taggart v. Fox, 11 Daly (N. Y.) 159 (1882); Conklin v. Stamler, 8 Abb. Prac. (N. Y.) 395; 2 Hilt. 422, 17 How. Prac. 399 (1859).

3. Tomlinson v. Borst, 30 Barb. (N. Y.) 42 (1859).

4. Sickles v. Mather, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521 (1838).

5. Vosburgh v. Thayer, 12 Johns. (N. Y.) 461, 462 (1815).

6. See also Dooley v. Moan, 57 Hun. (N. Y.) 535, 11 N. Y. Suppl. 239, 33 N. Y. St. Rep. 118 (1890); Rexford v. Comstock, 3 N. Y. Suppl. 876 (1888); Knight v. Cunningham, 6 Hun (N. Y.) 100 (1875); Conklin v. Stamler, 8 Abb. Prac. (N. Y.) 395, 2 Hilt. 422, 17 How. Prac. 399 (1859); Tomlinson v. Borst, 30 Barb. (N. Y.) 42 (1859); La Rue v. Rowland, 7 Barb. (N. Y.) 107 (1849).

It is said in respect to these conditions that the courts in imposing them might have been relieved from all difficulty as to devising a safeguard if they had simply recognized the practice as it had prevailed in the Dutch tribunals and declared that the party should or could be examined under oath as to the truth or correctness of the entries made by him.⁷

§ 3056. (*American Modifications*); Is the Evidence Primary or Secondary?— When under the shop book rule subject to its limitations and restrictions such a book is received it becomes primary and independent evidence of the facts stated therein¹ though used in what may be termed a hearsay or assertive capacity. In the case of the shop book we have the automatism of regular intuitive spontaneous action in the ordinary and regular routine of business, the absence of motive to misrepresent, the habit of making truthful entries acquired in bookkeeping, and the necessity of so doing. It is the existence of these various factors which give to the entries their probative force, create the relevancy of regularity, and render them primary evidence.

§ 3057. (*American Modifications*); “Principle of the *Res Gestae*.”— Notwithstanding the authority of Professor Greenleaf to the contrary, which we have considered in greater detail elsewhere,¹ it would seem that the rule permitting the introduction of the shop book in evidence is not founded upon the principle that the entries therein are a part of the *res gestae*. The relevancy of such evidence is found in the automatic regularity and truthfulness with which a bookkeeper or other accountant makes his entries. A system of accounts demands accuracy, and accuracy becomes habitual with the person keeping such accounts. Nothing but a deep-laid plan of systematic falsification of records can ordinarily result in erroneous accounts, as an error is usually detected in the course of the business, and, unless the party keeps his own books, there can ordinarily be no motive to make erroneous entries, as such would result harmfully to the entrant in most cases. These considerations are regarded as sufficient to make the evidence worthy of consideration by a court of justice in its

7. Conklin v. Stamler, 8 Abb. Prac. (N. Y.) 395, 2 Hilt. 422, 17 How. Prac. 399 (1859). § 3056-1. Place v. Parsons, 17 Wkly. Dig. (N. Y.) 293 (1883).
§ 3057-1. §§ 2997 et seq.

endeavor to get as much light as possible on the truth. It is unnecessary to seek for some obscure source of relevancy, difficult of explanation and demoralizing to a logical understanding of the reason of the rule, such as is found in the so-called "principle of the *res gestae*. It is true that the courts have sometimes explained the admissibility of this class of evidence under consideration by stating that it is a "part of the *res gestae*," but an examination into the attendant facts almost invariably discloses that the relevancy of regularity was the true ground of admissibility.

§ 3058. (*American Modifications*); Later Developments.—In an early case decided in Maryland in 1807¹ the ruling was made that unless the contrary is proved it is presumptive evidence that a clerk, who is dead, and who made certain entries on the books of his employer, delivered the goods as charged. In this case the plaintiff had offered the books in court and a witness to prove the handwriting of the clerk, which offer was resisted by defendant's counsel. So a few years later in Massachusetts it was said that "what a person, having in charge a particular trust or duty, does in pursuance of that trust or duty, is a fact which may be proved by other testimony than that of the party who does the act, when he is dead and his testimony entirely lost."² In this case similarly it was held that a book containing entries made by a deceased person in the usual line of his duty was, upon proof of his handwriting, admissible in evidence. Shortly afterwards it was also said by Mr. Justice Story, speaking for the United States Supreme Court,³ "We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done," thus establishing the principle which permitted the admission in evidence of books containing entries made by deceased persons in the regular routine of duty or business.

§ 3059. (*American Modifications*; *Later Developments*); Second Stage.—Although the reason which originally pre-

§ 3058-1. *Clarke v. Magruder*, 2 Harr. & J. (Md.) 77 (1807).

2. *Welsh v. Barrett*, 15 Mass. 380, 383 (1819), per Parker, C. J.

3. *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 337, 5 L. ed. 628 (1823), per Mr. Justice Story.

vailed for the use of shop books in evidence was to a great extent removed by statutes, which enabled a party to be a witness in his own behalf, yet the value of evidence of this character was if anything increased instead of diminished owing to the growth and development of business and commercial transactions. Accompanying the continued growth in the number and frequency of these transactions, there was of necessity an increase in the number of entries recording the same, and, therefore, making formal common law proof of each item difficult.¹ The courts, recognizing these facts, gradually opened the doors to admit book accounts in evidence, not only in accordance with the formalities of the shop book rule, but also as collateral evidence of the testimony of the now competent party. The relevancy of books of account, based on regularity, seems, in fact, for a time to have occupied little attention.

§ 3060. (*American Modifications; Later Developments; Second Stage*); Memoranda to Refresh Recollection.—Originally, the rule in England seems to have been that account books could only be referred to for the purpose of refreshing the memory of the witness and could under no circumstances be made evidence *per se*, and that unless the witness, after refreshing his memory, could swear to the facts from recollection, he could not testify.¹ This rule was also adopted and followed to some extent in America.² At a later date, the practice of using account books as memoranda to refresh the recollection of a witness became common in cases where a proper foundation for the admission of the books themselves under the shop book rule could not well be laid.³

§ 3059-1. *Culver, Admx., v. Marks*, 122 Ind. 554, 564, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377 (1889); 1 *Smith's Leading Cases* (9th ed.), note 566.

§ 3060-1. *Russell v. Hudson River Railroad Company*, 17 N. Y. 134 (1858); 1 *Phillips Ev.* 289.

2. *Fecter v. Heath*, 11 Wend. (N. Y.) 477 (1833); *Lawrence v. Barker*, 5 Wend. (N. Y.) 301 (1830); *Juniata Bank v. Brown*, 5 Serg. & R. (Pa.) 226 (1819).

3. *Wilber v. Scherer*, 13 Ind. App. 428, 41 N. E. 837 (1895); *Stallings v. Gottschalk*, 77 Md. 429, 26 Atl. 524 (1893); *Bullock v. Hunter*, 44 Md. 416 (1875); *Mayor v. Second Avenue Railroad Co.*, 102 N. Y. 572, 7 N. E. 905 (1886); *Krom v. Levy*, 47 How. Prac. (N. Y.) 97, 1 Hun 171, 3 Thomp. & C. 704 (1874); *Philbin v. Patrick*, 3 Abb. Dec. (N. Y.) 605, 6 Abb. Pr. (N. S.) 284 (1868); *Marely v. Shults*, 29 N. Y. 346 (1864); *Russell v. Hudson River*

§ 3061. (*American Modifications; Later Developments; Second Stage; Memoranda to Refresh Recollection*); Memoranda as Secondary Evidence.—Moreover, the development of the use of account books as evidence, which took place after statutory enactments had removed the incompetency of a party to testify for himself, did not stop with the use of the books for the purpose of refreshing the recollection. If the witness, after referring to the books, could not then speak from recollection, but was able to swear that the entries in the books were correct when made, the entries could be read to the jury in connection with his oral testimony.¹ This practice became firmly established and has continued to be a common method of introducing accounts in evidence. In such cases it is only as auxiliary to and not as a substitute for the oral testimony of the witness that the writing is admissible.²

§ 3062. (*American Modifications; Later Developments*); Third Stage.—The difficulty, expense and frequent impossibility of making proof of book accounts combined with legislative enactments and judicial rulings, have resulted in a decided broadening of the “shop book” rule. The rule, in its first stage of development, although frequently designated by its original name, has, in most jurisdictions, been modified by removing every limitation in regard to the amount involved in the transaction and allows, under the old conditions prescribed by the “shop book” rule, original entries in the books of account of persons engaged in all lines of business, professional lines included, made in the usual course of business, as a contemporaneous record of current transactions, by a party or his agent or employee, to be introduced in evidence, without regard to whether such record is in favor of or against the party whose transactions are recorded therein.

§ 3063. (*American Modifications; Later Developments; Third Stage*); “Principle of the Res Gestae.”—The ground of relevancy of book entries made in the course of business remains the same as in the days of the “shop book” rule, strictly speaking, namely, the well-known accuracy of such records, briefly de-

Railroad, 17 N. Y. 134 (1858); Halsey v. Sinsebaugh, 15 N. Y. 485 (1857).

§ 3061-1. Halsey v. Sinsebaugh, 15 N. Y. 485 (1857).

2. Russell v. Hudson River Railroad Co., 17 N. Y. 134 (1858).

scribed as the accuracy resulting from regularity, the features of which are considered in a preceding section.¹ This ground of relevancy is sometimes not judicially recognized in plain language, the expression "part of the *res gestae*," being frequently used, apparently as a labor-saving device, to avoid an explanation of the real reason for regarding the evidence as sufficiently reliable to be considered by a jury.

§ 3064. Administrative Requirements.—The books must appear to the court to be trustworthy in order that a party may be entitled to introduce them in evidence.¹ Part of the basis of the presiding judge's ruling in this connection may well consist of facts gained by his own perception, and in passing upon the admissibility of such a book he may reasonably weigh a large number of considerations.

All the circumstances of the case, such as the education of the persons concerned, their financial resources, the nature of the trade or calling which they carry on; these elements and any similar or otherwise relevant facts may be taken into account in dealing with the conditions of admissibility² which are essen-

§ 3063-1. § 3057.

§ 3064-1. *Alabama*.—North Birmingham Lumber Co. v. Sims, 157 Ala. 595, 48 So. 84 (1908); Avery's Ex'rs v. Avery, 49 Ala. 193 (1873).

Florida.—Stewart v. Stewart, 62 Fla. 388, 56 So. 413 (1911).

Georgia.—Bower v. Smith, 8 Ga. 74 (1850).

Illinois.—Pittsburgh, etc., R. Co. v. Fawcett, 56 Ill. 513 (1870).

Iowa.—Karr v. Stivers, 34 Iowa 123 (1871).

Massachusetts.—Riley v. Boehm, 167 Mass. 183, 45 N. E. 84 (1896).

New York.—Skipworth v. Devell, 83 Hun 307, 31 N. Y. Suppl. 918, 64 N. Y. St. Rep. 725 (1894).

North Carolina.—Peele v. Powell, 156 N. C. 553, 73 S. E. 234 (1911).

2. *Alabama*.—Halliday v. Butt, 40 Ala. 178 (1866).

Florida.—Dunbar v. Wright's Adm'r, 20 Fla. 446 (1884).

Kansas.—Holden v. Spier, 65 Kan. 412, 70 Pac. 348 (1902).

Massachusetts.—Riley v. Boehm, 167 Mass. 183, 45 N. E. 84 (1896); Com. v. Morgan, 159 Mass. 375, 34 N. E. 458 (1893); Pratt v. White, 132 Mass. 477 (1882); Com. v. Coe, 115 Mass. 481 (1874); Hawks v. Charlemont, 110 Mass. 110 (1872); Mathes v. Robinson, 8 Metc. 269, 41 Am. Dec. 505 (1844).

Mississippi.—Moody v. Roberts, 41 Miss. 74 (1866).

Ohio.—Allen v. Davis, Tapp. 60 (1816).

An example of the court's action and some of the considerations which affect it may be seen in an early Massachusetts case, Davis v. Sanford, 9 Allen (Mass.) 216 (1864), per Chapman, J., in which the court said: "A few of the entries for goods sold contain the dates of the sales, and appear to be

tial to be established to permit of the introduction of the books in evidence.³

§ 3065. (Administrative Requirements); Necessity.—The fundamental administrative necessity for receiving evidence of shop books lay in the circumstance that, as a rule, facts such as indebtedness from small transactions could be proved in no other way.¹ Under the exception as to hearsay the declarant would

original charges made at or near the time of the transactions to be proved. But most of the entries are without any date; and on some of the pages the handwriting and ink are so much alike as to indicate that the entries were all made at one time, though they relate to separate sales which were probably made on different days. The book does not, on inspection, sufficiently appear to be the daily minutes of the party, made at or near the time of the transactions to be proved, so as to be admissible in evidence, within the rule stated in *Cogswell v. Dolliver*, 2 Mass. 221 (1806), and *Prince v. Smith*, 4 Mass. 455 (1808). But the principal charges are for cash, and the items exceed forty shillings in amount. The book is inadmissible in proof of these charges. *Burns v. Fay*, 14 Pick. 8 (1833). The court are of opinion that the whole was properly excluded.”

3. § 3082.

§ 3065-1. California.—*Landis v. Turner*, 14 Cal. 573 (1860).

Connecticut.—*Terrill v. Beecher*, 9 Conn. 344 (1832); *Beach v. Mills*, 5 Conn. 493 (1825).

Maine.—*Dunn v. Whitney*, 10 Me. 9 (1833).

Massachusetts.—*Faxon v. Hollis*, 13 Mass. 427 (1816).

Pennsylvania.—*Sterrett v. Bull*, 1 Binn. 234 (1808).

Texas.—*Cole v. Dial*, 8 Tex. 347 (1852).

“It has been sanctioned as an exception to the general rule of law, as it formerly existed, that a party should not be a witness in his own case, and from supposed necessity, in order to prevent a failure of justice, that he shall be allowed to produce the record of his daily transactions, to many of which, on account of their variety and minuteness, it cannot be expected there will be witnesses.” *Pratt v. White*, 132 Mass. 477, 478 (1882), per Devens, J.

“It was founded upon a supposed necessity and was intended for cases of small traders who kept no clerks.” *Smith v. Rentz*, 131 N. Y. 169, 176, 30 N. E. 54, 15 L. R. A. 138 (1892), per Andrews, J.

“That mischief (intended to be remedied) was the extreme difficulty, and, in many cases, the utter impossibility of proving the quantity, quality, or delivery of articles passing from one person to another upon credit, and which are ordinarily charged upon book. The merchant does not always keep a clerk by whom this proof could be made; the farmer or mechanic rarely, if ever. Hence the necessity of the statute.” *Cram v. Spear*, 8 Ham. (Ohio) 494, 497 (1838), per Hitchcock, J.

“In consideration of the mode of doing business in the infancy of the country, when many people kept their own books, it has been permitted, from the necessity of the case, to offer these books in evidence. But

have been competent as a witness had he been available. In case of the shop book the declarant was a party; and, as the law then stood, he was excluded as a witness on account of his interest. The paramount right of the litigant to prove his case in the best way in his power, required administrative concession. It could only be looked for in the production of the book itself. It could scarcely happen that the sale and delivery of the article handled by the small tradesman, the rendering of the services of the handicraftsman should take place in the presence of persons other than the parties. In some cases where other persons competent as witnesses were present, it would still less often happen that these persons would have given the affairs of others sufficient attention to enable them to testify to the attendant facts.²

If little relief from this situation could be anticipated from the presence of casual witnesses who would be competent to testify, there would seem almost as little reason to expect general relief in this class of cases from the rule of procedure which enables an employee or servant having personal knowledge of facts, to testify as a witness for his master or employer. In the first place, it well might happen that handicraftsmen, small tradesmen or the like who had occasion to sell goods on credit or make charges for labor would conduct a business too small to warrant the employment of a clerk or assistant who could swear to the accuracy of the account. Under such circumstances the creditor would be without remedy, in the absence of some admission by the alleged debtor. He could not testify to the accuracy of his account. No one else had knowledge as to it sufficient to enable him to do so.³

§ 3066. (*Administrative Requirements; Necessity*); No Clerk.—It is a frequent administrative requirement that it should be affirmatively shown by the proponent that he had no clerk at the time the entries were made.¹ The term “clerk” has received,

when no such necessity exists, when the fact is that clerks have been employed and the entries made by them, there is no cause for violating that wise principle that no man shall be allowed to give testimony for himself.” *Sterrett v. Bull*, 1 Bin. (Pa.) 234, 237 (1808), per *Tilghman, C. J.*

2. *Pratt v. White*, 132 Mass. 477

(1882); *Molony v. Benners*, 3 Grant (Pa.) 233, 234 (1858); *Missouri Pac. R. Co. v. Johnson*, (Tex. Sup. 1888) 7 S. W. 838.

3. *Cole v. Dial*, 8 Tex. 347 (1852).

§ 3066-1. *California*.—*Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811 (1886); *Landis v. Turner*, 14 Cal. 573 (1860).

upon sound administrative principles, such a definition as will best succeed in carrying out the beneficial object of the rule itself. The book is not made inadmissible by the existence of a "clerk," except in cases where the latter can fully take its place. It is also necessary that the employee, in order to be such a clerk as would render the book inadmissible, when verified by the employer, should have a general knowledge of the business itself. In other words, the clerk who made the entry must, in order to exclude the book, be in a position to testify to the same facts which the book entry would cover. He must be sufficiently in charge of the business in question to make the entry upon the book, and he must also possess personal knowledge of the truth of the facts which he sets down.² In some particulars, therefore, the "clerk" must be, with regard to the employer, an *alter ego*, a vice-principal. Whether the employee in question shall be deemed to constitute "a clerk" within the meaning of the rule, will be determined by the two conditions above enumerated. By statute,³ and occasionally by the practice of the courts,⁴ a party is permitted to authenticate his own books whether kept by himself or by another, and this rule is generally applied.⁵

Illinois.—Waggeman v. Peters, 22 Ill. 42 (1859); Boyer v. Sweet, 3 Scam. 120 (1841).

Maine.—Dunn v. Whitney, 10 Me. 9 (1833).

Michigan.—Jackson v. Evans, 8 Mich. 476 (1860).

New York.—Smith v. Smith, 163 N. Y. 163, 57 N. E. 300, 52 L. R. A. 545 (1900); Irish v. Horn, 84 Hun 121, 32 N. Y. Suppl. 455, 65 N. Y. St. Rep. 641 (1895); Tomlinson v. Borst, 30 Barb. 42 (1859); Conklin v. Stamler, 8 Abb. Prac. 395, 2 Hilt. 422, 17 How. Prac. 399 (1859); Foster v. Coleman, 1 E. D. Smith 85 (1850); Sickles v. Mather, 20 Wend. 72, 32 Am. Dec. 521 (1838); Vosburgh v. Thayer, 12 Johns. 461 (1815).

See Martin v. Fyffe, Dudley (Ga.) 16 (1831); Harris v. Caldwell, 2 M'Mull. (S. C.) 133 (1842), holding that where a shopkeeper himself sold and delivered goods to a party, and during the same day the entries were

made by another person, who occasionally acted as clerk for him, the book was no evidence of the debt, and that the evidence was inadmissible.

2. An attorney's clerk who knows nothing about the book keeping is not within the rule. Rexford v. Comstock, 3 N. Y. Suppl. 876 (1888). See also, In re Simpson's Estate, 53 Hun (N. Y.) 629, 5 N. Y. Suppl. 833, 24 N. Y. St. Rep. 685 (1889). See Adequate Knowledge, §§ 3071, *et seq.*

3. Perry State Bank v. Elledge, 99 Ill. App. 307 (1901); House v. Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892); Webb v. Michener, 32 Minn. 48, 19 N. W. 82 (1884).

Compare Ingersoll v. Banister, 41 Ill. 388 (1866) (decided prior to statute).

4. Webb v. Pindergrass' Adm'r, 4 Harr. (Del.) 439 (1846).

5. Hurley v. Macey, 94 N. Y. App.

What constitutes a clerk.—It would seem essential that the employee in question, in order to constitute a clerk within the rule, must have some charge of the book itself. Thus, a foreman, superintending each delivery of goods and putting it down every day upon a slate from which the entries were taken off each day by the plaintiff who alone entered them in the book, is not a clerk within the meaning of the rule.⁶ Nor do clerks to procure orders⁷ or those who were merely temporary employees, taken into service from time to time, constitute clerks within the contemplation of the rule.⁸ Where, however, a salesman enters the actual sales upon a book of original entry, daily and in the regular course of business, he is a clerk;⁹ and the ledger or other book into which the entries have been copied by the plaintiff are not admissible.¹⁰

Where the entries were made by the party himself it is not material that he had a clerk who might have made them.¹¹ It follows that where the entries were made in part by the employer and partly by his clerk, the book is admissible as to entries made by the party.¹²

One whose sole connection with the business is that of a bookkeeper is not a "clerk" within the rule.¹³ Thus where the plaintiff, a blacksmith, and his foreman wrote on a slate the items of every day's work and these items were, under the plaintiff's direction, entered on the account book by a bookkeeper who knew nothing about any other part of the plaintiff's business, it was decided that the book was admissible,¹⁴ even though the wife of

Div. 9, 87 N. Y. Suppl. 924 (1904); *McGoldrick v. Wilson's Ex'rs*, 18 Hun (N. Y.) 443 (1879); *Stroud v. Tilton*, 42 N. Y. (3 Keyes) 139, 4 Abb. Dec. 324 (1866). But see *Burke v. Wolfe*, 38 N. Y. Super. Ct. 263, 268 (1874).

6. *Sickles v. Mather*, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521 (1838). See also, *Van Name v. Barber*, 115 N. Y. App. Div. 593, 100 N. Y. Suppl. 987 (1906); *Atwood v. Barney*, 80 Hun (N. Y.) 1, 29 N. Y. Suppl. 810, 61 N. Y. St. Rep. 485 (1894).

7. *Van Name v. Barber*, 100 N. Y. Suppl. 987, 115 App. Div. 593 (1906).

8. *Atwood v. Barney*, 80 Hun (N. Y.) 1, 29 N. Y. Suppl. 810 (1894).

9. *Ives v. Waters*, 30 Hun (N. Y.) 297 (1883) (blotter).

10. *Dooley v. Moan*, 57 Hun (N. Y.) 535, 11 N. Y. Suppl. 239, 33 N. Y. St. Rep. 118 (1890).

11. *Townsend v. Coleman*, 18 Tex. 418, 20 Tex. 817 (1857).

12. *Dunlap v. Hooper*, 65 Ga. 211 (1880); *McDaniel v. Trulock*, 27 Ga. 366 (1859); *Wheeler v. Smith*, 18 Wis. 651 (1864).

13. *Matter of McGoldrick v. Trap-hagen*, 88 N. Y. 334 (1882).

14. *Matter of McGoldrick v. Trap-hagen*, 88 N. Y. 334 (1882).

the employer was his bookkeeper.¹⁵ The wife of a party who keeps his books, but enters only such transactions as she is told, is not regarded as a clerk within the rule.¹⁶ "We think," say the New York Court of Appeals,¹⁷ "that the clerk intended was one who had something to do with and had knowledge generally of the business of his employer in reference to goods sold or work done, so that he could testify on that subject. It evidently means an employee whose duty it is to attend to the details of business and thus is able to prove an account, and not one who from his isolated position as bookkeeper, can have but little means of knowledge personally as to the transactions done, or information relating thereto, except what is mainly derived from others."¹⁸

As a corporation must necessarily act by clerks or other servants or agents, it cannot prove an account by means of the shop-book rule.¹⁹

§ 3067. (Administrative Requirements; Necessity); Clerk Unavailable.—An equally important reason for introducing the shop book as evidence of the indebtedness arose where the plaintiff had had a clerk, in whose handwriting the entries were, but the latter had deceased. From an early time if a party's clerk were dead the shop book or "store book" containing his entry was admissible.¹ The close connection between the shop book rule and

15. *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 543 (1900); *Taggart v. Fox*, 11 Daly (N. Y.) 159 (1882).

16. *Smith v. Smith*, 163 N. Y. 158, 57 N. E. 300, 52 L. R. A. 543 (1900). See also, *Carr v. Cornell*, 4 Vt. 116 (1832). Where the entry is made in the presence and under the superintendence of the husband, she may testify to these circumstances and he to the correctness of the books: *Littlefield v. Rice*, 10 Metc. (Mass.) 287 (1845), but supervision by the husband is essential. Merely writing in the husband's presence where he is unable to exercise any supervision because unable to read, does not suffice to admit the book. *Luce v. Doane*, 38 Me. 478 (1853).

17. *Matter of McGoldrick v. Trap-*

hagen, 88 N. Y. 334, 338 (1882), per Miller, J.

18. See, also, *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 543 (1900); *Atwood v. Barney*, 80 Hun (N. Y.) 1, 29 N. Y. Suppl. 810, 61 N. Y. St. Rep. 845 (1894); *Young v. Luce*, 66 Hun (N. Y.) 631, 21 N. Y. Suppl. 225, 50 N. Y. St. Rep. 253 (1892); *Rexford v. Comstock*, 3 N. Y. Suppl. 876 (1888); *Sickles v. Mather*, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521 (1838); *Harris v. Caldwell*, 2 McMull. (S. C.) 133 (1842).

19. *Congdon & Aylesworth Co. v. Sheehan*, 11 N. Y. App. Div. 455, 42 N. Y. Suppl. 255 (1896); *Snyder v. Harris*, 61 N. J. Eq. 480, 48 Atl. 329 (1901).

§ 3067-1. *Lewis v. Norton*, 1 Wash. (Va.) 76 (1792).

the exception to the hearsay rule admitting entries made in the regular course of business² is thus made apparent. As this exception to the general rule treating as secondary evidence of the facts asserted the unsworn statements made by deceased persons in the regular course of business or official duty became formulated under the rulings of the English courts,³ it is not surprising to find that the attention of the American tribunals was distracted from the shop book rule in this particular to the more comprehensive, far-reaching and flexible use of hearsay under practically similar circumstances as secondary evidence.⁴ From this point, the general exception to hearsay of regular entries in the course of business, dissociated from any restrictions to the account books of a party, may be regarded as fully established. The rule practically adopted by the courts is well settled that if the clerk, servant or employee who made the entry can be produced as a witness, this course should be pursued.⁵

§ 3068. (*Administrative Requirements; Necessity*); The Modern Situation.—It is entirely consistent with good legal reasoning to confine the admissibility of this species of evidence to the necessity from which it took its use. This has been done by the Supreme Court of New Hampshire.¹ Where other evidence can be obtained the shop book should be rejected.

In point of fact, however, the removal of the disqualification of parties as witnesses does not preclude the party from still offering his shop books in evidence at the present time.²

2. § 2870.

3. *Hagedorn v. Reid*, 3 Campb. 377 (1813); *Pritt v. Fairclough*, 3 Campb. 305 (1812).

4. *Clarke v. Magruder*, 2 Harr. & J. (Md.) 77 (1807); *Welsh v. Barrett*, 15 Mass. 380 (1817); *Sterrett v. Bull*, 1 Binn. (Pa.) 234, 238 (1808); *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 5 L. ed. 628 (1823).

5. See § 3072.

§ 3068-1. "As this is in truth the admission of a party to be a witness on his own cause, the practice is confined to cases, where it may be presumed there is no better evidence."

Eastman v. Moulton, 3 N. H. 156, 157 (1825), per Richardson, C. J.

2. *Georgia*.—*Revere v. Powell & Murphy*, 61 Ga. 30, 34 Am. Rep. 94 (1878).

Missouri.—*Robinson v. Smith*, 111 Mo. 205, 20 S. W. 29, 33 Am. St. Rep. 519 (1892).

New Hampshire.—*Swain v. Cheney*, 41 N. H. 232 (1860).

New York.—*Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545 (1900).

Texas.—*Missouri Pac. R. Co. v. Johnson*, (Sup. 1888) 7 S. W. 838.

§ 3145.

§ 3069. (*Administrative Requirements; Necessity; The Modern Situation*); Clerk Deceased.—Under the general trend of modern decisions and statutory enactments entries made by clerks contemporaneously with the occurrence of the actual transactions, with full knowledge and without motive to misrepresent, may be offered in evidence after the death of the entrant.¹ In case of the

§ 3069-1. *Alabama*.—*Sands v. Ham-mell*, 108 Ala. 624, 18 So. 489 (1895); *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87 (1890); *Elliott v. Dyke*, 78 Ala. 150 (1884); *Dismukes & Patrick v. Tolson & Barrett*, 67 Ala. 386 (1880); *Avery's Ex'rs v. Avery*, 49 Ala. 193 (1873); *Montgomery Bank v. Plan-nett*, 37 Ala. 222 (1861).

California.—*Sill v. Reese*, 47 Cal. 294 (1874).

Colorado.—See *Farrington v. Tucker*, 6 Colo. 557 (1883).

Connecticut.—*Bridgewater v. Rox-bury*, 54 Conn. 213, 6 Atl. 415 (1886); *Ashmead v. Colby*, 26 Conn. 287 (1857); *Livingston v. Tyler*, 14 Conn. 493 (1842).

Illinois.—*Telford v. Howell*, 119 Ill. App. 83 (1905); *affirmed*, 220 Ill. 52, 77 N. E. 82 (1906).

Indiana.—*Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489 (1889); *Glover v. Hunter*, 28 Ind. 185 (1867).

Louisiana.—*Lathrop v. Lawson*, 5 La. Ann. 238, 52 Am. Dec. 585 (1850); *Oxnard v. Locke*, 13 La. 447 (1839); *Hunter v. Smith*, 6 Mart. (N. S.) 351 (1827); *Herring v. Levy*, 4 Mart. (N. S.) 383 (1826).

Maine.—*Dow v. Sawyer*, 29 Me. 117 (1848).

Maryland.—*Reynolds v. Manning*, *Stimpson & Co.*, 15 Md. 510 (1859); *King v. Maddux's Ex'r*, 7 Harr. & J. 467 (1824); *Clarke v. Magruder*, 2 Harr. & J. 77 (1807).

Massachusetts.—*Kennedy v. Doyle*, 10 Allen 161 (1865); *Jones v. How-ard*, 3 Allen 223 (1861); *Washington*

Bank v. Prescott, 20 Pick. 339 (1838); *Shove v. Wiley*, 18 Pick. 558 (1836); *North Bank v. Abbot*, 13 Pick. 465, 25 Am. Dec. 334 (1833); *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 181 (1825).

New Hampshire.—*Hutchins v. Berry*, 75 N. H. 416, 75 Atl. 650 (1910); *Roberts v. Rice*, 69 N. H. 472, 45 Atl. 237 (1898); *Wheeler v. Walker*, 45 N. H. 355 (1864); *Rand v. Dodge*, 17 N. H. 343 (1845).

New York.—*State Bank v. Brown*, 96 App. Div. 441, 89 N. Y. Suppl. 381 (1904); *Bentley v. Falker*, 24 N. Y. App. Div. 560, 49 N. Y. Suppl. 691 (1898); *Fisher v. New York*, 67 N. Y. 73 (1876), *reversing* 6 Hun 64 (1875); *Livingston v. Arnoux*, 56 N. Y. 507 (1874); *Elsworth v. Muldoon*, 15 Abb. Pr. (N. S.) 440, 46 How. Prac. 246 (1873); *Gawtry v. Doane*, 51 N. Y. 84 (1872); *Stroud v. Tilton*, 42 N. Y. 139, 4 Abb. Dec. 324 (1866).

North Carolina.—*Bland v. Warren*, 65 N. C. 372 (1871).

Oregon.—*Raski v. Wise*, 56 Ore. 72, 107 Pac. 984 (1910).

South Carolina.—*Hand v. Savan-nah, etc., R. Co.*, 17 S. C. 219 (1881).

South Dakota.—*Smith v. Hawley*, 8 S. D. 363, 66 N. W. 942 (1896).

Vermont.—*State v. Phair*, 48 Vt. 366 (1875); *Bacon v. Vaughn*, 34 Vt. 73 (1861); *Derby v. Salem*, 30 Vt. 722 (1858).

Virginia.—*Brown's Adm'x v. Brown*, 2 Wash. 151 (1795); *Lewis v. Norton*, 1 Wash. 76 (1792).

Washington.—See *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884 (1912).

decease of the clerk, it will be required that his handwriting be proved.² When the fact of death is established it would, as a general rule, be unreasonable to refuse to admit the book. Should it appear, however, that better evidence exists of the facts to be established by the entries of a deceased clerk, the presiding judge may be justified in declining to receive proof of the entries.³

§ 3070. (*Administrative Requirements; Necessity; The Modern Situation*); Other Unavailability of Entrant.—The same rule that proof may be made of the handwriting of the entrant when deceased, is applied when the latter has since become insane,¹ or where a witness is unable to attend because of physical sickness² or generally where for any cause it is impossible to procure his testimony.³ Permanent absence from the jurisdiction likewise involves the use of the same administrative expedient.⁴ One

United States.—Chaffee v. U. S., 18 Wall. 516, 21 L. ed. 908 (1873); Gale v. Norris, 9 Fed. Cas. No. 5,190, 2 McLean 469 (1841); U. S. Bank v. Davis, 2 Fed. Cas. No. 915, 4 Cranch C. C. 533 (1835); Nicholls v. Webb, 8 Wheat. 326, 5 L. ed. 628 (1823). See also Owens v. Adams, 18 Fed. Cas. No. 10,633, 1 Brock. 72 (1803).

England.—Poole v. Dicas, 1 Bing. N. Cas. 649, 27 E. C. L. 803 (1835); Doe v. Turford, 3 B. & Ad. 890, 1 L. J. K. B. 262, 23 E. C. L. 388 (1832); Doe v. Robson, 15 East 32, 13 Rev. Rep. 361 (1812); Barry v. Bebbington, 4 T. R. 514, 2 Rev. Rep. 450 (1792); Price v. Torrington, 2 Ld. Raym. 873, 1 Salk. 285 (1703); Pitman v. Maddox, 1 Ld. Raym. 732 (1698). Compare Sikes v. Marshal, 2 Esp. 705 (1799).

2. Farrington v. Tucker, 6 Colo. 557 (1883); Owens v. Adams, 18 Fed. Cas. No. 10,633, 1 Brock. 72 (1803).

3. Montgomery Bank v. Plannett, 37 Ala. 222 (1861).

§ 3070-1. Bolling v. Fannin, 97 Ala. 619, 12 So. 59 (1893); Beattie v. McMullen, 82 Conn. 484, 74 Atl. 767 (1909); Bridgewater v. Roxbury, 54

Conn. 213, 6 Atl. 415 (1886); Holbrook v. Gay, 6 Cush. (Mass.) 215 (1850); Union Bank v. Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181 (1825).

2. Rodman v. Hoops' Ex'r, 1 Dall. (Pa.) 85, 1 L. ed. 47 (1784). See Taylor v. Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 84, (1890).

3. Van Horne's Ex'r v. Brady, Wright (Ohio) 451 (1833). Compare Hale v. Smith, 6 Me. 416 (1830).

4. *Alabama.*—McDonald v. Carnes, 90 Ala. 147, 7 So. 919 (1890), overruling Moore v. Andrews & Bros., 5 Port 107 (1837).

Colorado.—Farrington v. Tucker, 6 Colo. 557 (1883).

Connecticut.—Bartholomew v. Farwell, 41 Conn. 107 (1874).

Illinois.—Cook v. People, 231 Ill. 9, 82 N. E. 863 (1907).

Indiana.—State v. Central States Bridge Co., (App. 1912) 97 N. E. 803; Culver v. Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489 (1889).

Maryland.—Heiskell v. Rollins, 82 Md. 14, 33 Atl. 263, 51 Am. St. Rep. 455 (1895); Reynolds v. Manning, 15 Md. 510 (1859).

of a temporary nature has also been held to warrant the reception of proof of the absentee's handwriting in case of an item entered by him on a book of account.⁵ In short, wherever a reasonable administrative necessity is shown for doing so, the evidence of the handwriting of the entrant will be received in lieu of his verbal testimony.⁶ The onus is upon the proponent of the book to show a reasonable excuse for not producing the testimony of the original entrant.⁷ Where the entrant is alive the sufficiency of the excuse for non-production is largely a matter of administration. As a general rule, however, all persons connected with an entry, even under the shop book rule, should be produced or their absence excused.⁸

Massachusetts.—North Bank v. Abbot, 13 Pick. 465, 25 Am. Dec. 334 (1833).

Michigan.—Cameron Lumber Co. v. Somerville, 129 Mich. 552, 89 N. W. 346 (1902).

Pennsylvania.—Crouse v. Miller, 10 Serg. & R. 155 (1823); Sterrett v. Bull, 1 Binn. 234 (1808). See also, Gochenauer v. Good, 3 Penr. & W. 274 (1831).

Rhode Island.—State v. Mace, 6 R. I. 85 (1859).

South Carolina.—Elms v. Chevis, 2 McCord 349 (1823).

Texas.—Smelting, etc., Co. v. Gonzales, 50 Tex. Civ. App. 79, 109 S. W. 946 (1908).

West Virginia.—Vinal v. Gilman, 21 W. Va. 301, 45 Am. Rep. 562 (1883).

United States.—James v. Whar-ton, 13 Fed. Cas. No. 7,187, 3 McLean 492 (1844). Compare Little Rock Granite Co. v. Dallas County, 66 Fed. 522, 13 C. C. A. 620 (1894).

See Browning v. Flanagan, 22 N. J. L. 567 (1849); Brewster v. Doane, 2 Hill (N. Y.) 537 (1842); Merrill v. Ithaca, etc., R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130 (1837); Wilbur v. Selden, 6 Cow. (N. Y.) 162 (1826); Whitfield & Brown v. Walk, 3 N. C. 24 (1797); Kennedy v. Fairman, 2 N. C. 458 (1797); Cooper v. Marsden, 1 Esp. 1 (1793).

5. Hay v. Kramer, 2 Watts & S. (Pa.) 137 (1841). See McKeen v. Providence County Sav. Bank, 24 R. I. 542, 54 Atl. 49 (1902); Douglass v. Hart, 4 McCord (S. C.) 257 (1827), distinguishing Spence v. Sanders, 1 Ray. (S. C.) 119 (1790); Foster v. Sinkler, 1 Bay (S. C.) 40 (1786).

6. North Bank v. Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334 (1833). See also, Townsend v. Pepperell, 99 Mass. 40 (1868); Stevelie v. Greenlee, 12 N. C. 317 (1827).

7. St. Louis, etc., R. Co. v. Henderson, 57 Ark. 402, 21 S. W. 878 (1893). See also, Sneed v. State, 47 Ark. 180, 1 S. W. 68 (1886).

8. *Kansas*.—Merywethers v. Youmans, 81 Kan. 309, 105 Pac. 545 (1909).

Massachusetts.—Littlefield v. Rice, 10 Mete. 287 (1845); Smith v. Sanford, 12 Pick. 139, 22 Am. Dec. 415 (1831). See also Barker v. Haskell, 9 Cush. 218 (1852).

Michigan.—Cameron Lumber Co. v. Somerville, 129 Mich. 552, 89 N. W. 346 (1902).

New Hampshire.—State v. Shinn-born, 46 N. H. 497, 88 Am. Dec. 224 (1866).

New York.—Bloomington Min. Co. v. Brooklyn Hygienic Ice Co., 58 N. Y. App. Div. 66, 68 N. Y. Suppl. 699 (1901); affirmed in 171 N. Y. 673, 64 N. E. 1118 (1902); Van Wie v.

§ 3071. (*Administrative Requirements*); *Relevancy; Adequate Knowledge*.—As in case of other statements, judicial or extrajudicial, used in an assertive capacity, i. e., as evidence of the facts alleged, it is required in case of the declaration contained in a shop book, that it should be objectively and subjectively relevant to the existence of some *res gestae* fact. Objective relevancy being assumed as an essential prerequisite for all evidence, it may be said that, in this connection as in others, the familiar elements of subjective relevancy are two: (1) The declarant must have adequate knowledge as to the fact asserted; (2) He must be free from controlling motive to misrepresent. The entrant must know of his own knowledge the truth of the transaction which he enters.¹ It has, however, been held not to be necessary for the creditor entering a charge upon a shop book to deliver the goods with his own hands.² If the entrant acts in pursuance of a report to him by an employee in the line of his employment there is a presumption of the truth of the entry.³ Even when the entry

Loomis, 77 Hun 399, 28 N. Y. Suppl. Y.) 425, 430, 52 N. Y. Suppl. 691 803, 60 N. Y. St. Rep. 51 (1894); (1898), per Ward, J. See also, Leask v. Hoagland, 205 N. Y. 171, 98 N. E. 284 (1891); Rudd v. Robinson, 54 Hun 339, 7 N. Y. Suppl. 535, 27 N. Y. St. Rep. 98, reversed 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 473, 22 Am. St. Rep. 816 (1889); West v. Van Tuyl, 49 Hun 605, 1 N. Y. Suppl. 718, 17 N. Y. St. Rep. 273, affirmed 119 N. Y. 620, 23 N. E. 450, 2 Silvernail Ct. App. 501 (1888); New York v. Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 (1886). Compare Dooley v. Moan, 57 Hun 535, 11 N. Y. Suppl. 239, 33 N. Y. St. Rep. 118 (1890).

Pennsylvania.—Ingraham v. Bockius, 9 Serg. & R. 285, 11 Am. Dec. 730 (1823).

Texas.—Missouri Pac. R. Co. v. Johnson, (Sup. 1888) 7 S. W. 838.

Wisconsin.—Taylor v. Davis, 82 Wis. 455, 52 N. W. 756 (1892).

§ 3071-1. It should appear as to these entries that "they related to transactions within the knowledge of the persons making the entries." Shipman v. Glynn, 31 App. Div. (N.

2. Curren v. Crawford, 4 Serg. & R. (Pa.) 3 (1818). See also, Kline v. Gundrum, 11 Pa. St. 242 (1849).

3. U. S. v. Cross, 20 D. C. 365, writ of error dismissed 145 U. S. 571, 12 Sup. Ct. 842, 36 L. ed. 821 (1892); Chicago, etc., R. Co. v. Province, 61 Miss. 288 (1883); Payne v. Hodge, 7 Hun (N. Y.) 612, affirmed 71 N. Y. 598 (1876); Imhoff v. Fleurer, 2 Phila. (Pa.) 35 (1857); Jones v. Long, 3 Watts (Pa.) 325 (1834). See Gould v. Conway, 59 Barb. (N. Y.) 355 (1871).

was made from memoranda furnished by a drayman, it has also been held unnecessary to call him to confirm the book re-enforced by the suppletory oath.⁴

§ 3072. (Administrative Requirements; Relevancy; Adequate Knowledge); Books of Account.—In the same way under the developed modern doctrine as to the use of books of account as primary evidence of the facts asserted affirmative proof will be required of the proponent of books of account to show that the entries upon which he relies were made by a person possessed of adequate knowledge regarding the facts which he purports to prove.¹ It follows that while in earlier forms of action where the submission of the book itself, re-enforced by the suppletory oath of the creditor, was the essential operative element of proof,² the books of a creditor who has had no personal knowledge of the facts will not be sufficient to establish the account.³ The usual

4. *Jones v. Long*, 3 Watts (Pa.) 325 (1834). See also, *Kessler v. McConachy*, 1 Rawle (Pa.) 435 (1829). In like manner, a blacksmith may prove his shop book in the ordinary way, although part of the account was made upon information furnished by a workman in his service. *Bailey v. Barnelly*, 23 Ga. 582 (1857) (slave).

§ 3072-1. *Illinois*.—*Schnellbacher v. Frank McLaughlin Plumbing Co.*, 108 Ill. App. 486 (1902).

Indiana.—*Dodge v. Morrow*, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153 (1895).

Minnesota.—*Carlton v. Carey*, 83 Minn. 232, 86 N. W. 85 (1901). See also, *Union Central L. Ins. Co. v. Prigge*, 90 Minn. 370, 96 N. W. 917 (1903).

New Jersey.—*New Jersey Zinc, etc., Co. v. Lehigh Zinc, etc., Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896).

New York.—*Dykman v. Northbridge*, 80 Hun 258, 30 N. Y. Suppl. 164, 61 N. Y. St. Rep. 863 (1894); *Burke v. Wolfe*, 38 N. Y. Super. Ct. 263 (1874).

United States.—*Chicago Lumbering Co. v. Hewitt*, 64 Fed. 314, 12 C. C.

A. 129 (1894); *Connecticut Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294 (1876); *Chaffee v. U. S.*, 18 Wall. 516, 21 L. ed. 908 (1874).

An electric light company which has furnished light to a theatre cannot prove the number of occasions on which light was furnished from a book made at the end of the month from an examination of the newspapers and the information furnished by the company's collector. *Union Electric Co. v. Seattle Theatre Co.*, 18 Wash. 213, 51 Pac. 367 (1897).

2. *Butler v. Cornwall Iron Co.*, 22 Conn. 335 (1853) (book debt.).

It has been held, however, that the indulgence does not exclude the more normal proof by the clerk himself in cases where he can be produced as a witness. *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892).

3. *Colorado*.—*Charles v. Ballin*, 4 Colo. App. 186, 35 Pac. 279 (1894).

Connecticut.—*Bartholomew v. Farwell*, 41 Conn. 107 (1874); *Stiles v. Homer*, 21 Conn. 507 (1852). See, *Butler v. Cornwall Iron Co.*, 22 Conn. 335 (1853).

requirement in such instances is to the effect that the clerk actually making the entry must be produced, if he be practically available.⁴

Georgia.—Day v. Crawford, 13 Ga. 508 (1853).

Iowa.—Karr v. Stivers, 34 Iowa 123 (1871).

New York.—Horowitz v. Jacobs, 34 Misc. 402, 69 N. Y. Suppl. 746 (1901); Smith v. Smith, 1 Thomps. & C. 63 (1873).

Vermont.—Cummings v. Fullam, 13 Vt. 441 (1841).

Compare Continental Nat. Bank v. Nashville First Nat. Bank, 108 Tenn. 374, 68 S. W. 497 (1902).

Statutory authority may be furnished for permitting a creditor to testify to his book accounts, though the clerk who made the entries is available as a witness. Weigle v. Brautigam, 74 Ill. App. 285 (1897); House v. Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892), *overruling* New Boston Presb. Church v. Emerson, 66 Ill. 269 (1872); Stettauer v. White, 98 Ill. 72 (1881); Kibbe v. Bancroft, 77 Ill. 18 (1875); Taliaferro v. Ives, 51 Ill. 247 (1869); Webb v. Michener, 32 Minn. 48, 19 N. W. 82 (1884).

4. *Alabama.*—Davie v. Roland, 3 Ala. App. 567, 57 So. 1034 (1912); Powell v. State, 84 Ala. 444, 4 So. 719 (1887).

California.—*In re* Flint, 100 Cal. 391, 34 Pac. 863 (1893); Kerns v. Dean, 77 Cal. 555, 19 Pac. 817 (1888); Kerns v. McKean, 76 Cal. 87, 18 Pac. 122 (1888).

Colorado.—Charles v. Ballin, 4 Colo. App. 186, 35 Pac. 279 (1894); Farrington v. Tucker, 6 Colo. 557 (1883).

Florida.—Union Bank v. Call, 5 Fla. 409 (1854).

Georgia.—Bracken & Ellsworth v. Dillon & Sons, 64 Ga. 243, 37 Am. Rep. 70 (1879).

Illinois.—Barnes v. Simmons, 27 Ill. 512, 81 Am. Dec. 248 (1862). See also, Trainor v. German-American Savings, etc., Assoc., 204 Ill. 616, 68 N. E. 650 (1903); F. H. Hill Co. v. Sommer, 55 Ill. App. 345 (1894); House v. Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892); Meeth v. Rankin Brick Co., 48 Ill. App. 602 (1892); Ruggles v. Gaton, 50 Ill. 412 (1869).

Iowa.—Ford & Butterfield v. St. Louis, etc., R. Co., 54 Iowa 723, 7 N. W. 126 (1880).

Kentucky.—See Louisville & N. R. Co. v. Daniel, 122 Ky. 256, 91 S. W. 691, 28 Ky. L. Rep. 1146, 3 L. R. A. (N. S.) 1190n (1906).

Maryland.—Goggett v. Tatham, 116 Md. 147, 81 Atl. 376 (1911); Owings & Piet v. Low, 5 Gill & J. 134 (1833).

Michigan.—Countryman v. Bunker, 101 Mich. 218, 59 N. W. 422 (1894); Tioga Mfg. Co. v. Stimson, 48 Mich. 213, 12 N. W. 173 (1882).

Mississippi.—Illinois C. R. Co. v. Butterfield Lumber Co., 95 Miss. 357, 49 So. 179 (1909).

New Jersey.—Browning v. Flanagan, 22 N. J. L. 567 (1849).

New Mexico.—McKenzie v. King, 14 N. M. 375, 93 Pac. 703 (1908).

New York.—Galway & Co. v. Prignano, 134 N. Y. Suppl. 571 (1912); Ocean Nat. Bank v. Carll, 55 N. Y. 440 (1874); Smith v. Smith, 1 Thomps. & C. 63 (1873); White v. Ambler, 8 N. Y. 170, Seld Notes 84 (1853); Sheridan v. Smith, 2 Hill 538 (1842); Merrill v. Ithaca, etc., R. Co., 16 Wend. 586, 30 Am. Dec. 130 (1837). See Steubing v. New York El. R. Co., 64 Hun 639, 19 N. Y. Suppl. 313, 46 N. Y. St. Rep. 799, *affirmed* 138 N. Y. 658, 34 N. E. 369 (1892).

The clerk who made the entries is competent as a witness for the purpose of proving them, after which they will be received.⁵

North Carolina.—Sloan & Co. v. McDowell, 75 N. C. 29 (1876). See also, State Bank v. Clark, 8 N. C. 36 (1820).

Ohio.—Bennett v. Shaw, 13 Ohio Cir. Ct. 574, 5 Ohio Cir. Dec. 480 (1896).

Pennsylvania.—Com. v. Berney, 28 Pa. Sup. Ct. 61 (1905); Budden v. Petriken, 5 Watts 286 (1836); Rhoads v. Gaul, 4 Rawle 404, 27 Am. Dec. 277 (1834); Gochenauer v. Good, 3 Penr. & W. 274 (1831); Patton's Adm'rs v. Ash, 7 Serg. & R. 116 (1821); Sterrett v. Bull, 1 Binn. 234 (1808). See also, Vance v. Fairis, 2 Dall. 217, 1 Yeates 321, 1 L. ed. 355 (1794). Compare Schollenberger v. Seldonridge, 49 Pa. St. 83 (1865).

South Carolina.—See King v. Western Union Tel. Co., 84 S. C. 73, 65 S. E. 944 (1908); Tunno v. Rogers, 1 Bay 480 (1795).

Texas.—Arnold v. Penn, 11 Tex. Civ. App. 325, 32 S. W. 353 (1895).

Vermont.—State v. Hopkins, 56 Vt. 250, 258 (1883); Burnham v. Adams, 5 Vt. 313 (1833).

Virginia.—Courtney v. Com., 5 Rand. 666 (1827).

West Virginia.—Vinal v. Gilman, 21 W. Va. 301, 45 Am. Rep. 562 (1883).

Wisconsin.—Marsh v. Case, 30 Wis. 531 (1872).

United States.—Chandler v. Romero, 87 Fed. 262, affirmed 96 Fed. 156, 37 C. C. A. 430 (1898); Little Rock Granite Co. v. Dallas County, 66 Fed. 522, 13 C. C. A. 620 (1894); Chaffee v. U. S., 18 Wall. 516, 21 L. ed. 908 (1874); Hodge v. Higgs, 12 Fed. Cas. No. 6,558, 2 Cranch C. C. 552 (1825). See also, Owens v. Adams, 18 Fed. Cas. No. 10,633, 1 Brock. 72 (1803).

5. *Alabama.*—Snow Hardware Co. v. Loveman, 131 Ala. 221, 31 So. 19

(1901); Walling v. Morgan County, 126 Ala. 326, 28 So. 433 (1899); Wager Lumber Co. v. Sullivan Logging Co., 120 Ala. 558, 24 So. 949 (1898); Bolling v. Fannin, 97 Ala. 619, 12 So. 59 (1893); Hart v. Kendall, 82 Ala. 144, 3 So. 41 (1886).

Arkansas.—St. Louis S. W. Ry. Co. v. White Sewing M. Co., 78 Ark. 1, 93 S. W. 58, 8 Ann. Cas. 208 (1906).

California.—Pauly v. Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98 (1895); McLennan v. State Bank, 87 Cal. 569, 25 Pac. 760 (1891).

Connecticut.—Weeden v. Hawes, 10 Conn. 50 (1833).

Georgia.—Taylor v. Tucker, 1 Ga. 231 (1846). See also, Williams v. Kelsey, 6 Ga. 365 (1849).

Illinois.—Laughlin v. Brauer, 138 Ill. App. 524 (1908); Chicago, etc., R. Co. v. American Strawboard Co., 190 Ill. 268, 60 N. E. 518 (1901), affirming 91 Ill. App. 635 (1900); Ryan v. Miller, 153 Ill. 138, 38 N. E. 642 (1894); Jones v. Smith, 37 Ill. App. 169 (1890). See also, Lehmann v. Rothbarth, 111 Ill. 185 (1884).

Indiana.—Cleland v. Applegate, 8 Ind. App. 499, 35 N. E. 1108 (1893); Culver v. Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489 (1889); Davis v. Franklin, 25 Ind. 407 (1865).

Louisiana.—Penny's Succession, 14 La. Ann. 194 (1859).

Maryland.—Spring Garden Mut. Ins. Co. v. Evans, 15 Md. 54, 74 Am. Dec. 555 (1859). See also, Blumhardt v. Rohr, 70 Md. 328, 17 Atl. 266 (1889).

Massachusetts.—Anderson v. Edwards, 123 Mass. 273 (1877); Jordan v. Osgood, 109 Mass. 457, 12 Am. Rep. 731 (1872); Adams v. Coulliard, 102 Mass. 167 (1869); Briggs v. Rafferty, 14 Gray 525 (1860); Bradford v. Stevens, 10 Gray 379 (1858). See

Naturally, the rule requiring the testimony of the entrant cognizant of the facts may rationally seem to a presiding judge of special importance in a criminal case.⁶

The statutory requirement is frequently to the same effect.⁷

also, *Parsons v. Manufacturers' Ins. Co.*, 16 Gray 463 (1860); *Watson v. Phoenix Bank*, 8 Metc. 217, 41 Am. Dec. 500 (1844); *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 181 (1825).

Michigan.—*Union Cent. L. Ins. Co. v. Smith*, 119 Mich. 171, 77 N. W. 706 (1899); *Welch v. Palmer*, 85 Mich. 310, 48 N. W. 552 (1891); *Peters v. Gallagher*, 37 Mich. 407 (1877).

Minnesota.—*Newell v. Houlton*, 22 Minn. 19 (1875).

Missouri.—*Borgess Invest. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567 (1897); *Smith v. Beattie*, 57 Mo. 281 (1874).

New Hampshire.—*State v. Shinnborn*, 46 N. H. 497, 88 Am. Dec. 224 (1866); *Webster v. Clark*, 30 N. H. 245 (1855); *Heath v. West*, 26 N. H. 191 (1852).

New York.—*Muckle v. Rennie*, 16 N. Y. Suppl. 208, 41 N. Y. St. Rep. 97 (1891); *Rosenstock v. Hoggarty*, 13 N. Y. Suppl. 228, 36 N. Y. St. Rep. 92, *affirmed* 131 N. Y. 647, 30 N. E. 867 (1891); *Dunn v. James*, 62 How. Pr. 307 (1879); *affirmed*, 85 N. Y. 642 (1881); *Gilbert v. Sage*, 57 N. Y. 639 (1874); *Green v. Disbrow*, 7 Lans. 381, *reversed* 56 N. Y. 334 (1873). See also, *Irish v. Horn*, 84 Hun 121, 32 N. Y. Suppl. 455, 65 N. Y. St. Rep. 641 (1895); *Peck v. Von Keller*, 15 Hun 470, *affirmed* 76 N. Y. 604 (1878).

Ohio.—*Moots v. State*, 21 Ohio St. 653 (1871).

Pennsylvania.—*Meighen v. Bank*, 25 Pa. St. 288 (1855); *Messinger v. Hagenbuch*, 2 Whart. 410 (1837); *Farmers', etc., Bank v. Boraef*, 1 Rawle 152 (1829). See also *Holt v. Pie*, 120 Pa. St. 425, 14 Atl. 389 (1888); *Petriken v. Baldy*, 7 Watts & S. 429 (1844).

Rhode Island.—*Almy v. Allen*, 22 R. I. 595, 48 Atl. 934 (1901).

South Carolina.—*Black v. Shooler*, 2 McCord 293 (1822).

Texas.—*Cahn v. Salinas*, 2 White & W. Civ. Cas. Ct. App., § 614 (1885); *Nugent & Co. v. Martin*, 1 White & W. Civ. Cas. Ct. App., § 1173 (1881); *Underwood v. Parrott*, 2 Tex. 168 (1847). See also, *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565 (1887); *Taylor v. Coleman*, 20 Tex. 772 (1858).

Utah.—*Burraston v. Nephi First Nat. Bank*, 22 Utah 328, 62 Pac. 425 (1900).

Vermont.—*Burnham v. Adams*, 5 Vt. 313 (1833).

Virginia.—*Courtney v. Com.*, 5 Rand. 666 (1827).

Wisconsin.—*Milwaukee Trust Co. v. Warren*, 112 Wis. 505, 87 N. W. 801 (1902); *Hopkins v. Stefan*, 77 Wis. 45, 45 N. W. 676 (1890); *Curran v. Witter*, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827 (1887); *Riggs v. Weise*, 24 Wis. 545 (1869); *Schettler v. Jones*, 20 Wis. 412 (1866).

United States.—*Reyburn v. Queen City Sav. B. & T. Co.*, 171 Fed. 609, 96 C. C. A. 373 (1909).

6. *Davis v. State*, 91 Ga. 167, 17 S. E. 292 (1892); *Com. v. Jeffs*, 132 Mass. 5 (1882); *People v. Brow*, 90 Hun (N. Y.) 509, 35 N. Y. Suppl. 1009, 11 N. Y. Cr. Rep. 443, 70 N. Y. St. Rep. 668 (1895); *Shriedly v. State*, 23 Ohio St. 130 (1872); *Moots v. State*, 21 Ohio St. 653 (1871). See also, *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106 (1892); *State v. Thomas*, 64 N. C. 74 (1870); *Wade v. State*, 37 Tex. Cr. App. 401, 35 S. W. 663 (1896); *Howard v. State*, 35 Tex. Cr. App. 136, 32 S. W. 544 (1895); *People v. Biddlecome*, 3 Utah 208, 2 Pac. 194 (1882).

7. *Arney v. Meyer*, 96 Iowa 395, 65

§ 3073. (*Administrative Requirements; Relevancy; Adequate Knowledge; Books of Account*); Effect of Contemporaneity.—In so far as the lapse of time between the occurrence of a business transaction and the entering it upon an account book may reasonably be assumed to have impaired the knowledge of the entrant below the probative point, the court may well reject the entry itself. Should the interval be short or the temporary and provisional record so complete as to make an extended period innocuous to impair the knowledge of the entrant, no such course may be justified.¹ Thus, where the record of a transaction is preserved, in a complete form, upon a slate or other place of regular though temporary entering,² a delay in posting in the place of initial permanent record even of considerable length of time will not prevent the admission of the entry. Entries made the next day after a transaction,³ or the next day but one,⁴ have been received as a matter of course. Those made after a longer time, e. g., three days, have also been admitted.⁵ Even a month⁶ has not been regarded as too long a delay where a memorandum has

N. W. 337 (1895); *Karr v. Stivers*, 34 Iowa 123 (1871); *Volker v. Tecumseh First Nat. Bank*, 26 Nebr. 602, 42 N. W. 732 (1889); *Gilbert v. Merriam, etc., Saddlery Co.*, 26 Nebr. 194, 42 N. W. 11 (1889); *Holland v. Commercial Bank*, 22 Nebr. 571, 35 N. W. 113 (1888).

§ 3073-1. "The rule . . . does not fix any precise time within which they must be made. There is no inflexible rule requiring them to be made on the same day. In this particular, every case must be made to depend upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. Upon questions of this sort much must be left to the judgment and discretion of the judge who presides at the trial." *Barker v. Haskell*, 9 Cush. (Mass.) 218, 221 (1852), per Bigelow, J.

2. *Landis v. Turner*, 14 Cal. 573 (1860); *Redlich v. Bauerlee*, 98 Ill.

134, 38 Am. Rep. 87 (1881); *Woolsey v. Bohn*, 41 Minn. 235, 42 N. W. 1022 (1889); *Van Swearingen v. Harris*, 1 Watts & S. (Pa.) 356 (1841); *Hartley v. Brookes*, 6 Whart. (Pa.) 189 (1841); *Forsythe v. Norcross*, 5 Watts (Pa.) 432, 30 Am. Dec. 334 (1836); *Vicary v. Moore*, 2 Watts (Pa.) 451, 27 Am. Dec. 323 (1834); *Kessler v. McConachy*, 1 Rawle (Pa.) 435 (1829); *Ingraham v. Bockius*, 9 Serg. & R. (Pa.) 285, 11 Am. Dec. 730 (1823).

3. *Jones v. Long*, 3 Watts (Pa.) 325 (1834); *Patton v. Ryan*, 4 Rawle (Pa.) 408 (1834); *Ingraham v. Bockius*, 9 Serg. & R. (Pa.) 285, 11 Am. Dec. 730 (1823).

4. *Hartley v. Brookes*, 6 Whart. (Pa.) 189 (1841). Compare *Grady v. Thigpen*, 6 Fla. 668 (1856).

5. *Landis v. Turner*, 14 Cal. 573 (1860); *Bay v. Cook*, 22 N. J. L. 343 (1850). See also, *Groff's Estate*, 14 Phila. (Pa.) 306 (1881); *Cook v. Ashmead*, 2 Miles (Pa.) 268 (1838).

6. *Redlich v. Bauerlee*, 98 Ill. 134,

been contemporaneously made, the only delay having been in transcribing it. Still less will the delay be regarded as fatal where the only fact established against the particular entry is the fact of the custom of making such a delay. In any case, where the delay will not impair the knowledge of the entrant, the evidence remains admissible.⁷

On the other hand, where facts of a somewhat varying tendency in respect to the impairment of knowledge, or other element of probative force have been shown, a delay of two weeks⁸ and even one of five or six days⁹ have been regarded as fatal to admissibility.

§ 3074. (Administrative Requirements; Relevancy; Adequate Knowledge; Books of Account); Joint Knowledge.—Practical administration does not in all cases require proof that the entrant should have had personal knowledge of the truth of what appears upon the entry. Under the complicated conditions of modern business the person who makes the entries seldom does anything else and is forced to rely for the accuracy of what he states upon the information of those who have sold the goods, rendered the services or done the other necessary parts of a completed transaction. An obvious administrative necessity exists that the proponent be permitted to show, under such circumstances, the system of doing business in the particular establishment in question. Having done this, he may then be permitted to show that the entry was accurately made from reports duly made or transmitted in the course of business, and, so far as practicable, that the reports were made by persons who had personal knowledge of the facts stated by them to him in the form of a report. So where a hospital register contains a record of the

38 Am. Rep. 87 (1881). See also, Hall v. Glidden, 39 Me. 445 (1855).

7. Landis v. Turner, 14 Cal. 573 (1860); Redlich v. Bauerlee, 98 Ill. 134, 38 Am. Rep. 87 (1881); Woolsey v. Bohn, 41 Minn. 235, 42 N. W. 1022 (1889); Hartley v. Brookes, 6 Whart. (Pa.) 189 (1841); Forsythe v. Norcross, 5 Watts (Pa.) 432, 30 Am. Dec. 334 (1836); Vicary v. Moore, 2 Watts (Pa.) 458, 27 Am. Dec. 323 (1834); Patton v. Ryan, 4

Rawle (Pa.) 408 (1834); Kessler v. McConachy, 1 Rawle (Pa.) 435 (1829); Ingraham v. Bockius, 9 Serg. & R. (Pa.) 285, 11 Am. Dec. 730 (1823).

8. Kessler v. McConachy, 1 Rawle (Pa.) 435 (1829).

9. Forsythe v. Norcross, 5 Watts (Pa.) 432, 30 Am. Dec. 334 (1836). See also, Vicary v. Moore, 2 Watts (Pa.) 451, 27 Am. Dec. 323 (1834).

patients admitted and facts relating to the nature of the disease, the treatment, results obtained and similar matters which the superintendent enters, together with information furnished him by the physicians in charge of the respective cases, as to the correctness of which he knows nothing, the book is not evidence of the facts stated in the absence of the testimony of the doctors themselves.¹ Should it prove impossible, under these or similar circumstances, to procure the testimony of the informant — either because he is dead, absent from the jurisdiction, or, for some other reason, unavailable — his attendance will be excused.² If the person furnishing the information on which the entry was made be available as a witness, he must be produced. In some States a different rule prevails.³ An entry may be perfectly admissible though the party making it knows only that he correctly entered the items as given to him by another person who has, perhaps, made his original memoranda in some permanent form for the purpose of assisting his memory and making the reports actually made by him later on. Under such circumstances the testimony of the entrant must be reinforced by that of his informant to the effect that he made a report of facts of which he then possessed personal knowledge.⁴ Should it appear that the informant on

§ 3074-1. *Price v. Standard L., etc. Co.*, 90 Minn. 264, 95 N. W. 1118 (1903).

2. *Illinois*.—*Schnellbacher v. Frank McLaughlin Plumbing Co.*, 108 Ill. App. 486 (1902).

Massachusetts.—*Atlas Shoe Co. v. Bloom*, 209 Mass. 563, 95 N. E. 952 (1911); *Kent v. Garvin*, 1 Gray 148 (1854).

Michigan.—*Jackson v. Evans*, 8 Mich. 476 (1860).

Minnesota.—*Paine v. Sherwood*, 21 Minn. 225 (1875).

New York.—*Rothenberg v. Herman*, 90 N. Y. Suppl. 431 (1904); *Ives v. Waters*, 30 Hun 297 (1883).

South Carolina.—*Venning v. Hacker*, 2 Hill 584 (1835); See *Clough v. Little*, 3 Rich. 353 (1831).

3. *Bailey v. Barnelly*, 23 Ga. 582 (1857); *Taylor v. Tucker*, 1 Ga. 231 (1846); *Groschell v. Knoll*, 10 Ky. L.

Rep. 314 (1888). See also, *Kline v. Gundrum*, 11 Pa. St. 242 (1849); *Jones v. Long*, 3 Watts (Pa.) 325 (1834). Compare *Kessler v. McConachy*, 1 Rawle (Pa.) 435 (1829); *Curren v. Crawford*, 4 Serg. & R. (Pa.) 3 (1818).

4. *Connecticut*.—*Smith v. Law*, 47 Conn. 431 (1879).

Illinois.—*House v. Beak*, 141 Ill. 290, 299, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892).

Indiana.—*Place v. Baugher*, 159 Ind. 232, 64 N. E. 852 (1902).

Massachusetts.—*Atlas Shoe Co. v. Bloom*, 209 Mass. 563, 95 N. E. 952 (1911); *Miller v. Shay*, 145 Mass. 162, 13 N. E. 468 (1887); *Barker v. Haskell*, 9 Cush. 218 (1852); *Littlefield v. Rice*, 10 Metc. 287 (1845); *Smith v. Sanford*, 12 Pick. 139 (1831); *Faxon v. Hollis*, 13 Mass. 426 (1816).

whose report the book entry was made does not testify to the correctness either of his memoranda or as to the accuracy of his information, the entries will be rejected.⁵ Some one in the chain of persons connected with the entry must be shown to have had personal knowledge of the facts themselves.⁶ Thus, where a book-keeper makes entries in accordance with information furnished him by a foreman, salesman, or the like, either personally or by memoranda furnished, the evidence of both as to the correctness of the entry so grounded will reasonably be required.⁷

Missouri.—Ridenour v. Wilcox Mines Co., 164 Mo. App. 576, 147 S. W. 852 (1912).

New York.—Smith v. Smith, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545 (1900); Krom v. Levy, 1 Hun 171 (1874).

Pennsylvania.—Hoover v. Gehr, 62 Pa. St. 136 (1869); Ingraham v. Bockius, 9 Serg. & R. 285 (1823).

South Carolina.—Thomson v. Porter, 4 Strobb. Eq. 58, 53 Am. Dec. 653 (1850); Clough v. Little, 3 Rich. L. 353 (1831).

Wisconsin.—Taylor v. Davis, 82 Wis. 455, 459, 52 N. W. 756 (1892).

See also, Mayor, etc., of N. Y. v. Sec. Ave. R. R. Co., 102 N. Y. 572, 7 N. E. 905 (1886); Missouri Pac. R. Co. v. Johnson, (Tex. Sup. 1888) 7 S. W. 838.

Entries regularly made by a party in a book kept for that purpose, from data furnished by an employee, where the employee testified that he knew of the correctness of the items and gave them correctly to the party entering them, and the party entering them testified that he entered the items as they were given to him, are admissible. Murray & Peppers v. Dickens, 149 Ala. 240, 42 So. 1031 (1906).

"Where one witness testifies that he knew the correctness of the details of weights or measurements or quantities, and that he correctly furnished that information to another, and that other testifies that he re-

ceived such information and correctly placed it upon original books of account, no doubt such books themselves will become competent evidence." Wright v. Charbonneau, 122 Ill. App. 52, 54 (1905), per Dibell, J.

"It is proper to introduce as witnesses all those persons who are thus connected with the transaction, and whose testimony is necessary to establish those facts which would be required to be proved by a single person." Harwood v. Mulry, 8 Gray (Mass.) 250, 251 (1857), per Dewey, J.

5. Missouri Pac. R. Co. v. Johnson, (Tex. Sup. 1888) 7 S. W. 838 (weighing grain at elevator); Little Rock Granite Co. v. Dallas Co., 66 Fed. 522 (1894).

6. U. S. v. Cross, 20 D. C. 365 (1892); Chicago, etc., R. Co. v. Province, 61 Miss. 288 (1883); Payne v. Hodge, 7 Hun (N. Y.) 612 (1876); Gould v. Conway, 59 Barb. (N. Y.) 355 (1871); Imhoff v. Fleurer, 2 Phila. (Pa.) 35 (1871); Jones v. Long, 3 Watts (Pa.) 325 (1834).

7. *California.*—Butler v. Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040 (1899).

Colorado.—Stidger v. McPhee, 15 Colo. App. 252, 62 Pac. 332 (1900). See also, Farrington v. Tucker, 6 Colo. 557 (1883).

Louisiana.—White v. Wilkinson, 12 La. Ann. 359 (1857).

§ 3075. (Administrative Requirements; Relevancy; Adequate Knowledge; Books of Account); Mixed Entries.—Where a book of original entries is kept by several persons, the entries being mingled, each entrant may testify to the accuracy of the charges or other items which he himself has entered.¹ An entrant is not, however, at liberty to testify to correctness of items entered by his associates.²

Massachusetts.—*Kent v. Garvin*, 1 Gray 148 (1854). *Compare* *Donovan v. Boston, etc.*, R. Co., 158 Mass. 450, 33 N. E. 583 (1893).

Michigan.—*Swan v. Thurman*, 112 Mich. 416, 70 N. W. 1023 (1897). See also, *Taylor-Woolfenden Co. v. Atkinson*, 127 Mich. 633, 87 N. W. 89 (1901).

Minnesota.—*Paine v. Sherwood*, 21 Minn. 225 (1875).

New York.—*Rathborne v. Hatch*, 80 N. Y. App. Div. 115, 80 N. Y. Suppl. 347 (1903); *Shipman v. Glynn*, 31 N. Y. App. Div. 425, 52 N. Y. Suppl. 691 (1898); *Abele v. Falk*, 28 N. Y. App. Div. 191, 50 N. Y. Suppl. 876 (1898); *Powers v. Savin*, 64 Hun 560, 19 N. Y. Suppl. 340, 22 N. Y. Civ. Proc. 253, 28 Abb. N. Cas. 463 (1892), *distinguishing* *New York v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 (1886); *Irving v. Claggett*, 9 N. Y. Suppl. 136 (1890); *Whitman v. Horton*, 46 N. Y. Super. Ct. 531 (1880), *affirmed* in 94 N. Y. 644 (1884). See also, *Fisher v. Verplanck*, 23 Hun 286 (1880); *Gould v. Conway*, 59 Barb. 355 (1871).

Pennsylvania.—*Imhoff v. Fleurer*, 2 Phila. 35 (1857); *Smith v. Lane*, 12 Serg. & R. 80 (1824).

Texas.—*International & G. N. R. Co. v. Startz*, 42 Tex. Civ. App. 85, 94 S. W. 207 (1906).

United States.—*The Norma*, 68 Fed. 509, 15 C. C. A. 553 (1895).

Canada.—*Leslie v. Hanson*, 12 New Br. 263 (1868).

See also, *U. S. v. Cross*, 20 D. C. 365 (1892); *Schaefer v. Georgia R. Co.*, 66 Ga. 39 (1880); *Bailey v. Barnelly*, 23 Ga. 582 (1857); *Fielder*,

Bros. & Co. v. Collier, 13 Ga. 495, 496 (1853).

On the issue of the price at which sales of stock were made by a broker he testified that he made them at the regular price named, and immediately made a memorandum of the transaction, including the price paid and the buyer, which he handed to his clerk on the floor of the exchange. The clerk testified that he always transmitted the contents of the memorandum correctly, over the telephone, to a clerk in the office, and subsequently compared the original memorandum with the entry made in the book at the office, and that it was always correct. The clerk at the office testified that he received the contents of the memorandum, and entered it correctly in the book according to the message received, that in every case he subsequently compared the memorandum made by the broker with the entry in the book, and that it was correct. The memoranda were subsequently destroyed. The court held that the book entries were competent evidence of the transactions which they represented. *Rathborne v. Hatch*, 181 N. Y. 520, 73 N. E. 1131 (1905); *affirming judgment* 85 N. Y. Suppl. 768, 90 App. Div. 151 (1904).

§ 3075-1. *Herriott v. Kersey*, 69 Iowa 111, 28 N. W. 468 (1886); *Green v. Disbrow*, 7 Lans. (N. Y.) 381 (1873); *Burnham v. Chandler*, 15 Tex. 441 (1855).

2. *Whitley Grocery Co. v. Roach*, 115 Ga. 918, 42 S. E. 282 (1902);

*An entry completed by one who did not begin it may be proved by him who finished the entry;*³—it being deemed that he has become personally conversant with all the facts which it states.

§ 3076. (*Administrative Requirements; Relevancy*); Absence of Controlling Motive to Misrepresent.—The suggestion has been offered that, as an administrative matter, it should not only be made to appear that the entrant had actual adequate knowledge,¹ but also that he was without such a controlling motive to misrepresent as would render it probable that he is not telling the truth.² Such a requirement might with greater propriety be insisted upon where the evidence offered is secondary, e. g., entry of a deceased person in course of business, rather than in cases where the evidence offered is primary in its nature.³ However this may be, it seems at least certain that there is no requirement that the entry should be adverse to the pecuniary interest of the entrant.⁴ The knowledge of the declarant is greatest before distracting circumstances have intervened. The motive to misrepresentation is reduced to a minimum where the possible consequences of the statement in its bearing upon the interest of the speaker has not as yet become apparent.

§ 3077. (*Administrative Requirements; Relevancy; Absence of Controlling Motive to Misrepresent*); Contemporaneity Required.—In connection with the questions of relevancy, adequate knowledge and lack of controlling motive to misrepresent, few considerations appeal more strongly to the court in case

Herriott v. Kersey, 69 Iowa 111, 28 N. W. 468 (1886); *Congdon, etc., Co. v. Sheehan*, 11 N. Y. App. Div. 456, 42 N. Y. Suppl. 255 (1896); *Skipworth v. Deyell*, 83 Hun (N. Y.) 307, 31 N. Y. Suppl. 918 (1894); *Hancock v. Flynn*, 5 Silv. Supreme (N. Y.) 122, 8 N. Y. Suppl. 133 (1889); *In re Simpson*, 5 N. Y. Suppl. 863 (1889); *Burnham v. Chandler*, 15 Tex. 441 (1855). See also, *Darlington v. Atlantic Trust Co.*, 68 Fed. 849, 16 C. C. A. 28 (1895).

3. Bradford v. Stevens, 10 Gray (Mass.) 379 (1858).

§ 3076-1. § 3071.

2. Lord v. Moore, 37 Me. 208 (1854); *Kennedy v. Doyle*, 10 Allen (Mass.) 161 (1865); *Polini v. Gray*, 12 Ch. D. 411 (1878); *Smith v. Blakey*, L. R. 2 Q. B. 326, 8 B. & S. 157, 36 L. J. Q. B. 156, 15 Wkly. Rep. 492 (1867). See also, *Burr v. Byers*, 10 Ark. 398, 52 Am. Dec. 239 (1850); *First Nat. Bldg. Co. v. Vandenberg*, 29 Okla. 583, 119 Pac. 224 (1911).

3. § 2888.

4. Augusta v. Windsor, 19 Me. 317 (1841); *Doe v. Turford*, 3 B. & Ad. 890, 1 L. J. K. B. 262, 23 E. C. L. 388 (1832).

of any extrajudicial declaration, written or oral, than that it should have been made at about the same time as the happening of the fact which it asserts. A large part of the probative force of the book entry, in any form, and under any rule, is that it should have been contemporaneous, or substantially so, with the transaction which it purports to record.¹ It is also true that the books offered in evidence should be shown to be the regular kept record of daily business.²

§ 3078. (*Administrative Requirements; Relevancy; Absence of Controlling Motive to Misrepresent; Contemporaneousness Required*); Length of Permissible Interval Uncertain.—The law

§ 3077-1. *Alabama*.—Avery v. Avery, 49 Ala. 193 (1873).

California.—San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 Pac. 999 (1909).

Connecticut.—Norman Printers Supply Co. v. Ford, 77 Conn. 461, 59 Atl. 499 (1904).

Florida.—Stewart v. Stewart, 56 So. 413 (1911).

Georgia.—Bower v. Smith, 8 Ga. 74 (1850).

Illinois.—Donaldson v. Donaldson, 142 Ill. App. 21 (1908), *judgment affirmed*, 237 Ill. 318, 86 N. E. 604; Dickson v. Kewanee Electric Light, etc., Co., 53 Ill. App. 379 (1893); Pittsburgh, etc., R. Co. v. Fawsett, 56 Ill. 513 (1870).

Iowa.—Karr v. Stivers, 34 Iowa 123 (1871).

Kansas.—Hastie v. Burrage, 69 Kan. 560, 77 Pac. 268 (1904).

Louisiana.—See Shea v. Sewerage & Water Bd., 124 La. 299, 332, 50 So. 166 (1909).

Massachusetts.—Riley v. Boehm, 167 Mass. 183, 45 N. E. 84 (1896); Donovan v. Boston, etc., R. Co., 158 Mass. 450, 33 N. E. 583 (1893); Pratt v. White, 132 Mass. 477 (1882).

Missouri.—See Avery v. Tucker, 137 Mo. App. 428, 118 S. W. 672 (1909); Bader v. Schult & Co., 118 Mo. App. 22, 94 S. W. 834 (1906).

New Mexico.—McKenzie v. King, 14 N. M. 375, 93 Pac. 703 (1908).

New York.—Linden v. Thieriot, 96 App. Div. 256, 89 N. Y. Suppl. 273 (1904); Skipworth v. Deyell, 83 Hun 307, 31 N. Y. Suppl. 918 (1894).

Pennsylvania.—McKnight v. Newell, 207 Pa. 562, 57 Atl. 39 (1904).

Texas.—Luttrell v. Parry, (Civ. App. 1910) 129 S. W. 865; Bouldin v. Atlantic Ricemills Co., (Civ. App. 1905) 86 S. W. 795.

West Virginia.—Architects & Builders v. Stewart, 68 W. Va. 506, 508, 70 S. E. 113, 36 L. R. A. (N. S.) 899n. (1911).

Wisconsin.—Lemma v. Blanding, 139 Wis. 156, 120 N. W. 842 (1909).

United States.—Reyburn v. Queen City Sav. B. & T. Co., 171 Fed. 609, 96 C. C. A. 373 (1909).

2. *Georgia*.—Petit v. Teal, 57 Ga. 145 (1876); Bower v. Smith, 8 Ga. 74 (1850).

Illinois.—Treadway v. Treadway, 5 Ill. App. 478 (1879); Kibbe v. Bancroft, 77 Ill. 18 (1875).

Massachusetts.—Prince v. Smith, 4 Mass. 455 (1808).

New Hampshire.—Richardson v. Emery, 23 N. H. 220 (1851); Eastman v. Moulton, 3 N. H. 156 (1825).

Pennsylvania.—McKnight v. Newell, 207 Pa. St. 562, 57 Atl. 39 (1904); Smith v. Lane, 12 Serg. & R. 80 (1824).

Texas.—Baldrige v. Penland, 68 Tex. 441, 4 S. W. 565 (1887).

has established no definite time after the transaction itself within which the entry, to be admissible, must have been made.¹ This is ordinarily a question of whether it was made within a reasonable time, which is to be determined upon the facts and circumstances of each particular case,² and is a matter entirely of administra-

§ 3078-1. *Alabama*.—Murray & Peppers v. Dickens, 149 Ala. 240, 42 So. 1031 (1906).

Illinois.—House v. Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892).

Missouri.—Penn v. Watson, 20 Mo. 13 (1854).

New Jersey.—Rumsey v. New York, etc., Telephone Co., 49 N. J. L. 322, 8 Atl. 290 (1887).

North Carolina.—Ray v. Castle, 79 N. C. 580 (1878).

Oregon.—Harmon v. Decker, 41 Ore. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748 (1902).

Pennsylvania.—McKnight v. Newell, 207 Pa. St. 562, 57 Atl. 39 (1904); Smith v. Lane, 12 Serg. & R. 80 (1824). See also, Vance v. Fairis, 2 Dall. 217, 1 L. ed. 355 (1794).

Texas.—Duty v. Storrs, (Civ. App. 1902) 70 S. W. 357. See also, Baldridge v. Penland, 68 Tex. 441, 4 S. W. 565 (1887).

Washington.—Union Electric Co. v. Seattle Theater Co., 18 Wash. 213, 51 Pac. 367 (1897).

Wisconsin.—Milwaukee Trust Co. v. Warren, 112 Wis. 505, 87 N. W. 801 (1902).

England.—Doe v. Bevis, 7 C. B. 456, 18 L. J. C. P. 128, 62 E. C. L. 456 (1849); Ray v. Jones, 2 Gale 220 (1836); Champneys v. Peck, 1 Stark. 404, 2 E. C. L. 157 (1816).

Canada.—Barton v. Dundas, etc., 24 U. C. Q. B. 273 (1865).

2. *Alabama*.—Murray & Peppers v. Dickens, 149 Ala. 240, 42 So. 1031 (1906); Lane v. May, etc., Hardware Co., 121 Ala. 296, 25 So. 809 (1898); Lunsford v. Butler, 102 Ala. 403, 15 So. 239 (1893).

California.—Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811 (1886).

Colorado.—See Lovelock v. Gregg, 14 Colo. 53, 23 Pac. 86 (1890).

Connecticut.—Mahoney v. Hartford Inv. Corps, 82 Conn. 280, 73 Atl. 766 (1909).

Florida.—Hooker v. Johnson, 6 Fla. 730 (1856).

Georgia.—Petit v. Teal, 57 Ga. 145 (1876); Williams v. Abercrombie, Dudley 252 (1833).

Illinois.—See Chisholm v. Beaman Mach. Co., 160 Ill. 101, 43 N. E. 796 (1896).

Iowa.—Farner v. Turner, 1 Iowa 53 (1855).

Kansas.—See Rice v. Hodge, 26 Kan. 164 (1881).

Maine.—Dwinel v. Pottle, 31 Me. 167 (1850).

Massachusetts.—Davis v. Sanford, 9 Allen 216 (1864); Barker v. Haskell, 9 Cush. 218 (1852); Earle v. Sawyer, 6 Cush. 142 (1850); Watts v. Howard, 7 Metc. 478 (1844); Cogswell v. Dolliver, 2 Mass. 217, 3 Am. Dec. 45 (1806).

Minnesota.—American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014 (1910).

Missouri.—Stephan v. Metzger, 95 Mo. App. 609, 69 S. W. 625 (1902); Wells v. Hobson, 91 Mo. App. 379 (1901); Collins Bros. Drug Co. v. Graddy, 57 Mo. App. 41 (1894); Martin v. Nichols, 54 Mo. App. 594 (1893).

New Hampshire.—Cummings v. Nichols, 13 N. H. 420, 38 Am. Dec. 501 (1843).

New Jersey.—Bay v. Cook, 22 N. J. L. 343 (1850).

New York.—Skipworth v. Deyell, 83 Hun 307, 31 N. Y. Suppl. 918

tion. While the courts who admit the evidence frequently do so on the ground that the entry is so made as to be part of the *res gestae*,³ the real reason is, in most cases the fact that the entry possesses, under the circumstances, the relevancy of regularity⁴ and the length of time may well be different, in the opinion of the presiding judge, from that involved in the operation of the relevancy of spontaneity,⁵ which is the essential element in the probative force of hearsay declarations part of the *res gestae*. A great variety of intervals, determinate and indeterminate, have been held sufficiently short, under the particular circumstances, to permit the entry to be received as contemporaneous.⁶ On the other hand, a length of time which, under some sets of facts might

(1894); *Healey v. Bauer*, 19 N. Y. Suppl. 989 (1892); *Griesheimer v. Tanenbaum*, 124 N. Y. 650, 26 N. E. 957 (1891); *Eberhardt v. Schuster*, 10 Abb. N. Cas. 374 (1880); *Forgay v. Atlantic Mut. Ins. Co.*, 2 Rob. 79 (1864).

Ohio.—See *Bogart v. Cox*, 4 Ohio Cir. Ct. 289, 2 Ohio Cir. Dec. 551 (1890).

Oregon.—See *Ladd, etc. v. Sears*, 9 Oreg. 244 (1881).

Pennsylvania.—*McGarry's Estate*, 9 Pa. Dist. 172 (1900); *In re Groff*, 14 Phila. 306 (1881); *Molony v. Benners*, 3 Grant 233 (1858); *Ridgway v. Bell*, 1 Phila. 117 (1850); *Koch v. Howell*, 6 Watts & S. 350 (1843); *Hartley v. Brookes*, 6 Whart. 189 (1841). See also, *McKnight v. Newell*, 207 Pa. St. 562, 57 Atl. 39 (1904); *Patterson v. Wyomissing Woolen Mfg. Co.*, 2 Woodw. (Pa.) 215 (1859).

South Carolina.—*Toomer v. Gadsden*, 4 Strobbh. 193 (1850).

Texas.—*Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565 (1887); *Stone v. Taylor*, 27 Tex. 555 (1864).

West Virginia.—*Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796 (1901).

United States.—*Kamm v. Rees*, 177 Fed. 14, 100 C. C. A. 432 (1910). See *Burley v. German-American Bank*,

111 U. S. 216, 4 S. Ct. 341, 28 L. ed. 406 (1883).

"While the entries must be made at or near the time of the transaction, yet no precise time is fixed by law when they should be made. The entry need not be made exactly at the time of the occurrence, but it is sufficient if it be made within a reasonable time. In this particular every case must be made to depend upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries." *Murray & Peppers v. Dickens*, 149 Ala. 240, 246, 42 So. 1031 (1903), per *Simpson, J.*

3. §§ 2891, 2998, 3057.

4. §§ 2983, 3051.

5. § 3078.

6. *Illinois*.—*Chisholm v. Beaman Mach. Co.*, 160 Ill. 101, 43 N. E. 796 (1896).

Kansas.—*Rice v. Hodge*, 26 Kan. 164 (1881).

New York.—*Forgay v. Atlantic Mut. Ins. Co.*, 2 Rob. 79 (1864).

Oregon.—*Ladd v. Sears*, 9 Oreg. 244 (1881).

Pennsylvania.—*Hartley v. Brookes*, 6 Whart. 189 (1841).

be insufficient to exclude an entry, under a different set, may have that effect.⁷

§ 3079. (*Administrative Requirements; Relevancy; Absence of Controlling Motive to Misrepresent; Contemporaneousness Required*); Nature of Business.—In deciding what entries are reasonably contemporaneous, the court may be somewhat guided by the nature of the business itself. Where, for example, it is so absorbing as to leave but little leisure for the entrant — e. g., where he works all day and occasionally into the night and on Sundays¹ — much indulgence may be accorded. Where, as in case of certain lines of mechanical work, e. g., that of a paper-hanger,² it is difficult to determine the amount of a charge for continuous work or the constant furnishing of similar materials until the completion of the entire contract, a lump charge for work and materials made at the end of the employment may be regarded as reasonably sufficient.³ The reason for this practice is found, in part, at least, in the rule of administration to the effect that, until a transaction is completed, the book entry of it is not admissible.⁴

§ 3080. (*Administrative Requirements; Relevancy; Absence of Controlling Motive to Misrepresent*); Books Must be Those of Charge not of Discharge.—The relevancy of regularity¹ which under the modern law of evidence is the basis for receiving the hearsay statement of book accounts as primary evidence of the facts asserted rests upon the feeling on the part of judicial administration that an act regularly and automatically done in the discharge of some business or official duty will be made without motive to misrepresent. In order that this result may be secured, the rule requires not only, as has been said, that the entry should

7. *Lovelock v. Gregg*, 14 Colo. 53, 23 Pac. 86 (1890); *Healey v. Bauer*, 19 N. Y. Suppl. 989 (1892); *Patterson v. Wyomissing Woolen Mfg. Co.*, 2 Woodw. (Pa.) 215 (1859).

§ 3079-1. *Yearsley's Appeal*, 48 Pa. St. 531 (1865) (once a week sufficient).

2. *Bolton's Appeal*, 3 Grant (Pa.) 204 (1856).

3. See *Le Franc v. Hewitt*, 7 Cal. 186 (1857); *Anderson v. Ames & Co.*, 6 Iowa 486 (1858); *Compare*

Shannon v. Starkey, 5 Phila. (Pa.) 153 (1863); *Benners v. Maloney*, 3 Phila. (Pa.) 57 (1858); *Koch v. Howell*, 6 Watts & S. (Pa.) 350 (1843).

4. *Laird v. Campbell*, 100 Pa. St. 159 (1882); *Rheem v. Snodgrass*, 2 Grant (Pa.) 379 (1858); *Ridgway v. Bell*, 1 Phila. (Pa.) 117 (1850); *Parker v. Donaldson*, 2 Watts & S. (Pa.) 9 (1841).

§ 3080-1. § 3051.

be contemporaneous of the event which it records,² but also that the entry employed for the purpose should be one of charge and not one entirely of discharge. The entry, in other words, of a debtor distinctly in his own favor may still properly be regarded as self-serving. Books of account, within the meaning of the rule, are those which charge another in respect to certain matters, not those which operate principally and primarily to discharge the entrant. Account books must show charges and not be composed entirely of the entry of credit charges in the entrant's favor. The books of the debtor are too self-serving to be within the rule. Thus, where one who buys goods or hires labor tenders his books,³ or those of a third person,⁴ for the purpose of showing payments,⁵ or to cause an inference in his own favor that a certain delivery was not made or a given service rendered because his book fails to contain a record of it,⁶ the evidence is to be rejected.

Probably the early shop book rule which operated in favor of small tradesmen and handicraftsmen in collecting accounts where there were, in most cases, few, if any, opposing entries,⁷ has not been entirely without effect in this connection. This early practice is, in part at least, responsible for the rule that such account books are available as a sword, but not as a shield. The creditor may use them for his own benefit. The debtor cannot reverse the process and employ his own books, it is said, to discharge himself. The person to whom goods are alleged to have been sold, cannot produce his books for the purpose of showing that they were not actually sold to him.⁸

2. § 3077.

3. *Van Every v. Fitzgerald*, 21 Nebr. 36, 31 N. W. 264, 59 Am. Rep. 835 (1887); *Alexander v. Hoffman*, 5 Watts & S. (Pa.) 382 (1843); *Rhoads v. Gaul*, 4 Rawle (Pa.) 404, 27 Am. Dec. 277 (1834); *Smith v. Lane*, 12 Serg. & R. (Pa.) 80 (1824); *Rogers v. Old*, 5 Serg. & R. (Pa.) 404 (1819).

4. *Masters v. Marsh*, 19 Nebr. 458, 27 N. W. 438 (1886).

5. *Morse v. Potter*, 4 Gray (Mass.) 292 (1855); *Summers v. McKim*, 12 Serg. & R. (Pa.) 405 (1825); *Dailey v. Sonnerborn & Co.*, 35 Tex. 60 (1872). See also, *J. Snow Hard-*

ware Co. v. Loveman, 131 Ala. 221, 31 So. 19 (1901); *Sherman v. Whiteside*, 93 Ill. App. 572 (1900), *affirmed* in 190 Ill. 576, 60 N. E. 838 (1901); *Waldron v. Priest*, 96 Me. 36, 51 Atl. 235 (1901).

6. *Kerns v. McKeen*, 76 Cal. 87, 18 Pac. 122 (1888); *Riley v. Boehm*, 137 Mass. 183, 45 N. E. 84 (1896); *Morse v. Potter*, 4 Gray (Mass.) 292 (1855); *Scott v. Bailey*, 73 Vt. 49, 50 Atl. 557 (1901); *Mattocks v. Lyman*, 18 Vt. 98, 46 Am. Dec. 138 (1846).

7. § 3051.

8. *Dailey v. Sonnerborn & Co.*, 35 Tex. 60 (1871).

§ 3081. (Administrative Requirements; Relevancy; Absence of Controlling Motive to Misrepresent); Res Gestae Distinguished.—The element of contemporaneousness is an important factor in creating both the relevancy of spontaneity, which is at the basis of the *res gestae* rule,¹ and that of regularity which admits public or private entries in course of business or official life.² In both cases, the unsworn statement, though used in its hearsay or assertive capacity, is primary evidence. In either connection, narrative statements will be excluded. The statement of a shop book would seem, however, notwithstanding the great authority of Prof. Greenleaf to the contrary,³ not to be properly classified as a *res gestae* fact. Substantially this is part of the reasoning upon which, apparently, Professor Greenleaf classifies such entries as part of the *res gestae*.⁴ As has been said elsewhere in greater detail,⁵ the real element of connection with the *res gestae* is the specific basis of the relevancy of regularity in business or official entries;—the substitution of the automatism of regular, intuitive spontaneous action for the disturbing influence of conscious self-interest due to reflection. Undoubtedly, the probability of this automatic action, partaking of the uniformity of nature rather than of the vagaries of volition, is greatest when the entry is most nearly contemporaneous with the act. The lapse of an extended interval under circumstances which give rise to no reasonable inference that the automatism of business or official routine regularity has been supplanted by a self-conscious interest to make the particular entry, will not suffice to exclude the declaration; while, under circumstances reasonably giving rise to such a conclusion, a much shorter interval of time may be fatal to admissibility.

§ 3082. (Administrative Requirements); Supplementary Oath; Preliminary Proof, etc.—The supplementary oath of the tradesman or handicraftsman as required in the administration of the courts was to the effect that his books were regularly and accurately¹ kept as a contemporaneous record of the daily doings of his business. The oath was evidently not that of a witness. It was, how-

§ 3081-1. § 2991.

2. § 3073.

3. §§ 2997 *et seq.*

4. § 2998.

5. §§ 2997 *et seq.*

§ 3082-1. *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461 (1815).

ever, probably administered in court.² Where the shop-book rule, after parties and privies are rendered competent as witnesses, still retains a traceable and distinct existence, the *suppletory oath*, properly so-called, has disappeared. It is still, however, necessary upon ordinary principles of administration that the proponent should show, to the satisfaction of the court, that the book offered by him is admissible. He must establish the proposition that all conditions for admissibility have been fulfilled.³ The preliminary proof must extend to showing that the books offered are those of the proponent, kept in the regular course of his business.⁴ In other words, the suppletory oath—or its more modern substitute, formal proof of regularity, accuracy and the like—will generally be required where the operation of the rule is invoked.⁵ Nor will

2. *Frye v. Barker*, 2 Pick. (Mass.) 65 (1823).

3. *Collins v. Carlin*, 106 N. Y. App. Div. 204, 207, 94 N. Y. Suppl. 317 (1905); *Rathbone v. Hatch*, 80 N. Y. App. Div. 115, 80 N. Y. Suppl. 347 (1903); *Textile Pub. Co. v. Smith*, 31 Misc. (N. Y.) 271, 273, 64 N. Y. Suppl. 123 (1900); *Irish v. Horn*, 84 Hun 121, 32 N. Y. Suppl. 455 (1895); *Place v. Parsons*, 17 Wk. Dig. 293 (1883).

It has been suggested that the book may be received, without proof of reliability, where the only object is to show the number of the entries; e. g. in case of the book of a physician, to prove the number of his visits. *Clarke v. Smith*, 46 Barb. (N. Y.) 30 (1866). This course has, however, been repudiated. *Knight v. Cunningham*, 6 Hun (N. Y.) 100, 102 (1875).

That no sufficient foundation was laid in the trial court for admitting the shop book, is a technical point which will not avail the opponent of the evidence on appeal unless objection was made, in the lower court, on the precise ground which is now urged. *Taggart v. Fox*, 11 Daly (N. Y.) 159 (1882); *Case v. Potter*, 8 Johns. (N. Y.) 211 (1811).

Cross-examination.— Since parties are made competent as witnesses the defendant may inquire "by cross-examination, the circumstances under which the entries are made." *Thomson v. Porter*, 3 Strob. Eq. (N. C.) 58 (1850).

4. *Lester-Whitney Shoe Co. v. Oliver*, 1 Ga. App. 244, 58 S. E. 212 (1907); *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545 (1900).

5. *Alabama*.— *Southern Ry. Co. v. Cortner*, 3 Ala. App. 400, 58 So. 84 (1912); *North Birmingham Lumber Co. v. Sims*, 157 Ala. 595, 48 So. 84 (1908); *Callaway v. Gay*, 143 Ala. 524, 39 So. 277 (1904).

Arkansas.— *Chicago Mill & L. Co. v. Osceola Land Co.*, 94 Ark. 183, 126 S. W. 380 (1910); *Atkinson v. Burt*, 65 Ark. 316, 53 S. W. 404 (1898).

California.— *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811 (1886); *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519 (1856).

Colorado.— *Temple v. Magruder*, 36 Colo. 390, 85 Pac. 832 (1906).

Florida.— *Lewis v. Meginniss*, 30 Fla. 419, 12 So. 19 (1892).

Georgia.— *Lester-Whitney Shoe Co. v. Oliver*, 1 Ga. App. 244, 58 S. E. 212 (1907).

it be dispensed with by the fact that such proof was made at a former trial.⁶ Several jurisdictions present modifications in the administration of the oath,⁷ and in others it is not required.⁸

Illinois.—Johnson Coal Co. v. Forcade, 136 Ill. App. 21 (1907); Sexton v. Brown, 36 Ill. App. 281 (1890); Baird v. Hooker, 8 Ill. App. 306 (1880); Kirby v. Watt, 19 Ill. 393 (1857). See also, Trainor v. German-American Savings, etc., Assoc., 204 Ill. 616, 68 N. E. 650 (1903), *reversing* 102 Ill. App. 604 (1902); Schnellbacher v. Frank McLaughlin Plumbing Co., 108 Ill. App. 486 (1902).

Iowa.—Kossuth County State Bank v. Richardson, 132 Iowa 370, 106 N. W. 923, 109 N. W. 809 (1906); Arney v. Meyer, 96 Iowa 395, 65 N. W. 337 (1895); U. S. Bank v. Burson, 90 Iowa 191, 57 N. W. 705 (1894); Security Co. v. Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311 (1892).

Kentucky.—Montgomery County v. Bean, 82 S. W. 240, 26 Ky. L. Rep. 568^c(1904).

Maine.—Dwinel v. Pottle, 31 Me. 167 (1850).

Maryland.—Hoogewerff v. Flack, 101 Md. 371, 61 Atl. 184 (1905).

Minnesota.—Wimmer v. Key, 87 Minn. 402, 92 N. W. 228 (1902).

Missouri.—Hensgen v. Donnelly, 24 Mo. App. 398 (1887).

Nebraska.—Goodyear Tire & R. Co. v. Bacon, 135 N. W. 217 (1912); Donner v. State, 72 Neb. 263, 100 N. W. 305, 117 Am. St. Rep. 789 (1904).

New Jersey.—Perry v. Lambert, 3 N. J. L. 408 (1809).

New Mexico.—Byerts v. Robinson, 9 N. M. 427, 54 Pac. 932 (1898).

New York.—Swan v. Warner, 197 N. Y. 190, 90 N. E. 430 (1910); Lowenthal v. Resnick, 110 N. Y. Suppl. 1045 (1908); Irish v. Horn, 84 Hun 121, 32 N. Y. Suppl. 455 (1895); Tomlinson v. Borst, 30 Barb. 42 (1859); Conklin v. Stamler, 8 Abbot's Prac. (N. Y.) 395, 2 Hilt. 422, 17 How. Prac. 399 (1859).

Oregon.—Raski v. Wise, 56 Oreg. 72, 107 Pac. 984 (1910).

Pennsylvania.—McKnight v. Newell, 207 Pa. St. 562, 57 Atl. 39 (1904).

South Carolina.—Seaboard Air L. Ry. v. Railroad Commr's, 86 S. C. 91, 67 S. E. 1069, 138 Am. St. Rep. 1028 (1910); Charleston Sav. Inst. v. Farmers & Merchants' Bank, 73 S. C. 545, 54 S. E. 216 (1904); Everingham v. Langton, 2 McCord 157 (1822).

Tennessee.—Forsee v. Matlock, 7 Heisk. 421 (1872); Neville v. Northcutt, 7 Coldw. 294 (1869).

Texas.—Stark v. Burkitt, 103 Tex. 437, 129 S. W. 343 (1910); Townsend v. Coleman, 18 Tex. 418, 20 Tex. 817 (1858).

Wisconsin.—Jones v. De Muth, 137 Wis. 120, 118 N. W. 542 (1908); Brown v. Warner, 116 Wis. 358, 93 N. W. 17 (1903).

"It was not competent, because the foundation for its introduction was not sufficient. It was not shown by whom the record was made or kept, and that it was made at or near the time the timber was cut and in the regular course of business, and that the party who made it cannot be produced as a witness to testify as to its accuracy." Chicago Mill & Lbr. Co. v. Osceola Land Co., 94 Ark. 183, 190 (1910), per Battie, J.

6. Linberger v. Latourette, 5 N. J. L. 809 (1820); Brown v. Williams, (Tex. Civ. App. 1895) 31 S. W. 225.

7. Hooker v. Johnson, 6 Fla. 730 (1856); Dwinel v. Pottle, 31 Me. 167 (1850); Forsee v. Matlock, 7 Heisk. (Tenn.) 421 (1872); Neville v. Northcutt, 7 Coldw. (Tenn.) 294 (1869).

8. Tomlinson v. Borst, 30 Barb.

§ 3083. (*Administrative Requirements; Suppletory Oath; Preliminary Proof*); Authentication by Proof of Handwriting.

— Ordinarily where the proponent who has made the entry is alive and able to attend the trial he should swear to the correctness of the entry, and proof of his handwriting will not supply the place of such authentication.¹ On the other hand, should the party be dead at the time of trial the book will be admissible upon proof of his handwriting.² It is generally, however, required when the party has deceased, and his book of accounts is offered in evidence, supported by proof of his handwriting, that this evidence should be reinforced by the oath of the personal representatives of the deceased authenticating the book, *mutatis mutandis*, to the same purport as would be required of the party were he still alive.³ Where the member of the firm who made the particular entry on the partnership books is dead,⁴ or out of reach of the process of the court,⁵ proof of his handwriting may be made by the co-partner who swears to the correctness of the book. Where, however, the partner who has made the entry has survived, he alone should be produced to swear to the book.⁶ Where two partners have united in making an entry both should swear to its correctness.⁷

§ 3084. (*Administrative Requirements; Suppletory Oath; Preliminary Proof*); Proof by or Against Representatives.—
The shop book may be used in evidence against the estate or per-

(N. Y.) 42 (1859); *Larue v. Rowland*, 7 Barb. (N. Y.) 107 (1849); *Sickles v. Mather*, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521 (1838).

§ 3083-1. *Townsend v. Coleman*, 18 Tex. 418, 20 Tex. 817 (1857).

2. *Leighton v. Manson*, 14 Me. 208 (1837); *Odell v. Culbert*, 9 Watts & S. (Pa.) 66, 42 Am. Dec. 317 (1845). See *Seaboard Air L. Ry. v. Railroad Commr's*, 86 S. C. 91, 67 S. E. 1069, 138 Am. St. Rep. 1028 (1910).

3. § 3084.

4. *Leighton v. Manson*, 14 Me. 208 (1837); *Thomson v. Porter*, 4 Strobh. Eq. (S. C.) 58, 53 Am. Dec. 653 (1850); *White v. Murphy*, 3 Rich. (S. C.) 369 (1832). Compare

Romer v. Jaecksch, 39 Md. 585 (1873).

5. *New Haven, etc., Co. v. Goodwin*, 42 Conn. 230 (1875); *Alter v. Berghaus*, 8 Watts (Pa.) 77 (1839); *Tunno v. Rogers*, 1 Bay (S. C.) 480 (1795); *Spence v. Sanders*, 1 Bay (S. C.) 119 (1790); *Foster v. Sinkler*, 1 Bay (S. C.) 40 (1786).

6. *Karr v. Stivers*, 34 Iowa 123 (1871); *Walker v. Parkham*, 3 McCord (S. C.) 295 (1825). See also, *Horton v. Miller*, 84 Ala. 537, 4 So. 370 (1887); *American F. Ins. Co. v. First Nat. Bank*, (Tex. Civ. App. 1895) 30 S. W. 384.

7. *Mitchell v. Belknap*, 23 Me. 475 (1844); *Smith v. Sanford*, 12 Pick. (Mass.) 139, 22 Am. Dec. 415 (1831).

sonal representatives of a deceased debtor,¹ the statutes which forbid a party to be a witness in his own behalf against the estate of a deceased person not being generally regarded as prohibiting such use.² After the decease of the creditor the book may also be available in favor of his executor or administrator upon proof of the handwriting of the deceased entrant,³ or where supported by the suppletory oath of the executor or administrator.⁴ Where the

§ 3084-1. *Young v. Luce*, 50 N. Y. St. Rep. 253, 21 N. Y. Suppl. 225 (1892).

2. *Colorado*.—*Haines v. Christie*, 28 Colo. 502, 66 Pac. 883 (1901).

Florida.—*Lewis v. Meginniss*, 30 Fla. 419, 12 So. 19 (1892); *Belote v. O'Brian's Adm'r*, 20 Fla. 126 (1883).

Illinois.—*Alling v. Brazee*, 27 Ill. App. 595 (1887).

Massachusetts.—*Dexter v. Booth*, 2 Allen 559 (1861).

Mississippi.—*Bookout v. Shannon*, 59 Miss. 378 (1882).

Missouri.—*Jesse v. Davis*, 34 Mo. App. 351 (1889).

Nebraska.—*Martin v. Scott*, 12 Neb. 42, 10 N. W. 532 (1881).

New Hampshire.—*Snell v. Parsons*, 59 N. H. 521 (1880).

New York.—*Young v. Luce*, 50 N. Y. St. Rep. 253, 21 N. Y. Suppl. 225 (1892). But see, *West v. Van Tuyl*, 119 N. Y. 620, 23 N. E. 450 (1890); *Matter of McGoldrick v. Traphagen*, 88 N. Y. 334 (1882).

Ohio.—*Bentley v. Hollenback*, *Wright* 168 (1832).

Pennsylvania.—*White's Estate*, 11 Phila. 100 (1875).

Rhode Island.—*Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214 (1893).

Vermont.—*Post v. Kenerson*, 72 Vt. 341, 47 Atl. 1072 (1900).

Washington.—*Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639 (1896).

But see *Dismukes & Patrick v. Tolson & Barrett*, 67 Ala. 386 (1880).

Statutory provisions for the protection of estates may admit the book as against an executor or administrator only in cases where the

auditor himself takes no part in the preliminary proof. *Wright v. Hick*, 61 N. Y. App. Div. 489, 70 N. Y. Suppl. 675 (1901); *Davis v. Seaman*, 64 Hun 572, 19 N. Y. Suppl. 260, 48 N. Y. St. Rep. 810 (1892); *Knight v. Cunningham*, 6 Hun 100, 105 (1875). See also, *Hooker v. Johnson*, 6 Fla. 730 (1856); *Bookout v. Shannon*, 59 Miss. 378 (1882).

This course is in some cases permitted by statute. *Estes v. Jackson*, 21 Ky. L. Rep. 859, 53 S. W. 271 (1899); *Freeman's Adm'r v. Deer, Bros.*, 14 Ky. L. Rep. 813 (1893).

3. *Alabama*.—*Burton v. Phillips*, 161 Ala. 664, 49 So. 848 (1909).

Arkansas.—*St. Louis, etc., R. Co. v. Murphy*, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202 (1895); *Mathews v. Sanders*, 15 Ark. 255 (1854).

Connecticut.—*Setchel v. Keigwin*, 57 Conn. 473, 18 Atl. 594 (1889); *Chase v. Burritt*, 14 Atl. 212 (1888).

Missouri.—*Milne v. Chicago, R. I. & P. Ry. Co.*, 155 Mo. App. 465, 135 S. W. 85 (1911).

Nevada.—*Buckley v. Buckley*, 12 Nev. 423 (1877).

Pennsylvania.—*Dicken v. Winters*, 169 Pa. St. 126, 32 Atl. 289 (1895); *Hoover v. Gehr*, 62 Pa. St. 136 (1869); *Odell v. Culbert*, 9 Watts & S. 66, 42 Am. Dec. 317 (1845); *Van Swearingen v. Harris*, 1 Watts & S. 356 (1841).

Compare Gill v. Staylor, 93 Md. 453, 49 Atl. 650 (1901).

4. *Pratt v. White*, 132 Mass. 477 (1882); *Sheehan v. Hennessey*, 65 N. H. 101, 18 Atl. 652 (1889); *Dodge v. Morse*, 3 N. H. 232 (1825).

entrant has become insane since making the entry the book is admissible if produced by the guardian and proof made of the handwriting of the declarant, accompanied by the suppletory oath of the guardian.⁵

§ 3085. (*Administrative Requirements*); Books Must be Those of Original Entry.—One of the administrative requirements in connection with the admission of the shop book in evidence is that it must be the book of original entries, that is, the book in which the entries were first permanently made.¹ In many

5. Holbrook v. Gay, 6 Cush. (Mass.) 215, 216 (1850), per Dewey, J.

"The same necessity which justifies the introduction of the books of the party, and especially the various cases of modification of the rule as to such entries, and its adaptation to the circumstances and mode of keeping the accounts, alike seem to require and justify the admission of them, where the party has become incapacitated to take the oath by reason of insanity. Where the case is one of permanent insanity, it seems quite clear, that such should be the rule. The only difficulty, that would seem to arise, will be in deciding upon the degree of insanity that must be shown to justify the admission of this evidence. That, we, think, must, from the nature of the case, be left to the sound discretion of the presiding judge. A supposed temporary insanity of a party should only operate as a postponement of the case until sufficient time has elapsed for due restoration. But when no such restoration can be reasonably anticipated, evidence like that offered in the present case should be admitted."

§ 3085-1. Alabama.—First Nat. Bank v. Chaffin, 118 Ala. 246, 24 So. 80 (1898).

California.—San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 Pac. 999 (1909); Watrous v. Cun-

ningham, 71 Cal. 30, 11 Pac. 811 (1886).

Florida.—Stewart v. Stewart, 62 Fla. 388, 56 So. 413 (1911); Hooker v. Johnson, 6 Fla. 730 (1856).

Georgia.—Martin v. Fyffe, Dudley 16 (1831).

Illinois.—Huston v. Wright, 158 Ill. App. 284 (1910); Bell Telephone Co. of Missouri v. Geary, 143 Ill. App. 311 (1908).

Iowa.—Frick v. Kabaker, 116 Iowa 494, 90 N. W. 498 (1902); Arney v. Meyer, 96 Iowa 395, 65 N. W. 337 (1895); Security Co. v. Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311 (1892).

Kentucky.—Groschell v. Knoll, 10 Ky. L. Rep. 314 (1888); Lawhorn v. Carter, 11 Bush 7 (1874).

Maine.—Witherell v. Swan, 32 Me. 247 (1850).

Maryland.—Dick v. Biddle Bros. 105 Md. 308, 66 Atl. 21 (1907); Hoogewerff v. Flack, 101 Md. 371, 61 Atl. 184 (1905).

Massachusetts.—Stetson v. Wolcott, 15 Gray 545 (1860); Cogswell v. Dolliver, 2 Mass. 217, 3 Am. Dec. 45 (1806).

Nebraska.—Pollard v. Turner, 22 Neb. 366, 35 N. W. 192 (1887).

New York.—Winne v. Hills, 91 Hun 89, 36 N. Y. Suppl. 683 (1895); Skipworth v. Deyell, 83 Hun 307, 31 N. Y. Suppl. 918 (1894).

Oklahoma.—First Nat. Bldg. Co. v. Vandenberg, 29 Okla. 583, 119 Pac. 224 (1911).

cases, however, the book of original entry is itself made up from loose memoranda, designed to assist a person who, when at his leisure, intends to make a formal or summarized entry of the same in a more permanent book which, for the purposes of bookkeeping, is that of original entry.² These first aids to memory, or memoranda, are made in various forms. It is, indeed, a common practice, especially among mechanics and handicraftsmen, that for purposes of convenience, neatness or conciseness, a first memorandum is made upon a stub,³ loose pieces of paper⁴ and the

Pennsylvania.—Folsom Building & Loan Ass'n v. Gogel, 24 Pa. Super. Ct. 539 (1904); Breinig v. Meitzler, 23 Pa. St. 156 (1854); Budden v. Petriken, 5 Watts 286 (1836); Curren v. Crawford, 4 Serg. & R. 3 (1818). See also, Huston's Estate, 167 Pa. St. 217, 31 Atl. 553 (1895); Wall v. Dovey, 60 Pa. St. 212 (1869).

South Carolina.—Furman & Smith v. Peay, 2 Bailey 394 (1831).

Texas.—Bouldin v. Atlantic Rice-mills Co., (Civ. App. 1905) 86 S. W. 795; Texas & P. Coal Co. v. Lawson, 10 Tex. Civ. App. 491, 31 S. W. 843 (1895); Missouri Pac. R. Co. v. Johnson, (Sup. 1888) 7 S. W. 838; Flato v. Brod & Hemmi, 37 Tex. 734 (1873); Cole v. Dial, 8 Tex. 347 (1852).

United States.—Reyburn v. Queen City Sav. B. & T. Co., 171 Fed. 609, 96 C. C. A. 373 (1909).

See also, Durkheimer v. Heilner, 24 Oreg. 270, 33 Pac. 401, 34 Pac. 475 (1893).

It will not be required that the books of original entry should have been made by the person, firm or partnership who now offers them in evidence. A successor in business may properly rely on a book kept by his predecessor in business. Dunlap v. Hooper, 66 Ga. 211 (1880) (surviving partner using firm books). In like manner, the individual account of a partner, kept on the firm books may properly be used by him. White v. Tucker, 9 Iowa 100 (1859).

The assessment book of a mutual

fire insurance company is admissible in evidence where it is shown to be a book of original entries containing the record of the policy in suit along with all others issued. In such a case the book is admissible not only as a book of original entries, but also as a record of a company of which the defendant was a member. Moore v. Rohrbacker, 30 Pa. Super. Ct. 568 (1906).

2. Wright v. Chicago, B. & Q. Ry. Co., 118 Mo. App. 392, 94 S. W. 555 (1906); Barclay v. Deyerle, 53 Tex. Civ. App. 236, 116 S. W. 123 (1909); Cascade Lumber Co. v. Aetna Indemnity Co., 56 Wash. 503, 106 Pac. 158 (1910).

If a charge is made in duplicate by means of the use of carbon paper upon blanks provided for that purpose, both copies are original and competent; and a book of first entry into which the charge shown on such carbon slips are transcribed, is competent as a book of original entry. Rudolph Wurlitzer Co. v. Dickinson, 153 Ill. App. 36 (1910), judgment affirmed, 93 N. E. 132.

3. *California*.—Landis v. Turner, 14 Cal. 573 (1860).

Delaware.—Nichols v. Vinson, 9 Houst. 274 (1891).

Illinois.—Redlich v. Bauerlee, 98 Ill. 134 (1881).

Maine.—Hall v. Glidden, 39 Me. 445 (1855).

Massachusetts.—Barker v. Haskell,

like, with the intention of putting the entries later in a suitable book. The latter is for the purposes of the rule, the "book of original entry."⁵ The administrative indulgence is made where the original memoranda have been placed upon pass books,⁶ or the order books in which an employee of a tradesman entered the orders which he had solicited from customers.⁷

§ 3086. (Administrative Requirements; Books Must be Those of Original Entry); Temporary Memoranda not Required.—It is not essential to the admissibility of a book entry that the original memoranda from which it was made be also produced.¹ In other words, as has been stated, an entry offered in evidence may be original within the meaning of the administrative requirement, although it has been made up from memoranda made on a slate,² loose sheets of paper,³ or other convenient place. Even chalk marks put on a butcher's cart,⁴ or other repository may constitute the memoranda for an original entry. These are regarded merely as impermanent expedients for refreshing the

9 Cush. 218 (1852); Faxon v. Hollis, 13 Mass. 427 (1816).

New Hampshire. — Pillsbury v. Locke, 33 N. H. 96 (1856).

New York. — Stroud v. Tilton, 4 Abb. Ct. of App. Dec. 324 (1866).

4. Hoover v. Gehr, 62 Pa. St. 136 (1869). See § 3094.

5. Smith v. Smith, 163 N. Y. 168, 57 N. E. 300 (1900); Matter of McGoldrick v. Traphagen, 88 N. Y. 334 (1882); Stroud v. Tilton, 3 Keyes (N. Y.) 139 (1866); Sickles v. Mather, 20 Wend. (N. Y.) 72 (1838).

6. Taggart v. Fox, 11 Daly (N. Y.) 159 (1882); Hoover v. Gehr, 62 Pa. St. 136 (1869); Gifford v. Thomas, 62 Vt. 34, 19 Atl. 1088 (1889). But see, Farley v. Gibbs, 51 Hun (N. Y.) 643, 4 N. Y. Suppl. 353, 22 N. Y. St. Rep. 94 (1889).

7. Hancock v. Hintrager, 60 Iowa 374, 14 N. W. 725 (1882); Van Name v. Barber, 115 N. Y. App. Div. 593, 100 N. Y. Suppl. 987 (1906); Laird v. Campbell, 100 Pa. 159 (1882); Parker v. Donaldson, 2 Watts & S. (Pa.) 19 (1841); Rhoads v. Gual, 4

Rawle (Pa.) 404, 27 Am. Dec. 277 (1834). But see, Ives v. Waters, 30 Hun (N. Y.) 297 (1883).

§ 3086-1. Landis v. Turner, 14 Cal. 573 (1860); Mahoney v. Hartford Inv. Corp., 82 Conn. 280, 73 Atl. 766 (1909).

While the first memoranda from which the original entry was made up need not be produced for admissibility of the book entry, these memoranda, if available, may be admitted in connection with the book entries made up from them, if it is shown to have been the regular custom of the particular business to make the memoranda. *Diamond v. Colloty*, 66 N. J. L. 295, 49 Atl. 445, 808 (1901).

2. Matter of McGoldrick v. Traphagen, 88 N. Y. 334 (1882) (slate, day book, ledger). See § 3085.

3. See §§ 3085, 3094.

4. Miller v. Shay, 145 Mass. 162, 13 N. E. 468. 1 Am. St. Rep. 449 (1887); Smith v. Sanford, 12 Pick. (Mass.) 139, 22 Am. Dec. 415 (1831).

memory of one who has no leisure or other opportunity to make a formal entry at the time. That is to say, the term "original entry" means original or first *permanent* entry, intended as a lasting memorandum.⁵ This is especially clear where the memorandum is merely a loose jotting, intended to mean something to the maker of it, which first appears in the formal entry.

§ 3087. (Administrative Requirements; Books Must be Those of Original Entry); Form of Books.—Primarily, books of account are those in which the charge is originally placed for

5. California.—Landis v. Turner, 14 Cal. 573 (1860).

Connecticut.—Smith v. Law, 47 Conn. 431 (1880).

Delaware.—Jefferis v. Urmy, 3 Houst. 653 (1864); Ewart v. Morrell, 5 Harr. 126 (1848).

Florida.—Grady v. Thigpin, 6 Fla. 668 (1856).

Georgia.—Taylor v. Tucker, 1 Ga. 231 (1846).

Illinois.—Ryan Car Co. v. Gardner, 154 Ill. App. 565 (1910); Redlich v. Bauerlee, 98 Ill. 134, 38 Am. Rep. 87 (1881).

Indiana.—Place v. Baugher, 159 Ind. 232, 64 N. E. 852 (1902).

Kansas.—State v. Stephenson, 69 Kan. 405, 76 Pac. 905, 105 Am. St. Rep. 171, 2 Am. & Eng. Ann. Cas. 841 (1904).

Kentucky.—Groschell v. Knoll, 10 Ky. L. Rep. 314 (1888).

Maine.—Hall v. Glidden, 39 Me. 445 (1855).

Massachusetts.—Whitney v. Sawyer, 11 Gray 242 (1858); Kent v. Garvin, 1 Gray 148 (1854); Barker v. Haskell, 9 Cush. 218 (1852); Norris v. Briggs, 3 Cush. 342 (1849); Arnold v. Sabin, 1 Cush. 525 (1848); Ball v. Gates, 12 Metc. 491 (1847).

Michigan.—Jackson v. Evans, 8 Mich. 476 (1860).

Missouri.—Afflick v. Streeter, 136 Mo. App. 712, 119 S. W. 28 (1909); Drumm-Flato Com. Co. v. Bank, 107 Mo. App. 426, 81 S. W. 503 (1904).

New Hampshire.—State v. Shinnborn, 46 N. H. 497, 88 Am. Dec. 224 (1866).

New Jersey.—Corkran v. Taylor, 77 N. J. L. 195, 71 Atl. 124 (1908).

New York.—Matter of McGoldrick v. Traphagen, 88 N. Y. 334 (1882); Davison v. Powell, 16 How. Pr. (N. Y.) 467 (1858); Sickles v. Mather, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521 (1838).

Pennsylvania.—Philadelphia v. Tradesmen's Trust Co., 38 Pa. Sup. Ct. 286 (1909); Haines' Estate, 10 Pa. Dist. 677 (1900); Heery's Estate, 10 Kulp. 226 (1900); Hartley v. Brookes, 6 Whart. 189 (1841); Patton v. Ryan, 4 Rawle 408 (1834); Ingraham v. Bockius, 9 Serg. & R. 285, 11 Am. Dec. 730 (1823).

South Carolina.—Seaboard Air L. Ry. v. Railroad Commr's, 86 S. C. 91, 67 S. E. 1069, 138 Am. St. Rep. 1028 (1910).

Texas.—Barclay v. Deyerle, 53 Tex. Civ. App. 236, 116 S. W. 123 (1909); Cahn v. Salinas, 2 White & W. Civ. Cas. Ct. App., § 614 (1885). Compare Guthrie v. Mann, (Civ. App. 1896) 35 S. W. 710.

Washington.—Cascade Lumber Co. v. Indemnity Co., 56 Wash. 503, 106 Pac. 158 (1910).

See Gage v. McIlwain, 1 Strobh. (S. C.) 135 (1846); Venning v. Hacker, 2 Hill (S. C.) 584 (1834); Drummond v. Hyams, Harp. (S. C.) 268, 18 Am. Dec. 649 (1824).

the purposes of permanent record. The book, if shown to the reasonable satisfaction of the court to have been the book of original entries may be kept in any form which does not throw such discredit on its accuracy and good faith as to deprive it of all reasonable probative force.¹ Day books and blotters fall easily within this class, and their absence will not be excused by the production of ledgers,² or other secondary books of account into which the entries have been transferred or "posted" from blotters, day books or similar books of original entry. Books of original entry may, however, be kept in ledger form, and are admissible if reasonably trustworthy.³ *A fortiori* should a book

§ 3087-1. *Delaware*.—Remington Mach. Co. v. Wilmington Candy Co., 6 Pennew. 288, 66 Atl. 465 (1907).

Georgia.—Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459 (1907).

Kansas.—State v. Stephenson, 69 Kan. 405, 76 Pac. 905, 105 Am. St. Rep. 171, 2 Am. & Eng. Ann. Cas. 841 (1904).

Maine.—Hooper v. Taylor, 39 Me. 224 (1855); Witherell v. Swan, 32 Me. 247 (1850).

Massachusetts.—Miller v. Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449 (1887).

Nebraska.—Anderson v. Kannon, 72 Neb. 32, 99 N. W. 824 (1904); Cather v. Damerell, 5 Neb. (Unof.) 490, 99 N. W. 35 (1904).

New Hampshire.—Remick v. Rumery, 69 N. H. 601, 45 Atl. 574 (1899); Cummings v. Nichols, 13 N. H. 420, 38 Am. Dec. 501 (1843).

Pennsylvania.—Staggers' Estate, 8 Pa. Super. Ct. 260 (1898).

Wyoming.—Lewis v. England, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A. (N. S.) 401 n. (1905).

"The law prescribes no regular mode or method in which accounts must be kept in order to make them competent as evidence. The question of competency must be determined by the appearance and character of the book, regard being had to the degree of education of the party, the nature of his business, the manner

of his charges against other people, and all other surrounding circumstances." Lewis v. England, 14 Wyo. 128, 139, 82 Pac. 869, 2 L. R. A. (N. S.) 401 (1905), per Van Orsdel, J.

The entries, however, should be contained in a book. The records of a cash registering machine will not be deemed books of account within the rule. Cullinan v. Moncrief, 90 N. Y. App. Div. 538, 85 N. Y. Suppl. 745 (1904).

An entry in pencil is as admissible as one in ink. Gibson v. Bailey, 13 Metc. (Mass.) 537 (1847); True v. Bryant, 32 N. H. 241 (1855); Walton's Estate, 4 Kulp (Pa.) 487 (1887); Hill v. Scott, 12 Pa. St. 168 (1849).

2. Way v. Cross, 95 Iowa 258, 63 N. W. 691 (1895); Fitzgerald v. McCarty, 55 Iowa 702, 8 N. W. 646 (1881); Clark v. Bullock, 2 N. Y. Suppl. 408, 18 N. Y. St. Rep. 939 (1888); Breinig v. Meitzler, 23 Pa. St. 156 (1854). See also, Haas' Estate, 3 Pa. Co. Ct. 345 (1886).

3. *Georgia*.—Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459 (1907).

Illinois.—Manhattan Brewing Co. v. Riordon, 157 Ill. App. 234 (1910).

Kansas.—State v. Stephenson, 69 Kan. 405, 76 Pac. 905, 105 Am. St. Rep. 171, 2 Am. & Eng. Ann. Cas. 841 (1904).

Massachusetts.—Gibson v. Bailey, 13 Metc. 537 (1847); Faxon v. Hollis,

of original entry appear to have been fairly and regularly kept it is not fatal to its admissibility that it has been also used to receive entries posted from other books or memoranda.⁴ On the contrary, where the account has simply been *copied* into the ledger⁵ the latter is admissible — certainly over objection.⁶

13 Mass. 427 (1816); Cogswell v. Dolliver, 2 Mass. 217, 3 Am. Dec. 45 (1806).

New Hampshire.—Wells v. Hatch, 43 N. H. 246 (1861); Swain v. Cheney, 41 N. H. 232 (1860).

New Jersey.—Schlicher v. Whyte, 74 N. J. Eq. 839, 71 Atl. 337 (1908); Jones v. De Kay, 3 N. J. L. 955 (1812).

New York.—Farley v. Gibbs, 51 Hun 643, 4 N. Y. Suppl. 353, 22 N. Y. St. Rep. 94 (1889).

Pennsylvania.—Hoover v. Gehr, 62 Pa. St. 136 (1869); Odell v. Culbert, 9 Watts & S. 66, 42 Am. Dec. 317 (1845); Rehner v. Zeigler, 3 Watts & S. 258 (1842); Thomson v. Hopper, 1 Watts & S. 467 (1841); Rodman v. Hoops' Ex'r, 1 Dall. 85, 1 L. ed: 47 (1784).

South Carolina.—Toomer v. Gadsden, 4 Strobb. 193 (1850); Hurtz v. Neufville's Ex'rs, 2 McMull. 138 (1842).

Vermont.—Gifford v. Thomas' Estate, 62 Vt. 4, 19 Atl. 1088 (1889).

See also, Leveringe v. Dayton, 15 Fed. Cas. No. 8,288, 4 Wash. 698 (1827).

"The fact that the book is called a 'ledger' does not change the character of the entries, nor is it necessary that the bookkeeper should have made the sales or billed out the goods sold to make the book of accounts admissible in evidence. If the sales made be regularly reported to the bookkeeper, and from such reports, or from orders or other temporary memoranda of the salesmen, the entries be promptly and faithfully made by the bookkeeper, the book is entitled to be read in evi-

dence, when duly verified by the one who kept it." State v. Stephenson, 69 Kan. 405, 408, 76 Pac. 905, 105 Am. St. Rep. 171 (1904), per Johnston, C. J.

Relevancy is, at all times, to be insisted upon. A ledger entry cannot be used to prove an immaterial fact. Seligman v. Ten Eyck Estate, 53 Mich. 285, 18 N. W. 818 (1884); Wells v. Hatch, 43 N. H. 246 (1861). But this is not because the entry cannot be proved by a ledger account, but for the reason that it cannot be proved at all.

4. *Colorado.*—Plummer v. Mercantile Co., 23 Colo. 190, 47 Pac. 294 (1896).

Illinois.—Chisholm v. Beaman Mach. Co., 160 Ill. 101, 43 N. E. 796 (1896); Redlich v. Bauerlee, 98 Ill. 134, 138, 38 Am. Rep. 87 (1881).

Massachusetts.—Miller v. Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449 (1887); Barker v. Haskell, 9 Cush. 218 (1852); Smith v. Sandford, 12 Pick. 139, 22 Am. Dec. 415 (1831).

Michigan.—Jackson v. Evans, 8 Mich. 476, 482 (1860).

Minnesota.—Levine v. L. Ins. Co., 66 Minn. 138, 68 N. W. 855 (1896).

Pennsylvania.—Wollenweber v. Ketterlinus, 17 Pa. St. 389 (1851); Ives v. Niles, 5 Watts 323 (1836).

Wisconsin.—Winne v. Nickerson, 1 Wis. 1, 5 (1853).

See Handy & Co. v. Smith, 77 Conn. 165, 58 Atl. 694 (1904).

Compare Fitzgerald v. McCarty, 55 Iowa 702, 8 N. W. 646 (1881).

5. *Estes v. Jackson*, 53 S. W. 271, 21 Ky. L. Rep. 859 (1899); *Breinig v. Meitzler*, 23 Pa. St. 156 (1854).

6. *Alabama.*—Talladega First Nat.

§ 3088. (Administrative Requirements; Books Must be Those of Original Entry; Form of Books); Cheque Stubs.—

The stub of a cheque book, from which cheques have been removed, leaving a stub showing date, amount and name of person to whose order payable, is not a shop book within the rule.¹ It

Bank v. Chaffin, 118 Ala. 246, 24 So. 80 (1897).

California.—*San Francisco Teaming Co. v. Gray*, 11 Cal. App. 314, 104 Fed. 999 (1909).

Colorado.—*Jones v. Henshall*, 3 Colo. App. 448, 34 Pac. 254 (1893).

Illinois.—*McCormick v. Elston*, 16 Ill. 204 (1854).

Iowa.—*Way v. Cross*, 95 Iowa 258, 63 N. W. 691 (1895).

Maryland.—*Hoogewerff v. Flack*, 101 Md. 371, 61 Atl. 184 (1905).

New York.—*Griesheimer v. Tanenbaum*, 124 N. Y. 650, 26 N. E. 957, 4 Silv. Ct. of App. 365, *reversing* 8 N. Y. Suppl. 582 (1891); *Vilmar v. Schall*, 35 N. Y. Super. Ct. 67, *affirmed* 61 N. Y. 564 (1872).

Oklahoma.—*First Nat. Bldg. Co. v. Vandenberg*, 29 Okla. 583, 119 Pac. 224 (1911).

Oregon.—*Durkheimer v. Heilner*, 24 Oreg. 270, 33 Pac. 401, 34 Pac. 475 (1893).

Pennsylvania.—*In re Huston*, 167 Pa. St. 217, 31 Atl. 553 (1895).

Texas.—*Pohl v. Bradford & Rowe Bros.*, (Civ. App. 1894) 25 S. W. 984.

United States.—*Holloway & Bro. v. White-Dunham Shoe Co.*, 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704 (1906).

But see, *Columbia v. Harrison*, 2 Mill (S. C.) 213 (1818).

Even under these circumstances, the ledger may be used to reinforce the book of original entry. *Stickle v. Otto*, 86 Ill. 161 (1877).

It is common practice to require a plaintiff to produce at the trial any book of account kept by him which contains any entry connected with the account sued upon, in order that

the debtor may receive the benefit of any credit item in his favor anywhere appearing on the books. *LaRue v. Rowland*, 7 Barb. (N. Y.) 107 (1849). Where, therefore, the day-book, when produced, shows that certain entries have been posted into the ledger, the latter must be produced. *Prince v. Swett*, 2 Mass. 569 (1793); *Eastman v. Moulton*, 3 N. H. 156 (1825); *Bonnell v. Mawha*, 37 N. J. L. 198 (1874). See also, *Stetson v. Godfrey*, 20 N. H. 227 (1850). *Compare Stokes v. Fenner*, 30 Leg. Int. 84, 10 Phila. (Pa.) 14 (1873). Should it not appear, however, from marks on the original book of entry, day-book, journal and the like, that any entries have been posted into a ledger, it is sufficient if a party, producing under a notice that makes no special reference to ledgers, tenders to his opponent only the book of original entries. *Hervey v. Harvey*, 15 Me. 357 (1839); *Tindall v. McIntyre*, 24 N. J. L. 147 (1853).

§ 3088-1. *Carter v. Fischer*, 127 Ala. 52, 28 So. 376 (1899); *MacKenzie v. Barrett*, 148 Ill. App. 414 (1909); *Leask v. Hoagland*, 205 N. Y. 171, 98 N. E. 395 (1912), *reversing judgment*, 128 N. Y. Suppl. 1017, 144 App. Div. 138; *rehearing denied*, 205 N. Y. 594, 98 N. E. 1106; *Simons v. Steele*, 82 N. Y. App. Div. 202, 81 N. Y. Suppl. 737 (1903), *aff'd* 177 N. Y. 542, 69 N. E. 1131 (1904); *Mathias Planing Mill Co. v. Hazen*, 20 Ohio Cir. Ct. 287, 11 Ohio Cir. Dec. 54 (1900); *Watts v. Shewell*, 31 Ohio St. 331 (1878); *Wilson v. Goodin, Wright (Ohio)* 219 (1833). See also, *Fulkerson v. Long*, 63 Mo. App. 268 (1895).

seems especially clear that such cheque stubs cannot be used in proof of the loaning of money or similar cash transactions.²

§ 3089. (*Administrative Requirements; Books Must be Those of Original Entry; Form of Books*); Collection Registers.—Collection registers¹ and loan docketts designed to keep a record of moneys collected or loaned have been held not to be account books within the meaning of the rules relating to that subject.²

§ 3090. (*Administrative Requirements; Books Must be Those of Original Entry; Form of Books*); Time Books.—A time book is admissible, though kept in the tabular form in which time books are usually kept;¹ i. e., with the names of the workmen arranged under each other in the first or left-hand column, and opposite in columns bearing the name of year, month, hours and the like, figures showing the necessary facts.

§ 3091. (*Administrative Requirements; Books Must be Those of Original Entry; Form of Books*); Memorandum Books, Diaries, etc.—Certain books, designed to serve a temporary purpose, such as memorandum books,¹ diaries² and the

2. *Simons v. Steele*, 82 App. Div. (N. Y.) 202, 81 N. Y. Suppl. 737 (1903), *affirmed* in 177 N. Y. 542, 69 N. E. 1131 (1904).

§ 3089-1. *U. S. Bank v. Burson*, 90 Iowa 191, 57 N. W. 705 (1894); *Larabee v. Klosterman*, 33 Neb. 150, 50 N. W. 1102 (1891).

2. *U. S. Bank v. Burson*, 90 Iowa 191, 57 N. W. 705 (1894); *Security Co. v. Graybeal*, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311 (1892); *Labaree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102 (1891); *Martin v. Scott*, 12 Neb. 42, 10 N. W. 532 (1881). See also, *Kassing v. Walter*, (Iowa 1896) 65 N. W. 832.

§ 3090-1. *Jones v. General Const. Co.*, 150 Iowa 194, 129 N. W. 830 (1911); *Mathes v. Robinson*, 8 Metc. (Mass.) 269, 41 Am. Dec. 505 (1844); *Cornell v. Standard Oil Co.*, 86 N. Y. Suppl. 633, 91 N. Y. App. Div. 345

(1904); *Dicken v. Winters*, 169 Pa. St. 126, 32 Atl. 289 (1895). See, *Mayor v. Second Ave. R. R. Co.*, 102 N. Y. 572 (1886).

§ 3091-1. *California*.—*Thompson v. Ruiz*, 34 Cal. 26, 66 Pac. 24 (1901).

Kentucky.—*Little v. Berry*, 113 S. W. 902 (1908).

Massachusetts.—*Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84 (1896); *Costello v. Crowell*, 139 Mass. 588, 2 N. E. 698 (1885).

New York.—*Leask v. Hoagland*, 205 N. Y. 171, 98 N. E. 395 (1912), *reversing judgment* 128 N. Y. Suppl. 1017, 144 App. Div. 138; *rehearing denied*, 205 N. Y. 594, 98 N. E. 1106.

Tennessee.—*Callaway v. McMillian*, 11 Heisk. 557 (1872).

2. *Barber's Appeal*, 63 Conn. 393, 410, 412, 27 Atl. 973, 22 L. R. A. 90 (1893); *Hutchins v. Berry*, 75 N. H. 416, 75 Atl. 650 (1910); *Covey v.*

like, are not books of account such as is contemplated by the rule.³ They may be used by the person making them for jotting down any fact which it is desired should not be forgotten. In such a book, entries of items appropriate for a shop book may undoubtedly be made from time to time.⁴ Neither memorandum books nor detached sheets are made shop books by being used for the preservation of items of account which might be proved if contained in a book of original entry.⁵ The fact that these sheets are bound in such a way as to keep the memoranda together does not affect the question of admissibility. They are no more to be received as shop books than would be loose sheets of paper which may be used in the same way. At most, the sheets or books are usable by the entrant only as memoranda to refresh the memory of the maker.⁶

Rogers, 84 Vt. 151, 78 Atl. 792 (1911). See, *Dorris v. Morrisdale Coal Co.*, 215 Pa. 638, 64 Atl. 855 (1909). Compare *Gleason v. Kinney's Adm'r*, 65 Vt. 560, 563, 27 Atl. 208 (1893).

3. *Maryland*.—*Ward v. Leitch*, 30 Md. 326, 333 (1868).

Michigan.—*Countryman v. Bunker*, 101 Mich. 218, 59 N. W. 422 (1894).

New Hampshire.—*Richardson v. Emery*, 23 N. H. 220 (1851).

Pennsylvania.—*Fulton's Estate*, 178 Pa. 78, 35 Atl. 880, 35 L. R. A. 133 (1896).

Vermont.—*Barber's Adm'r v. Bennett*, 58 Vt. 476, 4 Atl. 231, 56 Am. Rep. 565 (1886).

Wyoming.—*Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581 (1896).

4. *Dreiske v. Jones & Adams Co.*, 133 Ill. App. 572 (1907); *Milne v. Chicago R. I. & P. Ry. Co.*, 155 Mo. App. 465, 135 S. W. 85 (1910). See, *Gibson v. Seney*, 138 Iowa 383, 116 N. W. 325 (1908).

5. *Illinois*.—*Cairns v. Hunt*, 78 Ill. App. 420 (1898); *Boyd v. Jennings*, 46 Ill. App. 290 (1892).

Iowa.—*Hancock v. Hintrager*, 60 Iowa 374, 14 N. W. 725 (1882). See also, *Hart v. Livingston*, 29 Iowa 217 (1870).

Maine.—*Waldron v. Priest*, 96 Me. 36, 51 Atl. 235 (1901).

Massachusetts.—*Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84 (1896); *Costelo v. Crowell*, 139 Mass. 588, 2 N. E. 698 (1885); *Watts v. Howard*, 7 Metc. 478 (1844).

Nebraska.—*Pollard v. Turner*, 22 Neb. 366, 35 N. W. 192 (1887).

New Hampshire.—*Hutchins v. Berry*, 75 N. H. 416, 75 Atl. 650 (1910); *Richardson v. Emery*, 23 N. H. 220 (1851).

Pennsylvania.—*Gibbons' Estate*, 1 Leg. Gaz. R. 10 (1869).

Tennessee.—*Callaway v. McMillian*, 11 Heisk. 557 (1872).

Texas.—*Gorman v. State*, 52 Tex. Cr. App. 327, 106 S. W. 384 (1907); *Kotwitz v. Wright*, 37 Tex. 82 (1873).

Vermont.—*Barnes v. Dow*, 59 Vt. 530, 10 Atl. 258 (1887); *Barger's Adm'r v. Bennett*, 58 Vt. 476, 4 Atl. 231, 56 Am. Rep. 565 (1886); *Lapham v. Kelly*, 35 Vt. 195 (1862). See also, *In re Diggins' Estate*, 68 Vt. 198, 34 Atl. 696 (1895); *Gleason v. Kinney's Adm'r*, 65 Vt. 560, 27 Atl. 208 (1893).

Wyoming.—*Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581 (1896).

6. *McKewn v. Barksdale*, 2 Nott &

§ 3092. (Administrative Requirements; Books Must be Those of Original Entry); Form of Entry; Dates.—Whether an entry is admissible when not dated is a question of administration upon which some conflict appears among the authorities. The obvious consideration is, that the dates may well, in the present state of the law of evidence be supplied by other proof. In view of this circumstance, entries have been received though not dated.¹ In other jurisdictions, undated entries have been refused admission, though the absence of the day of the month has not been regarded as fatal where other circumstances of suspicion do not appear, extrinsically or intrinsically in connection with the entries.² An entry dated on Sunday has been rejected.³

§ 3093. (Administrative Requirements; Books Must be Those of Original Entry; Form of Entry); Lump Charges.—The probative value of specific charges capable of being traced and verified is so superior to those of an item where a number of such specific charges are joined in one—or, as the phrase is, “lumped”—that the court may well be justified in rejecting an entry covering such composite or “lump” statement.¹ Accordingly, an item such as “Repairing brick machine,”² “building 92 1-4 rods of Cedar fence at 75 cents, 69.56,”³ and the like⁴

McC. (S. C.) 17 (1819); Bates v. Sabin, 64 Vt. 511, 24 Atl. 1013 (1892).

§ 3092-1. Doster v. Brown, 25 Ga. 24, 71 Am. Dec. 153 (1858).

2. Little v. Berry, (Ky. 1908) 113 S. W. 902; Cummings v. Nichols, 13 N. H. 420, 38 Am. Dec. 501 (1843). See also, McNulty's Appeal, 135 Pa. St. 210, 19 Atl. 936 (1890); Harbison v. Hawkins, 6 Leg. Gaz. (Pa.) 157 (1874).

3. Walton's Estate, 4 Kulp (Pa.) 487 (1887).

§ 3093-1. Georgia.—Williams v. Abercrombie, Dudley 252 (1833).

Maine.—Putman v. Grant, 101 Me. 240, 63 Atl. 816 (1906).

Massachusetts.—Earle v. Sawyer, 6 Cush. 142 (1850); Henshaw v. Davis, 5 Cush. 145 (1849).

Pennsylvania.—Scranton Trust Co. v. Hartshorn, 36 Pa. Sup. Ct. 208

(1908); McKnight v. Newell, 207 Pa. 562, 57 Atl. 39 (1904); Bartron v. Exeter Mach. Wks., 11 Kulp 76 (1902); Foreman's Estate, 7 Pa. Dist. 214, 20 Pa. Co. Ct. 627 (1898); Harbison v. Hawkins, 6 Leg. Gaz. 157 (1874). See also, Nichols v. Haynes, 78 Pa. St. 174 (1875).

Rhode Island.—Cargill v. Atwood, 18 R. I. 303, 27 Atl. 214 (1893).

South Carolina.—Lance v. McKenzie, 2 Bailey 449 (1831); Petrie v. Lynch, 1 Nott & McC. 130 (1818).

2. Corr v. Sellers, 100 Pa. St. 169, 45 Am. Rep. 370 (1882).

3. Towle v. Blake, 38 Me. 95 (1854).

4. Hughes v. Hampton, 3 Brev. (S. C.) 544 (1815) (“13 dollars for medicine and attendance on one of the general's daughters, in curing the whooping cough”).

may properly be refused admission. A composite entry of this kind may equally well consist of a "balance from former accounts"⁵ or similar references to items not specified.⁶ All such entries may properly be rejected. The question is, however, almost entirely one of administration. In the exercise of its so-called "discretion"⁷ much will depend upon the circumstances presented in each particular case;—especial consideration being given to the possibility, without unreasonable effort, of making other proof, and of the importance to an opposing party of learning the particulars upon which the composite item is based. Where no advantage could come to the opponent from further particulars—e. g., where work is done, in the same way, at the same price, for a series of days,⁸ or goods are delivered for over a period of several days on a single order,⁹ no administrative objection may exist to receiving the evidence.

§ 3094. (Administrative Requirements; Books Must be Those of Original Entry); Separate Sheets of Paper.—It is not fatal to the admissibility of an account that it has been kept on separate sheets of paper.¹ Where these leaves have been sewed together so as fairly to constitute a book,² the question of admissibility seems comparatively simple. The admission of loose scraps of paper³ puts a greater strain upon the administrative indulgence of the court. Much of the probative force of contemporaneousness and regularity seems lost under these circumstances.

5. *Buckner v. Meredith*, 1 Brewst. (Pa.) 306 (1867).

6. *Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214 (1893).

7. *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501 (1843). Most frequently, perhaps, this is spoken of as the "sound discretion" of the court. This, apparently is a statement of the fact that if the exercise of the administrative power of the trial court is *reasonable*, i. e., is *sound* in point of judgment, it will not be disturbed by an appellate tribunal.

8. *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501 (1843); *Bay v. Cook*, 22 N. J. L. 343 (1850).

9. *Le Franc v. Hewitt*, 7 Cal. 186 (1857).

§ 3094-1. *Delaware*.—*Remington Mach. Co. v. Wilmington Candy Co.*, 6 Pennw. 288, 66 Atl. 465 (1907).

Georgia.—*Taylor v. Tucker*, 1 Ga. 231 (1846).

Maine.—*Hooper v. Taylor*, 39 Me. 224 (1855).

Missouri.—*Jonesboro, L. C. & E. R. Co. v. United Iron Wks. Co.*, 117 Mo. App. 153, 94 S. W. 726 (1906).

Vermont.—*Bell v. McLeran*, 3 Vt. 185 (1831).

Wyoming.—*Lewis v. England*, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A. (N. S.) 401 (1905).

2. *Hall v. Field*, 4 Har. (Del.) 533 note a (1795).

3. *Smith v. Smith's Ex'r*, 4 Har. (Del.) 532 (1843).

Should it appear, however, that the loose leaves were originally bound and have been reduced to their present separated state by reason of accident rather than design, e. g., where a number of leaves are cut by mistake from an entry book regularly kept,⁴ the somewhat different administrative question is presented. But the book is inadmissible while the suspicion of intentional fraudulent mutilation attaches to the proponent.⁵ In many jurisdictions the courts go further — admissibility being denied to loose sheets of this nature on the ground that no certainty is readily felt that such sheets are, of necessity, the contemporaneous record of daily business.⁶

§ 3095. (Administrative Requirements); Completeness Demanded.—As is more fully seen in another place,¹ the presiding judge will insist that the proponent of a book entry make, in the first instance, such a presentation of the account as is fairly essential to its completeness.²

§ 3096. (Administrative Requirements); Corroboration Aliunde.—The presiding judge is justified in requiring that the plaintiff reinforce the effect of his book by showing facts tending to establish its accuracy and his own care in keeping it. Even without this evidence, the presiding judge may admit the book *de bene*, i. e., conditional upon corroboration of this nature being subsequently furnished. If this corroboration be not supplied, the judge may reject the book, as his final action in the matter.¹ Corroborative proof must be given² by evidence independent of

4. *Allen v. Davis*, Tapp. (Ohio) 60 (1816).

5. *Carroll v. School*, 2 Phila. (Pa.) 260 (1871).

6. *Donaldson v. Donaldson*, 237 Ill. 318, 86 N. E. 604 (1908); *Jones v. Jones*, 21 N. H. 219 (1850); *Thomson v. McKelvey*, 13 Serg. & R. (Pa.) 126 (1825). See also, *Kennedy v. Ankrum*, Tapp. (Ohio) 40 (1816); *Fulton's Estate*, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133 (1896); *Ogden Packing & P. Co. v. Meat, etc. Co.*, (Utah 1912) 124 Pac. 333.

§ 3095-1. § 3082.

2. *Countryman v. Bunker*, 101 Mich. 218, 59 N. W. 422 (1894).

§ 3096-1. "The judge could not know, until the end of the trial, what corroborating evidence there would be; and after the evidence was all in, it was proper for the court to decide upon the competency of the book. This is a species of evidence peculiar in its nature, of the competency of which, in each case, the court must decide." *Henshaw v. Davis*, 5 Cush. (Mass.) 145 (1849).

2. *Conklin v. Stamler*, 2 Hilt. (N. Y.) 422, 8 Abb. Prac. 395, 17 How. Prac. 399 (1859); *Morrill v. Whitehead*, 4 E. D. Smith (N. Y.) 239 (1855). See also, *Cheever v. Brown*, 30 Ga. 904 (1860); *Countryman v.*

the book itself. Indeed, it seems to have been deemed necessary that this corroborative evidence should be furnished if the rule itself is to apply. Confirmation of a particular item may be sufficient.³ Where there is but a single transaction for two articles sold and delivered at the same time,⁴ the shop book has been rejected. As was said in an early New York case:⁵ "They are admissible where 'regular dealings between the parties' is shown, some of the items being otherwise proved; and then only 'from the necessity of the case, and the consideration that the party debited is shown to have reposed confidence, by dealing with and being intrusted by the other party.'"⁶

In other words it was necessary for the proponent to call third persons,⁷ such as those who had dealt with the plaintiffs and found their books to be correct.⁸ Where evidence of this precise nature is unavailable the proponent is at liberty to produce the best corroborative evidence of the accuracy of the entries and the good faith with which the books are kept,⁹ which it is within his power to submit.¹⁰ The rule has been applied to professional charges — e. g., a physician's book arranged for the recording of visits.¹¹ In this connection, an employee is as competent as a witness as a customer would be. Thus, the plaintiff's bookkeeper may testify that his employer kept accurate and honest books of

Bunker, 101 Mich. 218, 59 N. W. 422 (1894); *Corning v. Ashley*, 4 Denio (N. Y.) 354 (1847); *Burleson v. Goodman & Stroud*, 32 Tex. 229 (1869).

3. *Linnell v. Sutherland*, 11 Wend. (N. Y.) 568 (1834).

4. *Case v. Potter*, 8 Johns. (N. Y.) 211 (1811).

5. *Corning v. Ashley*, 4 Denio (N. Y.) 354, 355 (1847), per Beardsley, J.

6. *Doty v. Smith*, 68 Hun (N. Y.) 199, 22 N. Y. Suppl. 840, 51 N. Y. St. Rep. 898 (1893); *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461 (1815).

7. *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892); *Seventh-Day Adventist Pub. Assoc. v. Fisher*, 95 Mich. 274, 54 N. W. 759 (1893); *Taggart v. Fox*, 11 Daly (N. Y.) 159 (1882); *Stroud v.*

Tilton, 4 Abb. Dec. (N. Y.) 324, 3 Keyes 139 (1866).

8. § 3097.

9. See also, for various minor aspects of the matter, *Trainor v. German-American Savings, etc., Association*, 204 Ill. 616, 68 N. E. 650 (1903), reversing 102 Ill. App. 604 (1902); *Schnellbacher v. Frank McLaughlin Plumbing Co.*, 108 Ill. App. 486 (1902); *Meyer v. Brown*, 130 Mich. 449, 90 N. W. 285 (1902); *Union Central L. Ins. Co. v. Prigge*, 90 Minn. 370, 96 N. W. 917 (1903).

10. *Chisholm v. Beaman Mach. Co.*, 160 Ill. 101, 43 N. E. 796 (1896); *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892); *Stettauer v. White*, 98 Ill. 72 (1881).

11. *Knight v. Cunningham*, 6 Hun (N. Y.) 100 (1875), disapproved *Clark v. Smith*, 46 Barb. (N. Y.) 30

account¹² and that he has found them so when settling his own private account with him.¹³ This corroborative proof by customers of the correctness of the books as a whole is not, however, required on all occasions. The defendant may, for example, have estopped himself, by his course, from insisting upon such proofs — e. g., where he has declined to receive any account or has made a payment on the demand.¹⁴ The administrative requirement of proof of the general accuracy of the books does not extend so far as to require proof of the correctness and reasonableness of the particular charge.¹⁵

The book to be verified by the testimony of the witness must be the same in which the account in question is entered.¹⁶

§ 3097. (Administrative Requirements; Corroboration All-unde); Dealing with Other Customers.—The plaintiff may, in corroboration of his book, produce other customers as witnesses to testify “that they had dealt and settled with the plaintiffs, and that they kept fair and honest books.”¹ It is the general rule that the plaintiff may corroborate his books by the testimony of those who had had dealings with him and had settled by his book, upon an inspection of the items,² which they found to be accurate.³ The evidence of one witness who has dealt with plain-

(1866); *Foster v. Coleman*, 1 E. D. Smith (N. Y.) 85 (1850); *La Rue v. Rowland*, 7 Barb. (N. Y.) 107 (1849).

12. *Cleland v. Applegate*, 8 Ind. App. 499, 35 N. E. 1108 (1893).

13. *Matter of McGoldrick v. Traphagen*, 88 N. Y. 334 (1882), *overruling* *Hauptman v. Catlin*, 1 E. D. Smith (N. Y.) 729 (1854).

14. *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892). See also, *West v. Van Tuyl*, 119 N. Y. 620, 23 N. E. 450, 2 Silvernail Ct. App. 501 (1890).

15. *Bailey v. Barnelly*, 23 Ga. 582 (1857).

16. *Wright v. Hicks*, 61 N. Y. App. Div. 489, 70 N. Y. Suppl. 675 (1901).

§ 3097-1. *Linnell & Foot v. Sutherland*, 11 Wend. (N. Y.) 569 (1834). See also, *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461 (1815).

2. *Bower v. Smith*, 8 Ga. 74 (1850); *Jackson v. Evans*, 8 Mich. 476 (1860); *Matter of McGoldrick v. Traphagen*, 88 N. Y. 334 (1882). See also, *Cole v. Anderson*, 8 N. J. L. 68 (1824); *Shute v. Ogden*, 3 N. J. L. 921 (1812).

3. *California*.—*Landis v. Turner*, 14 Cal. 573 (1860).

Georgia.—*Cheever v. Brown*, 30 Ga. 904 (1860). See also, *Taylor v. Tucker*, 1 Ga. 231 (1846); *Martin v. Fyffe*, *Dudley* 16 (1831).

Illinois.—*Patrick v. Jack*, 82 Ill. 81 (1876); *Ruggles v. Gatton*, 50 Ill. 412 (1869); *Ingersoll v. Banister*, 41 Ill. 388 (1866); *Waggeman v. Peters*, 22 Ill. 42 (1859); *Boyer v. Sweet*, 4 Ill. 120 (1841). See also, *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892).

New Mexico.—See *Radcliffe v. Chaves*, 15 N. M. 258, 110 Pac. 699 (1910).

tiff, has settled with him by his books and found them correct and fair, is sufficient corroboration to render the book admissible.⁴ Naturally, the probative force of the evidence is increased, within certain limits, by adding to the number of witnesses to this point.⁵ It is required that the witnesses should have seen and settled by the book itself.⁶ It is not sufficient to settle on the basis of the correctness of bills rendered by the plaintiff,⁷ even should it also appear by satisfactory evidence that the bills were, in point of fact, correct transcripts of the entries on the book.⁸ It is not important that the settlement used as corroboration have been

New York.—*Mott v. Ingalsbe*, 136 App. Div. 140, 120 N. Y. Suppl. 151 (1909); *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 7 N. Y. Annot. Cas. 470, 52 L. R. A. 545 (1900), *affirming* 13 App. Div. 207, 43 N. Y. Suppl. 257 (1897); *Textile Pub. Co. v. Smith*, 31 Misc. Rep. 271, 64 N. Y. Suppl. 123 (1900); *Irish v. Horn*, 84 Hun 121, 32 N. Y. Suppl. 455, 65 N. Y. St. Rep. 641 (1895); *Atwood v. Barney*, 80 Hun 1, 29 N. Y. Suppl. 810, 61 N. Y. St. Rep. 485 (1894); *Beatty v. Clark*, 44 Hun 126, 8 N. Y. St. Rep. 423 (1887); *Ives v. Waters*, 30 Hun 297 (1883).

Texas.—*Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565 (1887); *Werbiskie v. McManus*, 31 Tex. 116 (1868).

The private books of a municipal corporation stand in this same position in respect to this rule. *Darlington v. Atlantic Trust Co.*, 68 Fed. 849, 16 C. C. A. 28 (1895).

4. *Van Name v. Barber*, 115 App. Div. (N. Y.) 593, 100 N. Y. Suppl. 987 (1906); *Matter of McGoldrick v. Traphagen*, 88 N. Y. 334 (1882); *Morrill v. Whitehead*, 4 E. D. Smith (N. Y.) 239 (1855); *Beattie v. Qua*, 15 Barb. (N. Y.) 132 (1852).

5. *Agency.*—One who has settled, as agent for another, with the plaintiff is a competent witness as to the accuracy of his books. *Smith v. Smith*, 13 App. Div. (N. Y.) 207, 43 N. Y. Suppl. 257, *affirmed* in 163 N.

Y. 168, 57 N. E. 300, 52 L. R. A. 545 (1897).

6. *Matter of McGoldrick v. Traphagen*, 88 N. Y. 334 (1882).

That the witness is an employee, affects merely the weight of his testimony. *Hurley v. Macey*, 94 App. Div. (N. Y.) 9, 87 N. Y. Suppl. 924 (1904); *Matter of McGoldrick v. Traphagen*, 88 N. Y. 334 (1882). *Compare*, *Hauptman v. Catlin*, 1 E. D. Smith (N. Y.) 729 (1854).

7. *Jackson v. Evans*, 8 Mich. 476 (1860); *Stone v. Cronin*, 72 App. Div. (N. Y.) 565, 76 N. Y. Suppl. 605 (1902); *Wright v. Hicks*, 61 App. Div. (N. Y.) 489, 70 N. Y. Suppl. 675 (1901); *Powell v. Murphy*, 18 App. Div. (N. Y.) 25, 45 N. Y. Suppl. 374 (1897); *Walbridge v. Simon*, 13 Misc. Rep. (N. Y.) 634, 34 N. Y. Suppl. 939, 69 N. Y. St. Rep. 164 (1895); *Davis v. Seaman*, 64 Hun (N. Y.) 572, 19 N. Y. Suppl. 260, 46 N. Y. St. Rep. 810 (1892); *Beatty v. Clark*, 44 Hun (N. Y.) 126, 8 N. Y. St. Rep. 423 (1887).

8. *Powell v. Murphy*, 18 App. Div. (N. Y.) 25, 45 N. Y. Suppl. 374 (1897); *Walbridge v. Simon*, 13 Misc. Rep. (N. Y.) 634, 34 N. Y. Suppl. 939 (1895). See also, *Stone v. Cronin*, 72 App. Div. (N. Y.) 565, 76 N. Y. Suppl. 605 (1902).

Such a restriction seems unscientific, for the accuracy of the books is the real objective of the evidence and personal inspection of them by

made after action brought; but, to avoid danger of collusion, it is required that the charge settled should have been in existence at the time the suit in which the evidence is offered was instituted.⁹

In default of other proof of fair dealing the statements of those who have been present at settlements or who can speak as to the plaintiff's fair dealing in other connections¹⁰ will be received.

Reputation for fair dealing.—"Reputation in the neighborhood of keeping correct accounts"¹¹ may be shown by the plaintiff.

It has been held that since the passage of statutes authorizing parties to testify on their own behalf, no administrative necessity exists for calling third persons who have settled by the books.¹²

§ 3098. (Administrative Requirements; Corroboration Aliunde); Delivery.—As to part at least, of the items for which he has charged, the plaintiff may be required to prove by affirmative evidence of the book that delivery of them has been made.¹ It must be shown by evidence *aliunde* that the goods were delivered, or the services were rendered,² or that at least part of them were delivered or performed, as the case may be.³

a customer will seldom be found to occur. Walbridge v. Simon, 13 Misc. Rep. (N. Y.) 634, 636, 34 N. Y. Suppl. 939, 69 N. Y. St. Rep. 164 (1895).

If the object, however, of the court be to discourage the operation of an archaic and now useless rule, the means seem well calculated to that end.

9. Foster v. Coleman, 1 E. D. Smith (N. Y.) 85 (1850).

10. Taylor v. Bernard, 71 Hun (N. Y.) 207, 24 N. Y. Suppl. 525, 54 N. Y. St. Rep. 306, *affirmed* in 144 N. Y. 654, 39 N. E. 494 (1893); McAllister v. Reab, 4 Wend. (N. Y.) 483, *affirmed* 8 Wend. 109 (1830).

11. Landis v. Turner, 14 Cal. 573, 576 (1860).

12. Seventh-Day Adventist Pub. Assoc. v. Fisher, 95 Mich. 274, 54 N. W. 759 (1893); Montague v. Dougan, 68 Mich. 98, 35 N. W. 840

(1888). See also, White v. Whitney, 82 Cal. 163, 22 Pac. 1138 (1889).

§ 3098-1. Linnell & Foot v. Sutherland, 11 Wend. (N. Y.) 568 (1834).

2. Maine.—Godfrey v. Codman, 32 Me. 162 (1850); Dwinel v. Pottle, 31 Me. 167 (1850).

New York.—Vosburgh v. Thayer, 12 Johns. 461 (1815).

North Carolina.—Adkinson v. Simons, 33 N. C. 416 (1850).

South Carolina.—Thomson v. Porter, 4 Strobb. Eq. 58, 53 Am. Dec. 653 (1849).

Tennessee.—Neville v. Northcutt & Richey, 7 Coldw. 294 (1869).

Texas.—Baldrige v. Penland, 68 Tex. 441, 4 S. W. 565 (1887).

But compare Hooker v. Johnson, 6 Fla. 730 (1856); Bookout v. Shannon, 59 Miss. 378 (1882).

3. Ingersoll v. Banister, 41 Ill. 388 (1866); Boyer v. Sweet, 4 Ill. 120 (1841); Conklin v. Stamler, 2 Hilt.

§ 3099. (*Administrative Requirements; Corroboration Allunde; Delivery*); Proof of Delivery.—Regarding proof of delivery by the use of the shop book itself, it is said that the shop book is admitted only to prove the delivery of goods to the defendant, and that it cannot be used to prove that articles were delivered to persons other than the alleged debtor, or that services were rendered to any person other than the latter. This, however, was subject to exception — as in the case of deliveries made to small children on their parents' account.¹ The exception has even been extended to cases where C. renders services, such as blacksmithing and the like, or delivers goods² to B. at the request and on the credit of A. the defendant.

§ 3100. (*Administrative Requirements*); Entry Must be Intelligent.—The court may well insist that the book of account, to be admissible, should have been so kept as to be clear and intelligible upon inspection. He may accordingly decline to receive evidence of a charge kept by arbitrary signs the meaning of which is known only to the proponent.¹ The entry, however, need not be absolutely clear on its face to one not acquainted with the usages of a particular business or calling. A charge of this nature may be explained by those having special knowledge on the subject.² For example, a physician may, in satisfactory com-

(N. Y.) 422, 8 Abb. Pr. 395, 17 How. Pr. 399 (1859); Morrill v. Whitehead, 4 E. D. Smith (N. Y.) 239 (1855); Vosburgh v. Thayer, 12 Johns. (N. Y.) 461 (1815). See also, House v. Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (1892); Kent v. Garvin, 1 Gray (Mass.) 148 (1854); Linnell & Foot v. Sutherland, 11 Wend. (N. Y.) 568 (1834).

§ 3099-1. "The rule, that where there is a delivery of goods to third persons, the book cannot be admitted, is not without exceptions. In cases of small articles procured by the members of a family, and delivered to children or servants, from time to time, it would be impossible that such delivery could generally be proved. To enforce this rule, as inflexible, would therefore produce

much more serious injury than the relaxation of it, under circumstances where the book itself contains the articles, as delivered, and which is subject to the examination of the debtor." Ball v. Gates, 12 Metc. (Mass.) 491, 493 (1847), per Hubbard, J.

2. Smith v. Joyce, 12 Barb. (N. Y.) 21, 23 (1851).

§ 3100-1. Remick v. Rumery, 69 N. H. 601, 45 Atl. 574 (1899); Swain v. Cheney, 41 N. H. 232 (1860); Cummings v. Nichols, 13 N. H. 420, 38 Am. Dec. 501 (1843); Kelley's Estate, 5 Pa. Dist. 263 (1896); Hough v. Doyle, 4 Rawle (Pa.) 291 (1833); Walker v. Skliris, 34 Utah 353, 98 Pac. 114 (1908).

2. Cummings v. Nichols, 13 N. H. 420, 38 Am. Dec. 501 (1843); Ful-

pliance with the rule, make his entries in the ordinary shorthand employed in his profession.³ The entry need not be in any particular language⁴ or form of bookkeeping.⁵ Abbreviations may even be used, in which case their meaning may be explained.⁶ The charge must, however, as a general rule, be sufficiently definite to apprise a person of average intelligence upon inspection as to what is its subject matter.⁷ Aside from this limitation, it has not been deemed material in what form a *bona fide* entry has been made.⁸ This administrative indulgence applies to all the essential features of the entry — e. g., as to the price charged,⁹

ton's Estate, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133 (1896); Hough v. Doyle, 4 Rawle (Pa.) 291 (1833).

3. Bay v. Cook, 22 N. J. L. 343 (1850). Compare Kelley's Estate, 5 Pa. Dist. 263 (1896). It may be otherwise by statute. Hedges' Ex'rs v. Boyle, 7 N. J. L. 68 (1823). In extreme cases the courts have occasionally rejected the book, as a matter of administration. "His diary or visiting list, as a physician, contained on each page a list of names of patients, with tally marks opposite, in columns which were headed separately with the days of the week; the name of the month appearing at the top of the page, and the date of the year on the cover. One column at the end of the space for each week was headed 'amount.' Preceding these lists, as a sort of preface to the book, was a 'Table of Signs.' This table embodied a series of hieroglyphics and figures, which were intended to denote visits made and to be made, and visits repeated or to be repeated; consultations proposed or made; services at the office; visits at night; medicines furnished, etc. It is quite clear that entries, patterned after this fashion, could serve, at best, only as memoranda from which to make more formal charges. As original entries, even if decipherable, they were incomplete, because their form admitted only of a weekly charge in

money, and in point of fact, no charge at all appeared to have been made. Allowing the utmost latitude to the plea of convenience and necessity, the law cannot tolerate as self-proving an entry of services which can be translated only by means of a glossary." German's Estate, 16 Phila. (Pa.) 318 (1883), per Ashman, J.

4. *Massachusetts*.—Miller v. Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449 (1887).

Nebraska.—Cather v. Damerell, 5 Neb. (Unof.) 490, 97 N. W. 35 (1904).

New Hampshire.—Cummings v. Nichols, 13 N. H. 420, 38 Am. Dec. 501 (1843).

Wisconsin.—Marsh v. Case, 30 Wis. 531 (1872).

Canada.—Barton v. Dundas, 24 U. C. Q. B. 275 (1865).

Chinese characters used in making entries may be translated to the court. Yick Wo v. Underhill, 5 Cal. App. 519, 90 Pac. 967 (1907).

5. Cather v. Damerell, 5 Neb. (Unof.) 490, 99 N. W. 35 (1904).

6. Richardson v. Benes, 115 Ill. App. 532 (1904); Bank v. Richardson, 141 Iowa 738, 118 N. W. 906 (1909).

7. Walton's Estate, 4 Kulp (Pa.) 487 (1887); Baldrige v. Penland, 68 Tex. 441, 4 S. W. 565 (1887).

8. § 3087.

9. Witherell v. Swan, 32 Me. 247

unless that fact has been fixed by law,¹⁰ in which case it is sufficient to set forth only facts from which, at the price established, the total amount due may be computed.¹¹ In general, the objection that the charge is not a complete one, that the number, weight, length, size and the like are omitted from it, is not sufficient to exclude the entry as a whole, other circumstances showing the good faith and general accuracy of the book being established to the satisfaction of the court.¹²

§ 3101. (Administrative Requirements); Entry on Book Account Must Have Been a Routine One.—That the characteristic probative force of the relevancy of regularity should arise in case of a book entry it is essential, as has been already stated in various repetitions, that the entry should have been a routine one—that it should have been made in the regular course of the entrant's business or employment.¹ The element of habit or

(1850); *Hagaman v. Case*, 4 N. J. L. 370 (1817); *Manufacturing Co. v. Harding*, 3 Pa. Co. Ct. 150 (1886).

10. *Witherell v. Swan*, 32 Me. 247 (1850).

11. In other jurisdictions, the whole element of price or value may be eliminated; its place being supplied by evidence *aliunde* on the point. *Morris v. Briggs*, 3 Cush. (Mass.) 342 (1849); *Remick v. Rumery*, 69 N. H. 601, 45 Atl. 574 (1899); *Steele v. John R. Howells Mfg. Co.*, 4 Kulp (Pa.) 414 (1887); *Jones v. Orton*, 65 Wis. 9, 26 N. W. 172 (1885).

12. *Hooper v. Taylor*, 39 Me. 224 (1855); *Pratt v. White*, 132 Mass. 477 (1882).

§ 3101-1. *Colorado*.—*Haines v. Christie*, 28 Colo. 502, 66 Pac. 883 (1901); *Farrington v. Tucker*, 6 Colo. 557 (1883).

Iowa.—*Monarch Mfg. Co. v. Omaha C. B. & S. Ry. Co.*, 127 Iowa 511, 103 N. W. 493 (1905).

Maine.—*McKenney v. Waite*, 20 Me. 349 (1841).

New York.—*Corless v. Carlisle*, 122 N. Y. Suppl. 407, 137 App. Div. 611

(1910); *New York v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 (1886); *Ridgeley v. Johnson*, 11 Barb. 527 (1851).

Oklahoma.—*First Nat. Bldg. Co. v. Vandenberg*, 29 Okla. 583, 119 Pac. 224 (1911).

Texas.—*Bouldin v. Atlantic Rice-mills Co.*, (Civ. App. 1905) 86 S. W. 795.

Wisconsin.—*Kelley v. Crawford*, 112 Wis. 368, 88 N. W. 296 (1901).

United States.—*Reyburn v. Queen City Sav. B. & T. Co.*, 171 Fed. 609, 96 C. C. A. 373 (1909); *Nicholls v. Webb*, 8 Wheat. 326, 5 L. ed. 628 (1823).

Canada.—*Barton v. Dundas*, 24 U. C. Q. B. 273 (1865).

"It is, to say the least of it, essential to the admission of shopbook entries in evidence that the entries should be made in and relate to matters in, the regular course of business, and they cannot be used to prove items that do not relate to the business, and are not properly the subject of book accounts; and ordinarily this rule excludes the admission of such evidence to prove collateral facts."

custom is, in itself, an inducement toward automatic routine action of no small consequence. This may be accentuated and increased by the instinct of business regularity and exactness, or the duty of a subordinate to comply with the wishes and orders of his employer, the responsibility of one member of a number of co-operating factors in an enterprise to see that his act or omission shall not derange the system upon which the success of all is dependent. The most complete automatism and instinctive following of an impulse to do the regular and correct thing regardless of self-serving deliberation, is furnished where, in lieu of the foregoing considerations, or, perhaps, in addition to them, is the direct and positive order of a rule of law. This occurs in the case of entries in the course of official duty, where the entrant is required to do a particular act, and to make a record of it. This element of a business duty to do a given act has been regarded as sufficiently strong to require that the entry should have been made by a servant or agent for another — entries made by a principal being excluded.² It must be the entrant's duty to make a record of the precise thing which he has recorded. This is a rule enforced with special stringency in England³ under the analogy of the rule regarding the admissibility of declarations of deceased persons in course of business as secondary evidence of facts asserted in an unsworn statement.⁴ This rule has had some following in the United States.⁵ Where the entry is a result of the

Bouldin v. Atlantic Ricemills Co., (Tex. Civ. App. 1905) 86 S. W. 795, 797, per Neill, J.

"Certain essential requirements, however, must be observed in order to justify the reception of books of account as evidence. It must appear that they were the regular method of keeping accounts adopted by the party, containing the regular entries of his transactions in the usual course of business, and made so near the time of the transactions as to establish the presumption that they were fairly and honestly kept." *Lewis v. England*, 14 Wyo. 128, 139, 82 Pac. 869, 2 L. R. A. (N. S.) 401 (1905), per Van Orsdel, J.

2. *Watts v. Shewell*, 31 Ohio St. 331 (1877); *Rex v. Worth*, 4 Q. B. 132, 3 G. & D. 376, 7 Jur. 172. 12 L.

J. Q. B. 144, 45 E. C. L. 132 (1843).

3. *Massey v. Allen*, 13 Ch. D. 558, 49 L. J. Ch. 76, 41 L. T. Rep. (N. S.) 788, 28 Wkly. Rep. 212 (1879); *Trotter v. Maclean*, 13 Ch. D. 574, 42 L. T. Rep. (N. S.) 118, 28 Wkly. Rep. 244 (1879); *Polini v. Gray*, 12 Ch. D. 411 (1878); *Smith v. Blakey*, L. R. 2 Q. B. 326, 8 B. & S. 157, 36 L. J. Q. B. 156, 15 Wkly. Rep. 492 (1867); *Webster v. Webster*, 1 F. & F. 401 (1858); *Chambers v. Bernasconi*, 1 C. M. & R. 347, 3 L. J. Exch. 373, 4 Tyrw. 531 (1834).

4. §§ 2870 *et seq.*

5. *Ridgeley v. Johnson*, 11 Barb. (N. Y.) 527 (1851). See also, *Osborn v. Merwin*, 50 How. Pr. (N. Y.) 183 (1875); *Watts v. Shewell*, 31 Ohio St. 331 (1877).

joint knowledge of several people it is necessary, in order that it should have the relevancy of regularity, that each person preparing memoranda or furnishing information should be under a duty or obligation to do as he is shown to have done.⁶ Such admissibility is by no means invariable. The question is one of administration and many considerations may properly affect the action of the trial judge, which, if guided by reason, will not be disturbed in an appellate court.

To put the same idea in a somewhat different form it is necessarily an essential element of the relevancy of regularity claimed on behalf of the hearsay statement of a book entry that it be affirmatively shown that the book has been regularly and systematically kept⁷ as a practically contemporaneous account of daily transactions. The important element is that of *routine* — which bears directly on the relevancy of *regularity*, while contemporaneousness though in a sense, also essential, is not significant on the matter of adequate knowledge.⁸

Administrative details.— In a serious matter, especially in a criminal case,⁹ the presiding judge is fully justified in requiring that the proponent of an entry should produce the entrant having personal knowledge where the latter can be produced by the use of reasonable diligence. So the train register of the arrival or departure of trains from a particular station may be rejected and the testimony of the conductor who actually made the entry be required so long as the attendance of the latter may be procured.¹⁰

§ 3102. (*Administrative Requirements; Entry on Book Account Must Have Been a Routine One*); Nature of Occupation.

— Among considerations which the court may properly regard in deciding whether the given entry may fairly be classed as a routine one is the nature of the business in which the entry is

6. *New York v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 (1886).

7. *Gamber v. Wolaver*, 1 Watts & S. (Pa.) 60 (1841); *Budden v. Petriken*, 5 Watts (Pa.) 286 (1836); *Gale v. Norris*, 9 Fed. Cas. No. 5,190, 2 McLean 469 (1841). See also, *Armstrong v. Landers*, 1 Pennew.

(Del.) 449, 42 Atl. 617 (1898); *Smith v. Lane*, 12 Serg. & R. (Pa.) 80 (1824); *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565 (1887).

8. § 3073.

9. *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106 (1892).

10. *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106 (1892).

made. Thus, for instance, the regular routine of a mercantile business such as banking,¹ involving, as it does, a multiplicity of small items which the entrant is engaged in handling without interruption or distraction presents conditions favorable for grounding a rational inference of automatism. On the other hand, an occupation requiring an alert and instant attention to a number of varying acts, each attended by possibly important individual consequences, may well negative the suggestion of any lulling of the respective faculties by the monotony of a routine round of similar tasks. Thus, for example, the train register kept by a

§ 3102-1. *Taylor County v. Bank of Campbellsville*, 145 Ky. 389, 140 S. W. 680 (1911); *Continental Nat. Bank v. First Nat. Bank*, 108 Tenn. 374, 68 S. W. 497 (1902); *Reyburn v. Queen City Sav. Bank & Trust Co.*, 171 Fed. 609, 96 C. C. A. 373 (1909), *affirming judgment*, *Queen City Sav. Bank & Trust Co. v. Reyburn*, (C. C. 1908) 163 Fed. 597.

Bank books.—"The reasons upon which books of original entry, as to sales of merchandise and as to work and labor performed, were admitted, has been long applied to the books kept by banks and those whose business is altogether or chiefly concerned with the care of money, and in dealing with debits and credits for the same. Indeed the reasons of necessity and convenience are stronger in the latter case than in the former, and the fundamental ground of circumstantial trustworthiness attaching to the entries made in regular course by a large banking corporation, is more apparent than in the cases originally embraced within the rule as to shop or tradesmen's books. A large banking institution must of necessity be organized in departments, and the integrity of its transactions must depend on the accuracy and fidelity with which those in charge of the records thereof perform their work. Indeed the whole business of such an institution may be said to rest on properly made

entries in proper books, and that such entries are, in a sense, themselves ultimate facts to be received under certain circumstances as probative facts, and both the necessity and convenience of the business world require that under a wise judicial discretion they should constitute legal *prima facie* evidence of the transactions to which they relate. They constitute, in most cases, the best evidence that is attainable, and as a matter of fact, such entries when regularly and fairly kept in the ordinary course of business, regarding debits and credits from day to day, are more reliable than fallible human memory could possibly be, as to any given transaction which they purport to record, especially where a considerable interval of time has elapsed between the giving of the testimony and the transaction referred to." *Reyburn v. Bank, etc., Co.*, 171 Fed. 609, 615, 96 C. C. A. 373 (1909), per Gray, C. J.

Books identified as discount registers by a bookkeeper of a bank who further testified that entries therein as to the discount of the notes in question were in his handwriting, made with the note before him in the usual course of business and in the discharge of his duty, have been received. *Wallabout Bank v. Peyton*, 108 N. Y. Suppl. 42, 123 App. Div. 727 (1908).

series of railroad conductors making separate entries at different periods as to the time of the arrival and departure of trains from particular stations² might properly be held not to be within the application of the principle.

§ 3103. (*Administrative Requirements*); Facts Creating Suspicion.—The presiding judge may, in the exercise of his power of administration, exclude a shop book where either from its condition or appearance or from other evidence, there are circumstances which, unexplained, are such as to create a suspicion that it is not a true record of daily transactions in the routine of business,¹ as where entries covering a period of several years appear, from the brightness of the pencil marks, etc., all to have been written at one time,² or where an account bears evidence of material alterations or erasures³ or contains only entries debiting the persons against whom the action is brought.⁴ This must be explained to the reasonable satisfaction of the judge before the book will be admitted.⁵ Otherwise, the court may well feel restrained to hold that the jury would not be justified, as reason-

2. *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106 (1892).

§ 3103-1. "The court examines it to see if it appears, *prima facie*, to be what it purports to be. If there are erasures and interlineations, and false or impossible dates, touching points that are material, or if for any reason it clearly appears not to be a legal book of entries, the court may reject it as incompetent." *Funk v. Ely*, 45 Pa. 444, 448 (1863), per Woodward, J.

"The true ground of the books of the party in evidence. . . I have always understood to be that the judge or court, before whom the case is tried, should, on inspection, determine that the book was proper for that purpose, and that such determination renders it competent evidence." *Cogswell v. Dolliver*, 2 Mass. 217, 3 Am. Dec. 45, (1806), per Sedgwick, J.

2. *Dunbar v. Wright's Adm'r*, 20 Fla. 446 (1884). See also, *Davis v. Sanford*, 91 Mass. 216 (1864).

Compare Robertson v. O'Neill, 67 Wash. 121, 120 Pac. 884 (1912), holding that erasures in books of account go to the weight and not to the competency.

3. *Connecticut*.—*Downer v. Lothrop*, 1 Root 273 (1791).

Massachusetts.—*Pratt v. White*, 132 Mass. 477 (1882).

Nebraska.—*Campbell v. Holland*, 22 Neb. 587, 35 N. W. 871 (1888).

Pennsylvania.—*Baughner v. Conn*, 1 Pa. Co. Ct. 184, 17 Phila. 81, 42 Leg. Int. 520 (1885).

Texas.—*Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565 (1887).

4. *Fulton's Estate*, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133 (1896).

5. *California*.—*Caldwell v. McDermitt*, 17 Cal. 464 (1861).

Florida.—*Robinson v. Dibble's Adm'r*, 17 Fla. 457 (1880).

Georgia.—*Harrold v. Smith*, 107 Ga. 849, 33 S. E. 640 (1899).

Iowa.—*Gutherless v. Ripley*, 98 Iowa 290, 67 N. W. 109 (1896).

Massachusetts.—*Pratt v. White*, 132 Mass. 477 (1882); *Mathes v.*

able men, in acting upon the book entries as made.⁶ In general, where it is obvious, on inspection, that the books of original entry are not properly kept, as where an acknowledged credit has not been entered,⁷ the court may reject the book when offered in evidence.⁸ The same ruling of exclusion has been made where an entire account was written upon the front fly leaf of a tradesman's books before the regular accounts began.⁹ *A fortiori*, there must be more than one entry.¹⁰ Among the material alterations which, in the absence of a satisfactory explanation, will operate to exclude the book is one as to the name of the person charged¹¹

Robinson, 8 Metc. 269, 41 Am. Dec. 505 (1844); Cogswell v. Dolliver, 2 Mass. 217, 3 Am. Dec. 45 (1806).

Minnesota.—Levine v. L. Ins. Co., 66 Minn. 138, 68 N. W. 855 (1896).

New Hampshire.—Eastman v. Moulton, 3 N. H. 156 (1825).

Pennsylvania.—McNulty's Appeal, 135 Pa. St. 210, 19 Atl. 936 (1890).

A disinterested witness has been required to make the explanation. The party is not deemed sufficiently unbiased to offer it. Caldwell v. McDermit, 17 Cal. 464 (1861).

6. Swing v. Sparks, 7 N. J. L. 59 (1823).

7. Dugan v. Longstaff, 52 Misc. Rep. (N. Y.) 288, 102 N. Y. Suppl. 1120 (1906).

Ledgers containing entries of charges by plaintiffs, but none of payments by defendants are not such books of account as can be used in plaintiffs' favor. "It is difficult to conceive of books of account, claimed to be correct as a basis for legal liability, which record only the debit side of an account." Dugan v. Longstaff, 52 Misc. R. (N. Y.) 288, 289, 102 N. Y. Suppl. 1120 (1906), per Rockwood, J., *affirmed* 105 N. Y. Suppl. 1114, 119 App. Div. 928 (1907).

8. Lloyd v. Lloyd, 1 Redf. Sur. (N. Y.) 399 (1859).

9. Lynch v. McHugo, 1 Bay (S. C.) 33 (1786).

A similar account on the fly leaf of a family Bible has been received.

Stephen v. Metzger, 95 Mo. App. 609, 69 S. W. 625 (1902). The last leaf of an account book stands in the same position, especially where blank leaves intervene between this final leaf and the regular items recorded in the book. Wilson v. Wilson, 6 N. J. L. 95 (1822).

10. *California*.—Le Franc v. Hewitt, 7 Cal. 186 (1857).

Illinois.—Ingersoll v. Banister, 41 Ill. 388 (1866).

Kansas.—Metzger v. Burnett, 5 Kan. App. 374, 48 Pac. 599 (1897).

Montana.—Ryan v. Dunphy, 4 Mont. 356, 5 Pac. 324, 47 Am. Rep. 355 (1882).

New Jersey.—Carman v. Dunham, 11 N. J. L. 189 (1830); Wilson v. Wilson, 6 N. J. L. 95 (1822).

New York.—Doty v. Smith, 68 Hun 199, 22 N. Y. Suppl. 840, 51 N. Y. St. Rep. 898 (1893); Corning v. Ashley, 4 Den. 354 (1847); Vosburgh v. Thayer, 12 Johns. 461 (1815).

In certain jurisdictions special enactments have been made making requirements inconsistent with the admissibility of account consisting of continuous items on a single page. Arney v. Meyer, 96 Iowa 395, 65 N. W. 337 (1895); Security Co. v. Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311 (1892); Atkins v. Seeley, 54 Neb. 688, 74 N. W. 1100 (1898); Pollard v. Turner, 22 Neb. 366, 35 N. W. 192 (1887).

11. Churchman v. Smith, 6 Whart. (Pa.) 146, 36 Am. Dec. 211 (1841).

or the amount with which he is debited.¹² "Material" must, however, be construed in relation to the issue before the court, and in view of the purpose for which the evidence is offered. Thus, an altered account is perfectly competent to show the method in which the books are kept;¹³ — while, as evidence of the truth of the facts asserted, it might, with equal reason, be rejected. The presence of error in the bookkeeping will not preclude the court from admitting the book in the absence of evidence of intentional falsification.¹⁴ Mutilation of a book of account in connection with some portion of the books material to the inquiry will prevent admissibility¹⁵ until a satisfactory explanation is furnished to the court. For example, an account kept by the entrant in a book from which a number of leaves, intervening between different parts of the account, have been torn,¹⁶ will not be received. Nor will pages torn from such a book be admitted.¹⁷ The grounds of objection to admitting the book are greatly strengthened where the mutilation of material items has been done since the suit was brought.¹⁸ The mere dilapidation of appearance, however, caused by long and continuous use, under which the corners are worn, outside leaves lost, and the like, is not mutilation; and, in the absence of proof of fraudulent intention, affords no ground for rejecting the book.¹⁹

See also, *Bartlett v. Morgan*, 4 Wash. 723, 31 Pac. 22 (1892).

12. *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153 (1858).

13. *Martin v. Victor Mill, etc., Co.*, 18 Nev. 303, 3 Pac. 488 (1884).

14. *Gosewich v. Zebbley*, 5 Harr. (Del.) 124 (1848); *Mathes v. Robinson*, 8 Metc. (Mass.) 269, 41 Am. Dec. 505 (1844); *Cogswell v. Dolliver*, 2 Mass. 217, 3 Am. Dec. 45 (1806); *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855 (1896); *Rodenbough v. Rosebury*, 24 N. J. L. 491 (1854).

15. *Colorado*.—*Lovelock v. Gregg*, 14 Colo. 53, 23 Pac. 86 (1890).

Georgia.—*Harrold v. Smith*, 107 Ga. 849, 33 S. E. 640 (1899).

Illinois.—*Deimel v. Brown*, 35 Ill. App. 303, *affirmed* 136 Ill. 586, 27 N. E. 44 (1889).

Michigan.—*Robinson v. Hoyt*, 39 Mich. 405 (1878).

New Jersey.—*Crane v. Brewer*, 73 N. J. Eq. 558, 68 Atl. 78 (1907).

Pennsylvania.—*Funk v. Ely*, 45 Pa. 444, 448 (1863).

See also, *Cheever v. Brown & Brown*, 30 Ga. 904 (1860); *Hartwell v. Rice*, 1 Gray (Mass.) 587 (1854); *Jones v. De Kay*, 3 N. J. L. 955 (1812).

16. *Robinson v. Hoyt*, 39 Mich. 405 (1878).

17. *Carroll v. School*, 2 Phila. (Pa.) 260 (1857); *Hough v. Doyle*, 4 Rawle (Pa.) 291 (1833). Compare *Queen City Sav. Bank & Trust Co. v. Reyburn*, 163 Fed. 597 (1908).

18. *Johnson v. Fry*, 88 Va. 695, 12 S. E. 973, 14 S. E. 183 (1892).

19. *Weigle v. Brautigam*, 74 Ill. App. 285 (1897).

§ 3104. (*Administrative Requirements*); Identity of Book Must be Established.—In any case involving the use of the book entry it must be shown to the reasonable satisfaction of the trial judge that the book before the court is, in fact, the book which it is said to be. No special form of attestation is, as a rule, demanded. Thus, the fact that a certain book produced in court is the stock ledger of a bank may be proved satisfactorily by the evidence of the cashier.¹ Though a book has been kept by several clerks it is not, on that account necessary to produce them all in order to identify the book or to testify regarding the method in which it was kept. One of them is sufficient for the purpose.² Where the book indicates on its face the purpose for which it is being kept, the court may properly admit it in evidence without putting the proponent to the necessity of making strict proof.³ It is also held to be an administrative requirement that the book offered should be identified as that of the party.⁴

§ 3105. (*Administrative Requirements*); Material Used.—It is not deemed necessary by the courts that any particular material, such as paper, be selected to act as a vehicle for the words, figures and the like constituting the account.¹

Wood may be used, as where an account is kept upon a shingle² or by notches made on a stick.³

§ 3106. (*Administrative Requirements*); Original Must be Produced.—The rule of procedure or canon of administration known as the “best evidence rule”¹ applies to the use of shop

§ 3104-1. *Skowhegan Bank v. Cutler*, 52 Me. 509 (1864).

2. *Furness v. Cope*, 5 Bing. 114, 6 L. J. C. P. (O. S.) 242, 2 M. & P. 197, 15 E. C. L. 498 (1828).

3. *Dow v. Sawyer*, 29 Me. 117 (1848).

4. *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545 (1900); *Dooley v. Moan*, 57 Hun (N. Y.) 535, 11 N. Y. Suppl. 239, 33 N. Y. St. Rep. 118 (1890); *Matter of McGoldrick v. Traphagen*, 88 N. Y. 334 (1882); *Tomlinson v. Borst*, 30 Barb. (N. Y.) 42 (1859); *Foster v. Coleman*, 1 E. D. Smith (N. Y.) 85

(1850); *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461 (1815); *Foster v. United States*, 178 Fed. 165, 101 C. C. A. 485 (1910).

§ 3105-1. *Hooper v. Taylor*, 39 Me. 224 (1855); *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501 (1843).

2. *Kendall v. Field*, 14 Me. 30, 30 Am. Dec. 728 (1836). See also, *Pallman v. Smith*, 135 Pa. St. 188, 19 Atl. 891 (1890).

3. *Rowland v. Burton*, 2 Harr. (Del.) 288 (1835).

§ 3106-1. §§ 480 *et seq.*

books. If the original book can be produced by the proponent, within the limits of reasonable exertion, he will be required to offer it.² Where the original book has been lost or destroyed a copy which the maker swears to be accurate may be received in evidence.³

§ 3107. (Administrative Requirements; Original Must be Produced); Account Books.—The early rule relating to shop books requiring the production of the original is still a tenet of judicial administration in the modern doctrine as to the admissibility of routine entries in account books as primary proof of the facts asserted, notwithstanding the existence of the hearsay rule. It is, indeed, essential to the relevancy of regularity which alone receives such hearsay statements contained in book entries as primary evidence of the facts asserted¹ that the original book entries should be produced to the tribunal.² The relevancy of

2. *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565 (1887). See, *Smiley v. Dewey*, 17 Ohio 156 (1848).

3. *Hodnett v. Gault*, 64 App. Div. (N. Y.) 163, 166, 71 N. Y. Suppl. 831 (1901). See also, *Wright v. Hicks*, 61 App. Div. (N. Y.) 489, 490, 70 N. Y. Suppl. 675 (1901).

§ 3107-1. §§ 3051, 3101.

2. *Alabama*.—*Baird Lumber Co. v. Devlin*, 124 Ala. 245, 27 So. 425 (1900).

California.—*Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122 (1888).

Colorado.—*Jones v. Henshall*, 3 Colo. App. 448, 34 Pac. 254 (1893).

Georgia.—*Bracken, etc. v. Dillon, etc.*, 64 Ga. 243, 37 Am. Rep. 70 (1879). See also, *Dunlap v. Hooper*, 66 Ga. 211 (1880).

Illinois.—*Lewis v. Richheimer*, 157 Ill. App. 231 (1910); *Schnellbacher v. Frank McLaughlin Plumbing Co.*, 108 Ill. App. 486 (1902); *Bradley v. Gardner*, 87 Ill. App. 404 (1899); *Cairns v. Hunt*, 78 Ill. App. 420 (1898). See also, *Meeth v. Rankin Brick Co.*, 48 Ill. App. 602 (1892).

Louisiana.—*Herring v. Levy*, 4 Mart. (N. S.) 383 (1826).

Maryland.—*Doggett v. Tatham*, 116 Md. 147, 81 Atl. 376 (1911); *Hoogewerff v. Flack*, 101 Md. 371, 61 Atl. 184 (1905); *Thomas v. Price*, 30 Md. 483 (1869).

Missouri.—*Owen v. Bray*, 80 Mo. App. 526 (1899).

New Jersey.—*New Jersey Zinc, etc., Co. v. Lehigh Zinc, etc., Co.*, 59 N. J. L. 189, 35 Atl. 915 (1896).

Oregon.—*Harmon v. Decker*, 41 Oreg. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748 (1902).

Pennsylvania.—*Bockelcamp v. Lackawanna & W. V. R. Co.*, 232 Pa. 66, 81 Atl. 93 (1911); *Bishop v. Goodhart*, 135 Pa. St. 374, 19 Atl. 1026 (1890); *Cooper v. Morrel*, 4 Yeates 341 (1807).

Texas.—*Bouldin v. Atlantic Rice-mills Co.*, (Civ. App. 1905) 86 S. W. 795; *Wills Point Bank v. Bates*, 72 Tex. 137, 10 S. W. 348 (1888). See also, *Maverick v. Maury*, 79 Tex. 435, 15 S. W. 686 (1891).

United States.—*Reyburn v. Queen City Sav. & B. Co.*, 171 Fed. 609, 96 C. C. A. 373 (1909); *Board of Com'rs of Lake County v. Keene Five-Cents Sav. Bank*, 108 Fed. 505, 47 C. C. A.

regularity demands the presence of the element of *contemporaneity*.³ Only these original entries can be said either to be regular or contemporaneous with the transaction to which they relate. This form of relevancy demands further that habit and duty should supply a certain degree of automatism to the statement, replacing the complicating ingredients of *reflection* with its perversions of self-interest, by the intuitive correctness of something regularly and contemporaneously done. These great probative factors can alone be present in a case of original entry; while the administrative value of the co-ordination of one original entry with others on the same day or on the same page are frequently of great, if not determinative, value. So important are these considerations felt to be in connection with the search for truth, that where it appears, either upon the face of the book, the examination of the proponent or in any other way that the professed entry is not the original one it may properly be rejected.⁴

464 (1901); *Chandler v. Pomeroy*, 87 Fed. 262, *affirmed* 96 Fed. 156, 37 C. C. A. 430 (1898); *James v. Wharton*, 13 Fed. Cas. No. 7,187, 3 McLean 492 (1844); *Gale v. Norris*, 9 Fed. Cas. No. 5,190, 2 McLean 469 (1841); *Owens v. Adams*, 18 Fed. Cas. No. 10,633, 1 Brock 72 (1803); *Fendall v. Billy*, 8 Fed. Cas. No. 4,725, 1 Cranch C. C. 87 (1802).

3. § 3077.

4. *Arkansas*.—*Mathews v. Sanders*, 15 Ark. 255 (1854).

California.—*San Francisco Teaming Co. v. Gray*, 11 Cal. App. 314, 104 Pac. 999 (1909); *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811 (1886).

Florida.—*Stewart v. Stewart*, 62 Fla. 388, 56 So. 413 (1911); *Hooker v. Johnson*, 6 Fla. 730 (1856).

Georgia.—*Martin v. Fyffe, Dudley* 16 (1831).

Illinois.—*Huston v. Wright*, 158 Ill. App. 284 (1910); *Bell Teleph. Co. v. Geary*, 143 Ill. App. 311 (1908); *Schnellbacher v. Frank McLaughlin Plumbing Co.*, 108 Ill. App. 486 (1902); *Cairns v. Hunt*, 78 Ill. App. 420 (1898).

Iowa.—*Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498 (1902); *Arney v. Meyer*, 96 Iowa 395, 65 N. W. 337 (1895); *Security Co. v. Graybeal*, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311 (1892).

Kentucky.—*Groschell v. Knoll*, 10 Ky. L. Rep. 314 (1888); *Lawhorn v. Carter*, 11 Bush. 7 (1874).

Maine.—*Witherell v. Swan*, 32 Me. 247 (1850).

Maryland.—*Dick v. Biddle Bros.*, 105 Md. 308, 66 Atl. 21 (1907).

Massachusetts.—*Stetson v. Wolcott*, 15 Gray 545 (1860); *Cogswell v. Dolliver*, 2 Mass. 217, 3 Am. Dec. 45 (1806).

Nebraska.—*Pollard v. Turner*, 22 Neb. 366, 35 N. W. 192 (1887).

New York.—*Winne v. Hills*, 91 Hun 89, 36 N. Y. Suppl. 683, 71 N. Y. St. Rep. 702 (1895).

Oklahoma.—*First National Bldg. Co. v. Vandenberg*, 29 Okla. 583, 119 Pac. 224 (1911); *Drumm-Flato Comm. Co. v. Edmisson*, 17 Okla. 344, 87 Pac. 311 (1906).

Pennsylvania.—*Breining v. Meitzler*, 23 Pa. St. 156 (1854); *Budden v. Petriken*, 5 Watts 286 (1836);

Where it is shown that the proponent keeps no other book of account than the one offered it is equivalent to proof that the entry is an original one.⁵ A book of account is not to be excluded merely because it contains not only original entries but those which are non-original as well.⁶ To make the form in which the book has been kept decisive of the question of admissibility regardless of the original character of entry itself, as where an original entry is rejected merely because entered on a ledger,⁷ seems bad administration. That the entrant has previously kept the entry or some suggestion as to it for his memory on a slate, loose piece of paper or the like does not prevent the entry when first placed in a permanent record from being an original one.⁸ These grounds of relevancy, moreover, attach to such an extent as to exclude the best authenticated copy, though made by the party himself, and even where the original books have been lost or destroyed by accident.⁹ Where, however, the transcript is otherwise shown to

Curren v. Crawford, 4 Serg. & R. 3 (1818).

Texas.—*Bouldin v. Atlantic Rice-mills Co.*, (Civ. App. 1905) 86 S. W. 795; *Guthrie v. Mann*, (Civ. App. 1896) 35 S. W. 710; *Flato v. Brod & Hemmi*, 37 Tex. 734 (1873); *Cole v. Dial*, 8 Tex. 347 (1852). See also, *Missouri Pac. R. Co. v. Johnson*, (Sup. 1888) 7 S. W. 838.

United States.—*Reyburn v. Queen City Sav. B. & T. Co.*, 171 Fed. 609, 96 C. C. A. 373 (1909).

5. *Patrick v. Jack*, 82 Ill. 81 (1876); *Van Swearingen v. Harris*, 1 Watts & S. (Pa.) 356 (1841).

6. *Chriholm v. Beaman*, Mach. Co., 160 Ill. 101, 43 N. E. 796 (1896); *Ives v. Niles*, 5 Watts (Pa.) 323 (1836).

7. *Fitzgerald v. McCarty*, 55 Iowa 702, 8 N. W. 646 (1881).

8. *Colorado*.—*Plummer v. Struby-Estabrooke Mercantile Co.*, 23 Colo. 190, 47 Pac. 294 (1896).

Kansas.—*State v. Stephenson*, 69 Kan. 405, 408, 76 Pac. 905, 105 Am. St. Rep. 171, 2 Am. & Eng. Ann. Cas. 841 (1904); *Rice v. Hodge*, 26 Kan. 164 (1881).

Michigan.—*Welch v. Palmer*, 85 Mich. 310, 48 N. W. 552 (1891); *Crane Lumber Co. v. Otter Creek Lumber Co.*, 79 Mich. 307, 44 N. W. 788 (1890).

Minnesota.—*Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855 (1896); *Webb v. Michener*, 32 Minn. 48, 19 N. W. 82 (1884); *Paine v. Sherwood*, 21 Minn. 225 (1875).

New Hampshire.—*State v. Shinn-born*, 46 N. H. 497, 88 Am. Dec. 224 (1866); *Pillsbury v. Locke*, 33 N. H. 96, 66 Am. Dec. 711 (1856).

New Jersey.—*Diamant v. Colloty*, 66 N. J. L. 295, 49 Atl. 445, 808 (1901). See also, *State v. New York, etc., Telephone Co.*, 49 N. J. L. 322, 8 Atl. 290 (1887).

New York.—*Anonymous*, 21 Misc. 656, 48 N. Y. Suppl. 277 (1897); *Van Wie v. Loomis*, 77 Hun 399, 28 N. Y. Suppl. 803 (1894); *Taggart v. Fox*, 11 Daly 159 (1882); *Stroud v. Tilton*, 4 Abb. Dec. 324, 3 Keyes 139 (1866); *Forgay v. Atlantic Mut. Ins. Co.*, 2 Rob. 79 (1864).

Pennsylvania.—*Heery's Estate*, 10 Kulp. 226 (1900); *Hartley v. Brookes*, 6 Whart. 189 (1841).

be a true copy of the original entries actually at one time existing on the proponent's book in which his daily transactions were recorded it has been held to be admissible.¹⁰

§ 3108. Scope of Evidence.—The doctrine has already been stated that an essential of the probative force of the relevancy of regularity is that the book entries must have been made in the regular routine of the entrant's business or employment.¹ It is the habit or custom of making such entries with an automatic regularity that gives to them an increased proving power. It therefore follows that the entries should relate to the regular business of the person for whom the books are kept,² in order to be admissible.

§ 3109. (Scope of Evidence); Collateral Matters.—As a general rule entries in books of account are not admissible to prove collateral facts.¹ In such cases there is entirely lacking any ele-

Rhode Island.—Podrat v. Narragansett Pier R. Co., 32 R. I. 255, 78 Atl. 1041 (1911).

Wisconsin.—Riggs v. Weise, 24 Wis. 545 (1869).

United States.—Chicago Lumbering Co. v. Hewitt, 64 Fed. 314, 12 C. C. A. 129 (1894).

England.—Price v. Torrington, 2 Ld. Raym. 873, 1 Salk. 285 (1704).

See also, Thomas v. Price, 30 Md. 483 (1869).

Gas meter readings entered on a meter book are not the less original because the first putting down of the fact was on a loose memorandum. Missouri Electric Light & P. Co. v. Carmody, 72 Mo. App. 534 (1897).

9. Creamer & Graham v. Shannon, 17 Ga. 65, 63 Am. Dec. 226 (1855); Prince v. Smith, 4 Mass. 455 (1808).

10. Prince v. Smith, 4 Mass. 455 (1808).

§ 3108-1. § 3101.

2. *Alabama.*—Avery's Ex'rs v. Avery, 49 Ala. 193 (1873).

California.—Batcheller v. Whittier, 12 Cal. App. 262, 107 Pac. 141 (1910).

Georgia.—Petit v. Teal, 57 Ga. 145 (1876).

Kentucky.—Galbraith v. Starks, 117 Ky. 915, 79 S. W. 1191, 25 Ky. L. Rep. 2000 (1904).

Pennsylvania.—Fulton's Estate, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133 (1896); Stuckslager v. Neel, 123 Pa. St. 53, 16 Atl. 94 (1888).

Texas.—Baldridge v. Penland, 68 Tex. 441, 4 S. W. 565 (1887); Cole v. Dial, 8 Tex. 347 (1852).

§ 3109-1. Alabama.—Davis v. Tarver, 65 Ala. 98 (1880).

California.—Batcheller v. Whittier, 12 Cal. App. 262, 107 Pac. 141 (1909).

Georgia.—See Bracken, et al. v. Dillon, et al., 64 Ga. 243, 37 Am. Rep. 70 (1879).

Illinois.—Palmer v. Goldsmith, 15 Ill. App. 544 (1884).

New Hampshire.—Bailey v. Harvey, 60 N. H. 152 (1880); Putnam v. Goodall, 31 N. H. 419 (1855); Batchelder v. Sanborn, 22 N. H. 325 (1851); Woods v. Allen, 18 N. H. 28 (1845); Little v. Wyatt, 14 N. H. 23 (1843). See also, Leighton v. Sargent, 31 N. H. 119, 64 Am. Dec. 323 (1855).

New Jersey.—Locke & Smith Co. v.

ment of habit or custom or of automatic action on the part of the entrant.² If it is necessary to establish such facts this must be done by other evidence.³

§ 3110. (Scope of Evidence; Collateral Matters); Credit.—

In some decisions the rule is stated that the books of a plaintiff showing a charge against another are not conclusive as to the person to whom credit is given,¹ "but only a circumstance, strong it is true, to be submitted with all the other evidence in the cause to the jury."² The principle, however, that entries in books of account are not admissible to prove collateral matters³ is as a general rule applied in this class of cases to the effect that they are not admissible against a defendant to charge him with goods delivered to, or services performed for, another on the former's order,⁴ or for money so paid.⁵ Where, however, the fact of such an order is established by evidence *aliunde*, the books then be-

Mechler, 81 N. J. L. 232, 79 Atl. 1059 (1911).

Pennsylvania.—Murphy v. Cress, 2 Whart. 33 (1836).

South Carolina.—Gage v. McIlwain, 1 Strobb. 135 (1846).

Texas.—Bouldin v. Atlantic Rice-mills Co., (Civ. App. 1905) 86 S. W. 795; Baldrige v. Penland, 68 Tex. 441, 4 S. W. 565 (1887).

2. The entries must relate to the particular business regularly carried on and not to an isolated transaction in no way connected therewith. "It was no part of appellant's merchandising business to buy real estate, and to pay for it in installments. Such entries on his books, though made contemporaneously, were utterly foreign to his mercantile affairs, and can not, therefore, be said to have been entries made by a merchant or tradesman in the usual course of his business; and consequently they are not entitled to the presumptions of regularity and of freedom from purposeful fabrication that the routine entries of merchandise sales are conceded in law." Galbraith v. Starks, 117 Ky. 915, 922, 79

S. W. 1191, 25 Ky. L. Rep. 2090 (1904), per O'Rear, J.

3. Forsee v. Matlock, 7 Heisk. (Tenn.) 421 (1872).

§ 3110-1. Myer v. Grafflin, 31 Md. 350, 100 Am. Dec. 66 (1869); Gilbert v. Porter, 2 Kerr (N. B.) 390 (1844).

2. Myer v. Grafflin, 31 Md. 350, 357 (1869), per Miller, J.

3. § 3109.

4. *Connecticut*.—Green v. Pratt, 11 Conn. 205 (1836).

Delaware.—Walker v. Yeatman, 2 Harr. 267 (1848).

Maine.—Soper v. Veazie, 32 Me. 122 (1850); Mitchell v. Belknap, 23 Me. 475 (1844).

Massachusetts.—Kaiser v. Alexander, 144 Mass. 71, 12 N. E. 209 (1887); Field v. Thompson, 119 Mass. 151 (1875); Bentley v. Ward, 116 Mass. 333 (1874); Somers v. Wright, 114 Mass. 171 (1873); Gorman v. Montgomery, 1 Allen 416 (1861); Keith v. Kibbe, 10 Cush. 35 (1852); Faunce v. Gray, 21 Pick. 243 (1838).

Michigan.—Montague v. Dougan, 68 Mich. 98, 35 N. W. 840 (1888); Larson v. Jensen, 53 Mich. 427, 19 N. W. 130 (1884).

come admissible to show the delivery of the goods or the performance of the services in pursuance thereof.⁶ In line with this latter ruling it is held permissible in an action of *scire facias* to establish a mechanic's lien, the fact that the materials were furnished on the credit of the building having been established by evidence *aliunde*, to admit, for the purpose of proving the amount of materials supplied, account books showing charges against the owner or contractor individually.⁷

§ 3111. (*Scope of Evidence; Collateral Matters*); Strictness of Rule.—It is apparent from what has been stated in the imme-

New Hampshire.—Webster v. Clark, 30 N. H. 245 (1855).

New Jersey.—Townley v. Wooly, 1 N. J. L. 377 (1795); Tenbroke v. Johnson, 1 N. J. L. 288 (1795).

New York.—Textile Pub. Co. v. Smith, 31 Misc. Rep. 271, 64 N. Y. Suppl. 123 (1900); Paine v. Ronan, 44 Hun 622, 6 N. Y. St. 420 (1887); Peck v. Von Keller, 76 N. Y. 604 (1879).

Pennsylvania.—Wheeler's Estate, 13 Phila. 373 (1880); Juniata Bank v. Brown, 5 Serg. & R. 226 (1819); Poultney v. Ross, 1 Dall. 238, 1 L. ed. 117 (1788).

Rhode Island.—Churchill v. Hebdon, 32 R. I. 34, 78 Atl. 337 (1910).

South Carolina.—Kinloch, Philips & Co. v. Brown, 1 Rich. 223 (1845); Darby v. Deas, 1 Nott & McC. 436 (1819).

Tennessee.—Black v. Fizer, 57 Tenn. 48 (1872).

Vermont.—Skinner v. Conant, 2 Vt. 453, 21 Am. Dec. 554 (1830).

Virginia.—Kerr v. Love, 1 Wash. 172 (1793). Compare Richmond Union Pass. R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 S. E. 573 (1897); Downer & Co. v. Morrison, 2 Gratt. 250 (1845).

Washington.—Bartlett v. Morgan, 4 Wash. 723, 31 Pac. 22 (1892).

Wisconsin.—Brown v. Warner, 116 Wis. 358, 93 N. W. 17 (1903). See Murphey v. Gates, 81 Wis. 370, 51 N. W. 573 (1892).

Compare Dunlap v. Hooper, 66 Ga. 211 (1880); Leisman v. Otto, 1 Bush (Ky.) 225 (1866); Coleman v. R. L. Ins. Ass'n, 77 Minn. 31, 79 N. W. 588 (1899); Winslow v. Dakota Lumber Co., 32 Minn. 237, 20 N. W. 145 (1884); Richmond U. P. R. Co. v. R. Co., 95 Va. 386, 28 S. E. 573 (1897).

5. Lyman & Co. v. Bechtel & Ross, 55 Iowa 437, 7 N. W. 673 (1880); Snell v. Eckerson, 8 Iowa 284 (1859); Prince v. Smith, 4 Mass. 455 (1808); Brown v. Warner, 116 Wis. 358, 93 N. W. 17 (1903). Compare Gleason v. Kinney's Adm'r, 65 Vt. 560, 27 Atl. 208 (1893).

6. *Maine.*—Mitchell v. Belknap, 23 Me. 475 (1844).

New Hampshire.—Bailey v. Harvey, 60 N. H. 152 (1880).

New York.—Wilcox Silver Plate Co. v. Green, 72 N. Y. 17 (1878).

Pennsylvania.—Hartley v. Brookes, 6 Whart. 189 (1841); Linn v. Naglee, 4 Whart. 92 (1839).

South Carolina.—Kinloch, Philips & Co. v. Brown, 2 Speers 284 (1844).

Wisconsin.—Schettler v. Jones, 20 Wis. 412 (1866).

7. Barbier v. Smith, 38 Pa. St. 296 (1861); Church v. Davis, 9 Watts (Pa.) 304 (1840); McMullin v. Gilbert, 2 Whart. (Pa.) 277 (1837). See also, Bailey v. Harvey, 60 N. H. 152 (1880); Schettler v. Jones, 20 Wis. 412 (1866). Compare Lynch v. Cronan, 6 Gray (Mass.) 531 (1856).

diately preceding sections that the relevancy of the entries being limited to the proof of a charge either for goods sold and delivered or for services performed, an entry which is in no way connected therewith is inadmissible. No matter which is collateral to the issue of debit and credit between the parties can be proved in this way.¹ This rule, to which there seems to be no recognized exception, has been applied to the exclusion of entries offered for the purpose of proving that a third person was a partner;² or that goods charged in the course of business were the consideration of a note.³ So where the books of a dry goods merchant contained an entry of the sale of a horse⁴ they were held to be inadmissible to prove such sale.

§ 3112. (*Scope of Evidence*); Nature of Charges.—In the early application of the rule permitting the introduction of shop books into evidence, many limitations were imposed as a prerequisite to their admissibility in respect to the amount and the nature of the charge. Many of these restrictions have been removed by the courts in the exercise of their powers of administration in applying the rule, although in most jurisdictions some of them have been retained such as that they are not admissible to prove a charge for a casual sale not in the line of the party's business¹ or to prove items of cash.² Yet in other respects the courts have in a wise exercise of their administrative powers ex-

§ 3111-1. *Palmer v. Goldsmith*, 15 Ill. App. 544 (1884); *Putnam v. Goodall*, 31 N. H. 419 (1855); *Juniata Bank v. Brown*, 5 Serg. & R. (Pa.) 226 (1819).

2. *Juniata Bank v. Brown*, 5 Serg. & R. (Pa.) 226 (1819).

3. *Davis v. Taner*, 65 Ala. 98 (1880).

4. *Stuckslager v. Neel*, 123 Pa. St. 53, 16 Atl. 94 (1888). "The rule is broad enough to include merchants, shop-keepers, tradesmen, mechanics and farmers, in all that pertains to their callings. But it would be dangerous to open the door of admission wider than this. The inclination of the court is not to extend this kind of evidence beyond its suc-

cinct limits, and we think it has not been so far stretched as to include the casual sale of an article not in the course of the parties' business, and of which it is usual to take other proof or evidence of sale. . . . It is much better to adhere to this practice than to overstep the ancient limits of the rule, sanctioned only through necessity, and then run the hazard of obliterating the only intelligible line of distinction." *Shoemaker v. Kellog*, 11 Pa. St. 310, 311 (1849), per Bell, J.

§ 3112-1. § 3108.

2. *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138 (1892). See, § 3116.

tended its application. Thus, generally they have wisely removed all limitations as to amount so that the rule operates not only in favor of the small tradesmen but also of the large mercantile firm whose only manner of proving goods sold can be by the books kept as a daily record of their business transactions.³ The general rule may be stated as extending to no other entries than for goods and articles sold; work, labor and services performed by a man or his servants, and means and materials found and provided. It is not permissible to admit the books of a party in evidence to prove any items which are not usually embraced in such an account.

§ 3113. (*Scope of Evidence; Nature of Charges*); Goods Sold and Delivered.—The relevancy of regularity being established books of account are admissible to prove a charge for goods or merchandise sold and delivered. Not only are such books *prima facie* evidence of the sale and delivery of goods, but also of the prices for which the same were sold.¹ They are likewise admis-

3. § 3118.

§ 3113-1. Alabama.—Bolling v. Fannin, 97 Ala. 619, 12 So. 59 (1892).

California.—White v. Whitney, 82 Cal. 163, 22 Pac. 1138 (1889); Severance v. Lombardo, 17 Cal. 57 (1860).

Connecticut.—Smith v. Law, 47 Conn. 431 (1880).

Delaware.—Conoway v. Spicer, 5 Har. 425 (1854).

Georgia.—Martin v. Fyffe, Dudley 16 (1831).

Illinois.—F. H. Hill Co. v. Sommer, 55 Ill. App. 345 (1894); The Presbyterian Church of New Boston v. James M. Emerson, 66 Ill. 269 (1872).

Indiana.—Place v. Baugher, 159 Ind. 232, 64 N. E. 852 (1902).

Maine.—Mitchell v. Belknap, 23 Me. 475 (1844); Clark v. Perry, 17 Me. 175 (1840).

Massachusetts.—Copeland v. Boston Dairy Co., 189 Mass. 342, 75 N. E. 704 (1905); Prince v. Smith, 4 Mass. 455 (1808); Cogswell v. Dolli-

ver, 2 Mass. 217, 3 Am. Dec. 45 (1806).

Michigan.—Columbia Phonograph Co. v. Sherman, 166 Mich. 324, 130 N. W. 186 (1911); Montague v. Dougan, 68 Mich. 98, 35 N. W. 840 (1888).

Minnesota.—Johnson v. Morstad, 63 Minn. 397, 65 N. W. 727 (1896).

Missouri.—Doherty v. Doherty, 155 Mo. App. 481, 134 S. W. 1112 (1911); Morrow v. Missouri Pac. Ry. Co., (App. 1910) 123 S. W. 1034; Wright v. Chicago, B. & Q. R. Co., 118 Mo. App. 392, 94 S. W. 555 (1906).

New Hampshire.—Sheehan Ex'r v. Hennessey, 65 N. H. 101, 18 Atl. 652 (1889).

New Jersey.—Bayonne v. Standard Oil Co., 81 N. J. L. 717, 78 Atl. 146 (1911).

North Carolina.—Bland Adm'r of Bland v. Warren and Wife, 65 N. C. 372 (1871).

Pennsylvania.—Vallee Bros. Electrical Co. v. North Penn. Iron Co., 32 Pa. Sup. Ct. 111 (1906); Curren v. Crawford, 4 Serg. & R. 3 (1818);

sible to prove the date of delivery where this is a material fact to be established.²

§ 3114. (Scope of Evidence; Nature of Charges; Goods Sold and Delivered); Bulky Articles.—An entry in a shop book may be inadmissible to show a sale and delivery where the article was so bulky that it would have been impossible to have delivered it without some aid.¹ In such a case the book is not regarded as what is called the “best evidence” of the fact to be proved. This may be better established by the testimony of those who assisted in the delivery where their presence can be procured.

§ 3115. (Scope of Evidence; Nature of Charges; Goods Sold and Delivered); Charges Prior to Delivery.—Administration, as a general rule, requires as a prerequisite to the admission of the shop book in evidence that it should appear to the satisfaction of the court that the sale which it is sought to prove was complete at the time of the entry.¹ The book should be a record of business actually done and not of orders, executory contracts and things to be done subsequent to the entry.² The fact, however, that the goods were not actually delivered until after such entry was made is not necessarily fatal to its admissibility,³ an effectual delivery thereafter having been made. Similarly, an entry is admissible where made at the time of delivery to a carrier for transportation to the consignee.⁴

§ 3116. (Scope of Evidence; Nature of Charges); Loans and Cash Payments.—The general rule, as sustained by the great

Ducoign v. Schreppel, 1 Yeates 347 (1794).

Rhode Island.—*Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214 (1893).

Texas.—*Rogers v. O'Barr*, (Civ. App. 1904) 81 S. W. 750.

Wisconsin.—*Jones v. Orton*, 65 Wis. 9, 26 N. W. 172 (1885).

2. *Costello v. Crowell*, 133 Mass. 352 (1882).

§ 3114-1. *Leighton v. Manson*, 14 Me. 208 (1837).

§ 3115-1. *Laird v. Campbell*, 100 Pa. St. 159 (1882); *Rheem v. Snodgrass*, 2 Grant (Pa.) 379 (1858); *Ridgway v. Bell*, 1 Phila. (Pa.) 117

(1850); *Parker v. Donaldson*, 2 Watts & S. (Pa.) 9 (1841).

2. *Hart v. Livingston*, 29 Iowa 217 (1870).

3. *Wollenweber v. Ketterlinus*, 17 Pa. St. 389 (1851); *Kaughley v. Brewer*, 16 Serg. & R. (Pa.) 133, 16 Am. Dec. 554 (1827); *Curren v. Crawford*, 4 Serg. & R. (Pa.) 3 (1818). But see, *Thompson v. Bullock*, 2 Miles (Pa.) 269 (1838); *Rhoads v. Gaul* 4 Rawle (Pa.) 404, 27 Am. Dec. 277 (1834).

4. *Keim v. Rugh*, 5 Watts & S. (Pa.) 377 (1843).

majority of the cases is to the effect that a party's books of account are not admissible to prove a loan or cash payment in his favor.¹ In such cases the shop book is not the primary or "best

§ 3116-1. *Alabama*.—*Bank of Montgomery v. Plannett's Adm'r*, 37 Ala. 222, 226 (1861).

California.—*Yick Wo v. Underhill*, 5 Cal. App. 519, 90 Pac. 967 (1907); *Le Franc v. Hewitt*, 7 Cal. 186 (1857).

Connecticut.—*Terrill v. Beecher*, 9 Conn. 344 (1832); *Bradley v. Good-year*, 1 Day 104 (1803).

Delaware.—*Townsend v. Townsend*, 5 Har. 127 (1848).

Georgia.—*Harrold v. Smith*, 107 Ga. 849, 33 S. E. 640 (1899); *Beall v. Rust*, 68 Ga. 774 (1882); *Bracken, et al. v. Dillon, et al.*, 64 Ga. 243, 37 Am. Rep. 70 (1879); *Petit v. Teal*, 57 Ga. 145 (1876).

Illinois.—*Rothschild v. Sessel*, 103 Ill. App. 274 (1901); *Ruggles v. Gatton*, 50 Ill. 412 (1869). See also, *Kibbe v. Bancroft*, 77 Ill. 18 (1875); *Ruggles v. Gatton*, 50 Ill. 412 (1869); *Boyer v. Sweet*, 3 Scam. (Ill.) 120 (1841).

Iowa.—*Shaffer v. McCrackin*, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 465 (1894); *U. S. Bank v. Burson*, 90 Iowa 191, 57 N. W. 705 (1894); *Security Co. v. Graybeal*, 85 Iowa 543, 546, 52 N. W. 497, 39 Am. St. Rep. 311 (1892); *Cummins v. Hull's Adm'r*, 35 Iowa 253 (1872); *Snell v. Eckerson*, 8 Iowa 284 (1859); *Sloan v. Ault*, 8 Iowa 229 (1859); *Young v. Jones*, 8 Iowa 219 (1859); *Veiths v. Hage*, 8 Iowa 163 (1859).

Kentucky.—*Brannin & Smith v. Foree's Adm'rs*, 12 B. Mon. 506 (1851). Compare *Hill's Guardian v. Hill*, 122 Ky. 681, 92 S. W. 924, 29 Ky. L. Rep. 201 (1906).

Maine.—*Waldron v. Priest*, 96 Me. 36, 51 Atl. 235 (1901).

Massachusetts.—*Cooley v. Collins*, 186 Mass. 507, 71 N. E. 979 (1904); *Davis v. Sanford*, 9 Allen 216 (1864);

Maine v. Harper, 4 Allen 115 (1862); *Townsend Bank v. Whitney*, 85 Mass. 454 (1862).

Missouri.—*Gregory v. Jones*, 101 Mo. App. 270, 73 S. W. 899 (1903).

New Hampshire.—*Richardson v. Emery*, 23 N. H. 220 (1851); *Eastman v. Moulton*, 3 N. H. 156 (1825).

New Jersey.—*Hauser v. Leveness*, 62 N. J. L. 518, 41 Atl. 724 (1898); *Oberg v. Breen*, 50 N. J. L. 145, 12 Atl. 203, 7 Am. St. Rep. 779 (1887); *Inslee v. Prall*, 23 N. J. L. 457, affirmed in 25 N. J. L. 665 (1852); *Carman v. Dunham*, 11 N. J. L. 189 (1830); *Wilson v. Wilson*, 6 N. J. L. 95 (1822). Compare *Craven v. Shaird*, 7 N. J. L. 345 (1799).

New York.—*Brown v. Bronson*, 87 N. Y. Suppl. 872, 93 App. Div. 312 (1904); *Shipman v. Glynn*, 31 App. Div. 425, 52 N. Y. Suppl. 691 (1898); *Dusenbury v. Hoadley*, 66 Hun 629, 20 N. Y. Suppl. 911, 49 N. Y. St. Rep. 560 (1892); *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138 (1892); *Schwartz v. Allen*, 7 N. Y. Suppl. 5, 24 N. Y. St. Rep. 912 (1889); *Irvine v. Wortendyke*, 2 E. D. Smith 374 (1854); *Low v. Payne*, 4 N. Y. 247 (1850). See also, *Case v. Potter*, 8 Johns. 211 (1811).

Ohio.—*Page v. Zehring*, 8 Ohio Dec. (Reprint) 211, 6 Cinc. L. Bul. 299 (1881). See also, *Kennedy v. Dodge*, 19 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 360 (1899); *Hough v. Henk*, 8 Ohio Cir. Ct. 354, 4 Ohio Cir. Dec. 69 (1894).

Pennsylvania.—*Fifth Mut. B. Soc. v. Holt*, 184 Pa. 572, 39 Atl. 293 (1898); *Walton's Estate*, 4 Kulp 487 (1887); *Hale's Ex'rs v. Ard's Ex'rs*, 48 Pa. St. 22 (1864); *Juniata Bank v. Brown*, 5 Serg. & R. 226 (1819); *Ducoign v. Schreppel*, 1 Yeates 347 (1794). See also, *Hess' Appeal*, 112 Pa. St. 168, 4 Atl. 340 (1886).

evidence" of the fact to be proved. It is within the power of the party at the time of making the loan or payment to require that some receipt or other memorandum be given to him.² Where actual cash is not paid, but a party gives his check, which is the usual course in the regular conduct of business, the latter with the indorsement upon it may be produced. Under all such conditions these evidences of payment are the primary or best evidence of the fact to be established. They arise out of the regular routine of business transactions and thus acquire a probative force superior to the book entry of the party. A different situation,

South Carolina.—*Williams v. Gregg*, 2 Strobb. Eq. 297 (1848); *Lever v. Lever*, 2 Hill Eq. 158 (1835). See also, *Rowland v. Martindale*, Bailey Eq. 226 (1831).

Tennessee.—*Callaway v. McMillian*, 11 Heisk. 557 (1872); *Black v. Fizer*, 10 Heisk. 48 (1872).

Texas.—*Mings v. Griggsby Const. Co.*, (Civ. App. 1907) 106 S. W. 192; *Cole v. Dial*, 8 Tex. 347 (1852). See also, *Kotwitz v. Wright*, 37 Tex. 82 (1873).

United States.—See *Mattei y Marquez v. Salazar & Co.*, 4 Porto Rico Fed. 9 (1907).

"The consideration of necessity introduced the rule in reference to the admission of books of account in evidence. . . . I hold, first, that there is not and never was a necessity for making books of entry evidence of the payment or the lending of money. There is no such great and overruling amount of inconvenience in requiring that men should take a receipt for money when they pay it, or a note or memorandum for money when they lend it, as that the safe, sound principle of legal evidence should be overturned on account of it. It is the ordinary mode in which all careful, prudent men transact such business." *Inslee v. Prall*, 23 N. J. 457, 463, 25 N. J. L. 665 (1852), per Potts, J.

"The rule . . . that the books of a tradesman, or other person en-

gaged in business, containing items of account, kept in the ordinary course of book accounts, are admissible in favor of the person keeping them, against the party against whom the charges are made after certain preliminary facts are shown, has no application to the case of books or entries relating to cash items or dealings between the parties. This qualification of the rule was recognized in the earliest decisions in this state and has been maintained by the courts with general uniformity. (*Vosburgh v. Thayer*, 12 Johns. 461 [1815]). It stands upon clear reason." *Smith v. Rentz*, 131 N. Y. 169, 176, 30 N. E. 54, 15 L. R. A. 138 (1892), per Andrews, J.

An entry of a commission charge for collection of money is held not to be admissible. *Hale v. Ard*, 48 Pa. St. 22 (1864); *Kotwitz v. Wright*, 37 Tex. 82 (1873). See also, *Greal v. Noll*, 1 Wkly. Notes Cas. (Pa.) 26 (1875).

2. "The necessity of the case, however, which gave birth to our practice in this particular, by no means warrants that entries in day books should be considered as evidence of money lent or cash paid. In those instances the necessity does not exist for the party has it in his power to take notes or receipts, in the ordinary course of dealing." *Ducoin v. Shreppel*, 1 Yeates (Pa.) 347 (1794).

permitting of the admission of the books in evidence, may exist where, although the item charged is of a loan, yet it is established by the evidence that in fact the money so charged was advanced in payment of goods or merchandise procured by the party for the defendant.³ In some jurisdictions the rule has been modified so as to permit the introduction of such books to prove payments not in excess of a certain amount⁴ or money charges made in the regular routine of business,⁵ as, for instance, that of banking.⁶

3. *Le Franc v. Hewitt*, 7 Cal. 186 (1857).

Payment of money.—The books being properly identified and the entries being shown to be made in the ordinary course of business, constitute competent evidence of the facts disclosed as to money paid. *Levi v. Levi*, (Iowa 1912) 136 N. W. 696.

4. *Georgia*.—*Beall v. Rust*, 68 Ga. 774 (1882); *Bagley v. Roberson*, 57 Ga. 148 (1876).

Maine.—*Waldron v. Priest*, 96 Me. 36, 51 Atl. 235 (1901); *Kelton v. Hill*, 58 Me. 114 (1870); *Hooper v. Taylor*, 39 Me. 224 (1855); *Dunn v. Whitney*, 10 Me. 9 (1833).

Massachusetts.—*Davis v. Sanford*, 9 Allen 216 (1864); *Turner v. Twing*, 9 Cush. 512 (1852); *Burns v. Fay*, 14 Pick. 8 (1833); *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 181 (1825).

New Hampshire.—*Page v. Hazelton*, 74 N. H. 252, 66 Atl. 1049 (1907); *Remick v. Rumery*, 69 N. H. 601, 45 Atl. 574 (1899); *Bailey v. Harvey*, 60 N. H. 152 (1880); *Rich v. Eldredge*, 42 N. H. 153 (1860); *Bassett v. Spofford*, 11 N. H. 167 (1840).

Ohio.—See *Watts v. Shewell*, 31 Ohio St. 331 (1878); *Cram v. Spear*, 8 Ohio 494 (1838).

Oregon.—See *Harmon v. Decker*, 41 Ore. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748 (1902).

Wisconsin.—*Kellogg Lumber & Mfg. Co. v. Webster Mfg. Co.*, 140 Wis. 341, 122 N. W. 737 (1909); *Dohmen v. Blum's Estate*, 137 Wis.

560, 119 N. W. 349 (1909); *Brown v. Warner*, 116 Wis. 358, 93 N. W. 17 (1903).

Compare Lyman v. Bechtel & Ross, 55 Iowa 437, 7 N. W. 673 (1880); *Veiths v. Hagge*, 8 Iowa 163 (1859); *McLellan v. Crofton*, 6 Me. 307 (1830).

5. *Alabama*.—*Hancock v. Kelly*, 81 Ala. 368, 2 So. 281 (1887).

Connecticut.—*Peck v. Pierce*, 63 Conn. 310, 313, 28 Atl. 524 (1893).

Georgia.—*Beall v. Rust*, 68 Ga. 774 (1882); *Bagley v. Roberson*, 57 Ga. 148 (1876); *Ganahl v. Shore*, 24 Ga. 17 (1858).

Illinois.—*Taliaferro v. Ives*, 51 Ill. 247 (1869).

Iowa.—*Orcutt v. Hanson*, 70 Iowa 604, 31 N. W. 950 (1887); *Lyman v. Bechtel & Ross*, 55 Iowa 437, 7 N. W. 673 (1880); *Veiths v. Hagge*, 8 Iowa 163 (1859).

Missouri.—*Stephen v. Metzger*, 95 Mo. App. 609, 69 S. W. 625 (1902).

New Jersey.—See *Wilson v. Wilson*, 6 N. J. L. 95 (1822).

Ohio.—*Cram v. Spear*, 8 Ohio 494 (1838).

Oregon.—See *Harmon v. Decker*, 41 Ore. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748 (1902).

Rhode Island.—*Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214 (1893).

South Dakota.—*Union School Furniture Co. v. Mason*, 3 S. D. 147, 52 N. W. 671 (1892).

Vermont.—*Gleason v. Kinney's Adm'r*, 65 Vt. 560, 27 Atl. 208 (1893), *distinguishing Parris v. Bellows' Estate*, 52 Vt. 351 (1880); *Lapham v. Kelly*, 35 Vt. 195 (1862).

Again, in other jurisdictions, the admission of such books in evidence to prove money charges is authorized by statute where a proper foundation for their admissibility otherwise exists.⁷ Where, however, by statute a book of accounts is admissible to

Wyoming.—*Lewis v. England*, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A. (N. S.) 401 (1905).

Compare Smith v. Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138 (1892).

"The general rule is clearly established by these authorities, that a charge for 'money paid,' or 'money lent,' cannot be proved by a party's book of accounts; that such transactions are not usually the subject of a charge in account; and that charges of that nature are not such as are made in the ordinary course of business by one party against another. . . . An individual might be engaged in business that would seem to justify such charges—as where one's ordinary business may be said to consist in receiving money on deposit and paying it out for others. When such fact is shown, the book may be proper evidence of the payment of money. This would not, however, apply to the case of a party engaged in the mere business of keeping a retail store, whose customers purchase goods of him on credit, which are charged to them in a running account." *Veiths v. Hagge*, 8 Iowa 163, 187 (1859), per *Stockton, J.*

"Upon principle, I can see no reason why a book should be lawful evidence of one item, and not of another; why it should be evidence of goods sold and delivered, and not of money paid or advanced. Why should there be witnesses called, or receipts taken, in the one case more than in the other? If necessity be pleaded for the one, may it not for the other also? For they are both transactions in the common course of business; equally necessary, and, I should think, equally frequent, or nearly so." *Wilson v.*

Wilson, 1 Halst. (N. J. L.) 95, 99 (1822), per *Kirkpatrick, C. J.*

"Money lent or paid is not ordinarily charged upon book. The person lending or paying usually takes a note or receipt. An individual, it is true, might be engaged in a business that would seem to justify such charges; and in such case, I am not prepared to say that he might not be examined as a witness." *Cram v. Spear*, 8 Ohio 494, 498 (1838), per *Hitchcock, J.*

6. "The business of banking is confined almost entirely to money items. So of the books of factors and commission merchants. So of brokers. Large pecuniary advances are made by commission houses to planters, in anticipation of crops. The customer sends an order for a thousand dollars. It is forwarded and charged to the planter's account. True, the factor has the written order, but the cash advanced depends upon the evidence of his books. Whatever doctrine may have obtained formerly upon this subject, the world is too much in a whirl, there is too much to be done in the twenty-four hours now, to allow of the particularity and consequent delay in the obtaining of receipts, etc., which might at one period have prevailed without prejudice." *Ganahl v. Shore*, 24 Ga. 17, 24 (1858), per *Lumpkin, J.*

7. *Richards v. Burroughs*, 62 Mich. 117, 28 N. W. 755 (1886); *Woolsey v. Bohn*, 41 Minn. 235, 42 N. W. 1022 (1889); *Stephen v. Metzger*, 95 Mo. App. 609, 69 S. W. 625 (1902). See also, *Union Central L. Ins. Co. v. Prigge*, 90 Minn. 370, 96 N. W. 917 (1903).

prove generally that a sum of money was paid its effect is held to be limited to the fact of payment only, it not being allowable to show upon what particular debt it was paid.⁸

§ 3117. (*Scope of Evidence; Nature of Charges; Money Limit.*)—The administrative necessity for receiving the shop book in evidence arose from the facts that small tradesmen often kept no clerk, and owing to their incompetency to testify in their own behalf they could prove an indebtedness in no other way.¹ It naturally followed that such books were allowed in evidence only for the purpose of proving items small in amount. The limitation of forty shillings was early established in the colonies.² This may undoubtedly be traced to an early English act.³ As late as 1864 this limitation was recognized in a case decided in Massachusetts.⁴ In other jurisdictions, also, the shop book was only admitted to prove small items,⁵ and even though such a limitation may have been removed, yet it is held in some cases that the magnitude of the entries may be such that they will not be admitted on such account not being the proper subject of book entries.⁶

§ 3118. (*Scope of Evidence; Nature of Charges; Money Limit*); Limitations as to Amount Removed.—Although, as has been stated, the limitation of forty shillings was recognized in at

8. *Bailey v. Harvey*, 60 N. H. 152 (1880).

§ 3117-1. § 3065.

2. See, *Plymouth Colony Laws*, p. 128 (1660); 3 *Dane's Abr. Ch.* 1, Art. 4, § 2.

3. 3 *Jac. Chap.* 15 (1605), which recited in the preamble that "whereas by virtue of divers acts of Common Council, made within the City of London, the Lord Mayor and Aldermen of the same City, for the Relief of poor Debtors dwelling within the said City, have accustomed monthly to assign 'Two Aldermen and Twelve discreet Commoners to be Commissioners, and sit in the Court of Requests, commonly called the Court of Conscience, in the Guildhall of the same city, there to sit and determine all matters of debt not

amounting to the Sum of forty Shillings, to be brought before them" the procedure is therefore amended.

4. *Davis v. Sanford*, 9 *Allen (Mass.)* 216 (1864). See also *Burns v. Fay*, 14 *Pick. (Mass.)* 8, 12 (1833).

5. *Kelton v. Hill*, 58 *Me.* 114 (1870); *Rich v. Eldredge*, 42 *N. H.* 153 (1860); *Alexander v. Smoot*, 13 *Ired. (N. C.) Law* 461 (1852). See, *Bland v. Warren*, 65 *N. C.* 372 (1871); *Charlton's Ex'r v. Lawry's Ex'r*, 1 *N. C.* 30, 1 *Mart.* 26 (1791); *Forsee v. Matlock*, 7 *Heisk. (Tenn.)* 421 (1872); *Neville v. Northcutt & Richey*, 7 *Coldw. (Tenn.)* 294 (1869).

6. *Bustin v. Rogers*, 11 *Cush. (Mass.)* 346 (1853); *Corr v. Sellers*, 100 *Pa. St.* 169, 49 *Am. Rep.* 370 (1882).

least one jurisdiction as late as 1864,¹ yet at a much earlier date there was a tendency shown in the courts to remove such limitation and to admit shop books as evidence of larger sums.² In subsequent decisions in various jurisdictions this extension of the rule admitting books of account as evidence of sums in excess of that originally limited by the courts has received judicial approval.³

§ 3119. (*Scope of Evidence; Nature of Charges*); Notes, Bills Receivable, etc.—In applying this rule, it is decided that it does not permit of the introduction of a book containing a record of bills receivable kept by a banking house¹ or of one containing a record of notes,² such books not being regarded as books of account. Nor is it permissible to prove, in this manner, the consideration of a promissory note.³

§ 3120. (*Scope of Evidence; Nature of Charges*); Services.—In the development of the rule permitting the introduction of shop books into evidence the courts naturally did not limit their admissibility to proof of charges by small tradesmen and shopkeepers, but included cases of entries for work, labor and services performed.¹ The same reason for the exercise by the court of its administrative power existed in both cases and similar limitations and restrictions were imposed.² In such a case it is held that it is no objection to the admission of the book in evidence that the labor and services were performed under a special contract as to the price.³

§ 3121. (*Scope of Evidence; Nature of Charges; Services*); Under Account Book Rule.—Under the rule which may now be

§ 3118-1. § 3117.

2. *Wilson v. Wilson*, 6 N. J. L. 95 (1822).

3. *Arkansas*.—*Railway Co. v. Murphy*, 60 Ark. 333, 30 S. W. 419 (1895).

California.—*White v. Whitney*, 82 Cal. 163, 22 Pac. 1138 (1889).

Missouri.—*Hissrick v. McPherson*, 20 Mo. 310 (1855).

New Hampshire.—*Richardson v. Emery*, 23 N. H. 220 (1851).

New York.—*Irish v. Horn*, 84 Hun 121, 32 N. Y. Suppl. 455, 65 N. Y. St. Rep. 641 (1895).

§ 3119-1. *Martin v. Scott*, 12 Neb. 42, 10 N. W. 532 (1881).

2. *Kassing v. Walter*, (Iowa 1896) 65 N. W. 832.

3. *Rindge v. Breck*, 10 Cush. (Mass.) 43 (1852).

§ 3120-1. *Codman v. Caldwell*, 31 Me. 560 (1850); *Wilson v. Wilson*, 6 N. J. L. 95 (1822); *Briggs v. Georgia*, 15 Vt. 61 (1843).

2. *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138 (1892).

3. *Swain v. Cheney*, 41 N. H. 232 (1860).

said to prevail either as a result of judicial administration or legislative enactments books of account containing entries of charges for labor performed or services rendered are admissible in behalf of a party, the proper foundation having been laid therefor.¹ In such cases the same factors control as where it is sought to prove a sale and delivery of goods or merchandise. It is in the automatic regularity with which these entries are made and their contemporaneousness with the doing of the act to which they relate that this element of probative force, called the relevancy of regularity, has its origin.

§ 3122. (Scope of Evidence; Nature of Charges; Services; Under Account Book Rule); Board.—Charges for meals furnished to a person are held to be the proper subject of a book entry, and where a book shows a daily entry of such a charge it may be admitted into evidence.¹

§ 3123. (Scope of Evidence; Nature of Charges; Services; Under Account Book Rule); Literary Services.—Literary services are held not to be the proper subject of a book entry so as to render such book admissible in evidence, within the rule.¹

§ 3124. (Scope of Evidence; Nature of Charges; Services; Under Account Book Rule); Public Services.—The books of a

§ 3121-1. Alabama.—Alabama Construction Co. v. Wagon Bros., 137 Ala. 388, 34 So. 352 (1902).

California.—Roche v. Ware, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539 (1886).

Connecticut.—Mahoney v. Hartford Inv. Corp., 82 Conn. 280, 73 Atl. 766 (1909).

Delaware.—Baker Mach. Co. v. Jedel, (Super. 1911) 80 Atl. 635; McDaniel v. Webster, 2 Houst. 305 (1858).

Florida.—Hooker v. Johnson, 6 Fla. 730 (1856).

Louisiana.—Shea v. Sewerage & Water Board of New Orleans, 124 La. 299, 50 So. 166 (1909).

Massachusetts.—Doody v. Pierce, 9 Allen 141 (1864); Faxon v. Hollis, 13 Mass. 427 (1816).

Michigan.—Baxter v. Reynolds, 112 Mich. 471, 70 N. W. 1039 (1897).

New Hampshire.—Snell Ex'r v. Parsons, 59 N. H. 521 (1880).

New Jersey.—Corkran & Meloney v. Taylor, 77 N. J. L. 195, 71 Atl. 124 (1908).

New York.—West v. Van Tuyle, 119 N. Y. 620, 23 N. E. 450, 2 Silvernail Ct. App. 501 (1890).

Pennsylvania.—Molony v. Benners, 3 Grant Cas. 233 (1859).

Rhode Island.—Cargill v. Atwood, 18 R. I. 303, 27 Atl. 14 (1893).

Wisconsin.—Betts v. Stevens, 6 Wis. 398 (1857).

§ 3122-1. Tremain v. Edwards, 7 Cush. (Mass.) 414 (1851). Compare Gibbons' Estate, 1 Leg. Gaz. (Pa.) 10 (1869).

§ 3123-1. Hirst v. Clarke, 3 Pa. L. J. 32, 1 Pa. L. J. Rep. 398 (1842).

public official containing entries of fees and disbursements where kept as a daily record of the transactions in connection with the performance of official services may be admitted in favor of his administration, as in the case of books kept by a United States marshal.¹

§ 3125. (*Scope of Evidence; Nature of Charges; Services; Under Account Book Rule*); Use of Animals.—Entries of charges for the hire of horses have been held admissible to prove an account therefor.¹

§ 3126. (*Scope of Evidence; Nature of Charges*); Special Contract.—Special contracts or agreements are susceptible, in respect to their terms, conditions and to performance thereunder, of various kinds of proof other than book entries. They may be embodied in some formal written or printed memoranda of greater or less length, and in fact frequently are. Under such circumstances the terms and conditions are provable by the memorandum of the contract which may be spoken of as the “best evidence.” In the absence of proof of this nature they may be shown by other evidence, such as by correspondence which has passed between the parties or by conversations at the time of making the alleged contract showing the agreement entered into. Performance or non-performance may also be established by various kinds of proof. In this class of cases the transaction is not regarded as arising in the usual course of business within the principle which makes the book of account primary evidence. There are lacking in the case of an entry as to terms, conditions or performance of a special contract the elements which are essential to the relevancy of regularity, which must be established to render the account book admissible.

§ 3127. (*Scope of Evidence; Nature of Charges; Special Contract*); Admissibility of Book Entry.—In the application of the principles stated in the preceding section¹ the rule is recognized that neither the terms and stipulations² nor the perform-

§ 3124-1. *Kinney v. United States*, 54 Fed. 313 (1893).

§ 3125-1. *Easley v. Eakin, Cooke* (Tenn.) 388 (1813).

§ 3127-1. § 3126.

2. *Alabama*.—*Snow Hardware Co. v. Loveman*, 131 Ala. 221, 31 So. 19 (1901).

California.—*Batcheller v. Whittier*, 12 Cal. App. 262, 107 Pac. 141 (1910).

ance³ of a special contract can be proved by books of account.

Compare Meridian Oil Co. v. Dunham, 5 Cal. App. 367, 90 Pac. 469 (1907).

Connecticut.—Terrill v. Beecher, 9 Conn. 344 (1832).

Delaware.—Ward v. Powell, 3 Har. 379 (1839).

Iowa.—Hart v. Livingston, 29 Iowa 217 (1870).

Maine.—Dunn v. Whitney, 10 Me. 9 (1833).

Michigan.—Jacobs v. Morgenthaler, 149 Mich. 1, 112 N. W. 492, 14 Detroit Leg. N. 307 (1907); Collins v. Shaw, 124 Mich. 474, 83 N. W. 146 (1900); *In re* Ward, 73 Mich. 220, 41 N. W. 431 (1889).

Missouri.—Daum v. Neumeister, 2 Mo. App. 597 (1876).

New Jersey.—Wait v. Krewson, 59 N. J. L. 71, 35 Atl. 742 (1896); Danser v. Boyle, 16 N. J. L. 395 (1838).

New York.—Griesheimer v. Tanenbaum, 124 N. Y. 650, 26 N. E. 957, 4 Silv. Ct. App. 365 (1891); Matter of McGoldrick v. Traphagen, 88 N. Y. 334 (1882). See also, Mason v. Wedderspoon, 43 Hun 20 (1887).

Pennsylvania.—Hall v. Woolen Co., 187 Pa. 18, 40 Atl. 986 (1898); Nickle v. Baldwin, 4 Watts & S. 290 (1842); Lonergan v. Whitehead, 10 Watts. 249 (1841).

South Carolina.—Pritchard v. McOwen, 1 Nott & McC. 131, note a (1818).

Vermont.—Stillwell v. Farewell, 64 Vt. 286, 24 Atl. 243 (1891).

Wisconsin.—Hazer v. Streich, 92 Wis. 505, 66 N. W. 720 (1896).

The books of a limited partnership association are not admissible to show that defendant paid money on an alleged special obligation to take treasury stock at 50 cents on the dollar, which obligation the defendant denies, and which is not otherwise proved. "The introduction of books of account in favor of their owners is upon the theory that they tend to prove the delivery of goods, the payment of

money, or the rendition of service to or for another. In this case they were introduced, not to show that the defendant had purchased treasury stock, which had been sold and delivered to him, but to establish the fact that he had paid money upon an alleged special obligation to take it at 50 cents on the dollar, which obligation is denied, and which the court decided not to have been otherwise proved. It is admitted that the money was paid by the defendant, and upon this record it clearly appears to raise the relation of debtor and creditor, unless by these books it be made to appear that it was paid upon a special contract. Books of account are not competent to prove a prior special agreement." Jacobs v. Morgenthaler, 149 Mich. 1, 12, 112 N. W. 492 (1907), per Hooker, J.

3. *California*.—Kerns v. McKean, 76 Cal. 87, 18 Pac. 122 (1888).

Delaware.—McDaniel v. Webster, 2 Houst. 305 (1860).

Iowa.—Lyman v. Bechtel, 55 Iowa 437, 7 N. W. 673 (1880).

Kentucky.—Brannin, et al. v. Foree's Adm'rs, 12 B. Mon. 506 (1851).

Massachusetts.—See Earle v. Sawyer, 6 Cush. 142 (1850).

Michigan.—Kuennan v. United States Fidelity & Guaranty Co., 159 Mich. 122, 123 N. W. 799, 16 Detroit Leg. N. 829 (1909).

Pennsylvania.—Hall v. Chambersburg Woolen Co., 187 Pa. St. 18, 40 Atl. 986, 67 Am. St. Rep. 563, 52 L. R. A. 689 (1898); Stuckslager v. Neel, 123 Pa. St. 53, 16 Atl. 94 (1888); Eshleman v. Harnish, 76 Pa. St. 97 (1874); Phillips v. Tapper, 2 Pa. St. 323 (1845); Alexander v. Hoffman, 5 Watts & S. (Pa.) 382 (1843); Nickle v. Baldwin, 4 Watts & S. 290 (1842).

Compare Ross v. Brusie, 70 Cal. 465, 11 Pac. 760 (1886); Ward v.

This conclusion operates to exclude entries in a book to prove such matters as the consideration of a note,⁴ to charge one as joint indorser,⁵ to show that a note was given in settlement of an account,⁶ the delivery of goods to be sold upon commission,⁷ the amount due upon a contract⁸ or a special contract under which it is alleged that a claim was paid.⁹

§ 3128. (*Scope of Evidence; Nature of Charges; Special Contract*); Damages.—Charges for damages which have not been liquidated and can only be made certain by convention or judicial decision are not proper subjects of book account. Entries of such items are therefore not admissible.¹

§ 3129. (*Scope of Evidence; Nature of Charges; Special Contract*); Independent Relevancy.—Though a book of accounts is not admissible to prove the performance of a special contract¹ yet the delivery of goods, or the rendition of services may properly be entered in a book notwithstanding that such acts are done in pursuance of a contract, and such entries may be admitted in evidence to show, not a performance under the contract, but that such goods were delivered or services were performed, and the amount of same.² They have also been held to be admissible where the agreement did not specify the amount of work to be done, what materials were to be furnished or the price to be paid.³

§ 3130. (*Scope of Evidence; Nature of Charges*); Trust Relations.—In case of a trust relation such as that of guardian and

Powell, 3 Har. (Del.) 379 (1841);
Moore v. Knott, 14 Oreg. 35, 12 Pac.
59 (1886).

4. Rindge v. Breck, 10 Cush.
(Mass.) 43 (1852).

5. Alger v. Thompson, 1 Allen
(Mass.) 453 (1861).

6. Estes v. Jackson, 21 Ky. L. Rep.
859, 53 S. W. 271 (1899).

7. Murphy v. Cress, 2 Whart. (Pa.)
33 (1836). See also, Baisch v. Hoff,
1 Yeates (Pa.) 198 (1792). Compare
Smith v. Law, 47 Conn. 431 (1880).

8. Danser v. Boyle, 16 N. J. L. 395
(1838). See also, Inslee v. Prall, 23
N. J. L. 457 (1852); Butz & Cleaver

v. Manwiller, 2 Woodw. (Pa.) 260
(1866).

9. Griesheimer v. Tanenbaum, 124
N. Y. 650, 26 N. E. 957 (1891).

§ 3128-1. Wait v. Krewson, 59 N.
J. L. 71, 35 Atl. 742 (1866); Swing
v. Sparks, 7 N. J. L. 59 (1823).

§ 3129-1. § 3128.

2. Bailey v. Harvey, 60 N. H. 152
(1880); Swain v. Cheney, 41 N. H.
232 (1860); Cummings v. Nichols, 13
N. H. 420, 38 Am. Dec. 501 (1843);
Oliver v. Phelps, 21 N. J. L. 597
(1845).

3. Kline v. Foster, 1 Walk. (Pa.),
250 (1874).

ward¹ the rule does not apply so as to permit the introduction in evidence of the accounts kept by the guardian.

§ 3131. (*Scope of Evidence; Nature of Charges*); Sports, Games, etc.—The rule permitting the introduction of books of account in evidence is held not to include in its application books kept by a billiard room proprietor¹ so as to allow charges for “games” or for “billiards and drinks” to be proved by them.²

§ 3132. (*Scope of Evidence; Nature of Charges*); Wholesale Dealings.—In those jurisdictions where by statute the amount which may be proved by books of account is limited,¹ proof of charges in connection with wholesale dealings would in many cases not be permissible by this means, such charges being in excess of the amount specified. In other cases aside from legislative enactment the same condition would exist where the rule is recognized that the charges may be of such magnitude as to exclude entries in proof thereof.² Evidence of this character would also, of course, be inadmissible under the early administration of this rule in view of the conditions which led to its adoption. Under the modern development of this doctrine, however, in these jurisdictions, where there is no limitation imposed either by legislative enactment or judicial administration, the same reasons control as to the admission of books of account showing charges in connection with wholesale transactions as apply in other cases.

§ 3133. (*Scope of Evidence*); Nature of Occupation; Tradesmen and Handicraftsmen.—The rule permitting the admission of shop books in evidence was originally for the benefit of the small tradesman or handicraftsman who kept no clerk and was limited to books kept by such persons, and to the items usually embraced in such accounts. Thus, in an early case, a book containing an entry as to the time a vessel was at a wharf was excluded as evidence to establish that fact, it being said by the court

§ 3130-1. *Fowler v. Hebbard*, 40 App. Div. (N. Y.) 108, 57 N. Y. Suppl. 531 (1899).

§ 3131-1. *Boyd v. Ladson*, 4 McCord L. (N. C.) 76, 17 Am. Dec. 707 (1826).

2. *Baldridge v. Penland*, 68 Tex. 441, 4 S. W. 565 (1887).

§ 3132-1. § 3117.

2. *Bustin v. Rogers*, 11 Cush. (Mass.) 346 (1853), per Dewey, J., wherein it was said of an item of “7 gold American watches \$308.” “This species of evidence was not the proper evidence to establish a sale of this magnitude and character.” See also, *Coor v. Seller*, 100 Pa. St. 169, 45 Am. Rep. 370 (1882).

that: "This suit is neither for goods sold, nor for work done, and it has been always understood that entries made by the plaintiff himself are evidence in no other cases. It is dangerous to allow a party to make evidence in his own favor. The rule must be confined to the two cases that have been mentioned; we see no distinction between the plaintiff's giving his book of original entries in evidence to prove the use and occupation of a wharf, and giving it in evidence to prove the use and occupation of a house or of anything else."¹ The origin of the rule may be attributed to necessity arising from the inability in such cases to prove an account owing to the fact that a party was not competent to be a witness in his own behalf.² The inherent probability or certainty of the truth of such entries arose from the fact of the making of the entry in the regular course of business, automatically, it may be said, and without any motive to misrepresent.

§ 3134. (*Scope of Evidence; Nature of Occupation; Tradesmen and Handicraftsmen*); Modern Modifications.—In the development of the rule admitting books of account, the early limitations have been, as a general rule, removed. The reasons which appealed to the courts in the early days for the application of the rule likewise existed to cause an extension of the principle so that it may be said generally that at the present day the rule applies, not only to tradesmen and merchants, but to all persons dealing, the one with the other,¹ in a business, occupation or calling where a record of transactions in the regular routine thereof is necessarily kept in a book of accounts. By legislative enactment the practice prevails in some states of admitting books of account in behalf of either party to any suit or action without regard to the fact of their being merchants.²

§ 3135. (*Scope of Evidence; Nature of Occupation*); Mechanics.—The rule does not limit the shop books to those of a trader or merchant, but in a suit by a mechanic for work done

§ 3133-1. *Wilmer v. Israel*, 1 Browne (Pa.) 257 (1811).

2. § 3051.

§ 3134-1. *Foster v. Coleman*, 1 E. D. Smith (N. Y.) 85 (1850); *Linnell v. Sutherland*, 11 Wend. (N. Y.) 568 (1834). See also, *Ganahl v. Shore*, 24 Ga. 17 (1858); *Tomlinson v.*

Borst, 30 Barb. (N. Y.) 42 (1859).

2. *Dunbar v. Wright's Adm'r*, 20 Fla. 446 (1884); *Hooker v. Johnson*, 6 Fla. 730 (1856). See also, *Coleman v. Retail Lumbermen's Ins. Assoc.*, 77 Minn. 31, 79 N. W. 588 (1899); *Lewine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855 (1896).

in the line of his business, after proof of one or two items of his account his books of account, with proof that he keeps honest and fair books, are competent evidence.¹ A different conclusion, however, has been reached where it appears that the work has been done upon the premises of another as in the case where repairs have been made upon a house,² it being declared that under such circumstances the work is apparent and may be proved by other evidence. And in the case of a journeyman shoemaker, it has been decided that a book containing an entry for work done is not admissible.³

§ 3136. (*Scope of Evidence; Nature of Occupation*); Merchants and Tradesmen.—In the case of merchants or tradesmen it is ordinarily customary to keep books of account showing a record of the daily transactions. Such books, when supported by the suppletory oath of the party, or under the modern administration of the rule, in most cases upon formal proof of regularity, accuracy and the like¹ are admissible to prove charges usually made in the particular business in which they are kept.² So it has been decided that the rule applies to books regularly kept by printers³ and owners of sawmills or grist mills,⁴ and to the books of a farmer or planter,⁵ but not to those of a peddler.⁶

§ 3137. (*Scope of Evidence; Nature of Occupation*); Professional Men.—The rule as to the admission of books of account apply to the case of entries in the books of professional men to show a charge for services rendered. Thus, in the case of an at-

§ 3135-1. Linnell & Foot v. Sutherland, 11 Wend. (N. Y.) 568 (1834).

2. White v. St. Philip's Church, 2 McMull (S. C.) 306, 39 Am. Dec. 125 (1842).

3. Schall v. Eisner, 58 Ga. 190 (1877).

§ 3136-1. White v. Whitney, 82 Cal. 163, 22 Pac. 1138 (1889); Singer Mfg. Co. v. Leeds, 48 Ill. App. 297 (1892); Karr v. Stivers, 34 Iowa 123 (1871).

2. Bass v. Gobert, 113 Ga. 262, 38 S. E. 834 (1901); Stucky v. Sheckler, 12 Ky. L. Rep. 985 (1891); Foster v. Sinkler, 1 Bay (S. C.) 40 (1786).

3. See also, Ward v. Powell, 3 Har. (Del.) 379 (1841); Gordan v. Arnold, 1 McCord, (S. C.) 517 (1821); Thomas v. Dyott, 1 Nott & McC. (S. C.) 186 (1818).

4. Exum v. Davis, 10 Rich. (S. C.) 357 (1857).

5. Tomlinson v. Borst, 30 Barb. (N. Y.) 42 (1859); Shoemaker v. Kellogg, 11 Pa. St. 310 (1849); Lamb v. Hart's Adm'r, 2 Bay 362, 1 Brev. (S. C.) § 105 (1802). Compare Jeter v. Martin, 2 Brev. (S. C.) § 156 (1807); Slade v. Teasdale, 2 Bay (S. C.) 172 (1798).

6. Thayer v. Deen, 2 Hill L. (S. C.) 677 (1835).

torney¹ it has been decided that the rendition of services may be proved by his daybook.² Similarly, in case of the medical profession entries of services in books of account regularly kept by a physician are evidence of the rendition and value of the services.³ Books of a schoolmaster have also been held admissible to prove an account for services rendered in giving instruction.⁴ In the case of a scrivener, however, the rule is said not to apply.⁵

§ 3138. (Scope of Evidence); Who May be Charged.—The rule permitting of the introduction of the shop book into evidence is ordinarily interpreted as limiting its admission thereunder to those cases where the entries show an intentional charge in favor of one party to the action against the adverse party.¹ This is in

§ 3137-1. *Waterhouse v. Fogg*, 38 Me. 425 (1854); *Codman v. Caldwell*, 31 Me. 560 (1850); *Rexford v. Comstock*, 3 N. Y. Suppl. 876 (1888); *Charlton's Ex'r v. Lawry's Ex'r*, 1 N. C. 30, 1 Mart. 26 (1791). *Compare* *Meany v. Kleine*, 3 Wkly. Notes Cas. (Pa.) 474 (1877); *Hale's Ex'rs v. Ard's Ex'rs*, 48 Pa. St. 22 (1864).

2. *Briggs v. Georgia*, 15 Vt. 61 (1843).

3. *Alabama.*—*Weaver v. Morgan's Ex'rs*, 49 Ala. 142 (1873); *Halliday v. Butt*, 40 Ala. 178 (1866); *Richardson v. Dorman's Ex'r*, 28 Ala. 679 (1856).

Mississippi.—*Simmons v. Means*, 8 Sm. & M. 397 (1847).

Missouri.—See *Knapp v. St. Louis Trust Co.*, 199 Mo. 640, 98 S. W. 70 (1906).

New Jersey.—*Bay v. Cook*, 22 N. J. L. 343 (1850).

New York.—*Rexford v. Comstock*, 3 N. Y. Suppl. 876 (1888); *Knight v. Cunningham*, 6 Hun 100 (1875); *Clarke v. Smith*, 46 Barb. 30 (1866); *Foster v. Coleman*, 1 E. D. Smith 85 (1850); *La Rue v. Rowland*, 7 Barb. 107 (1849).

Pennsylvania.—*In re Moffett's Estate*, 32 Leg. Int. 218 (1875); *Harlocker v. Gertner*, 4 Pa. L. J. 191 (1842).

South Carolina.—*McBride v. Watts*, 1 McCord 384 (1821).

4. *Oliver v. Phelps*, 21 N. J. L. 597 (1845). *Compare* *Pelzer v. Cranston*, 2 McCord (S. C.) 328 (1823).

5. *Watson v. Bigelow*, 2 Brev. (S. C.) § 127 (1807); *Slade v. Teasdale*, 2 Bay (S. C.) 172 (1798).

§ 3138-1. *Georgia.*—*Forlaw v. Stores Co.*, 133 Ga. 138, 65 S. E. 370 (1909).

Illinois.—*Sanford v. Miller*, 19 Ill. App. 536 (1886); *Ingersoll v. Banister*, 41 Ill. 388 (1866).

Maryland.—*Gill v. Staylor*, 93 Md. 453, 49 Atl. 650 (1901).

Mississippi.—*Bookout v. Shannon*, 59 Miss. 378 (1882).

Nebraska.—*Pollard v. Turner*, 22 Neb. 366, 35 N. W. 192 (1887); *Van Every v. Fitzgerald*, 21 Neb. 36, 31 N. W. 264, 59 Am. St. Rep. 835 (1887); *Masters v. Marsh*, 19 Neb. 458, 27 N. W. 438 (1886); *Martin v. Scott*, 12 Neb. 42, 10 N. W. 532 (1881).

New Hampshire.—*Brown v. George*, 17 N. H. 128 (1845).

New Jersey.—See *New Jersey Zinc, etc., Co. v. Lehigh Zinc, etc., Co.*, 59 N. J. L. 189, 35 Atl. 915 (1886).

Oregon.—See *Harmon v. Decker*, 41 Oreg. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748 (1902).

line with the underlying principle upon which the rule is founded and the administrative requirement that the entry must have been made in the regular routine of business. Being so made it would naturally follow, the book being admissible in favor of the party making the entry, that the intent must have existed to charge the adverse party.

§ 3139. (*Scope of Evidence; Who May be Charged*); Alternative Charges.—The fact that a charge is made in the alternative, as, for instance, where the entry was against “A. B., or C. and D,”¹ does not necessarily render the book inadmissible. In such a case the reason for so entering the charge may be explained, and if this is done in a satisfactory manner the book will be admitted, the other preliminary proof required having been made.

§ 3140. (*Scope of Evidence; Who May be Charged*); Goods Delivered or Services Rendered to Third Person.—As has been stated in a preceding section¹ it is a general rule that books of account will not be received in evidence for the purpose of charging a person with goods delivered to, or services performed for, another on the former's order, except where such order is established by evidence *aliunde*. As has also been stated, it is a general rule that the entry must be of a charge against the adverse party to render the book admissible.² An exception to this latter rule has, however, been made where the entry may be in the nature of an admission against the entrant. Thus, account books of a plaintiff were held to be admissible, upon an issue whether the defendant or a third person owed the debt in question, to show that the charge was entered against a third person instead of the defendant.³

Pennsylvania.—Foreman's Estate, 20 Pa. Co. Ct. 627 (1898); Fairchild v. Dennison, 4 Watts 258 (1835); Hough v. Doyle, 4 Rawle 291 (1833). See also, Gamber v. Wolaver, 1 Watts & S. 60, 66 (1841).

Compare Witherell v. Swan, 32 Me. 247 (1850); Coleman v. Retail Lumberman's Ins. Assoc., 77 Minn. 31, 79 N. W. 588 (1899); Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W.

855 (1896); Woolsey v. Bohn, 41 Minn. 235, 42 N. W. 1022 (1889).

§ 3139-1. Burnell, Gillett & Co., v. Dunlap, 11 Iowa 446 (1861).

§ 3140-1. § 3110.

2. § 3138.

3. Loomis v. Stuart, (Tex. Civ. App. 1893) 24 S. W. 1078. See also, Winslow v. Dakota Lumber Co., 32 Minn. 237, 20 N. W. 145 (1884).

§ 3141. (Scope of Evidence; Who May be Charged); Rectifying Mistakes.—A mistake in a book of accounts whereby items are entered against a name other than that of the person intended to be charged is not in all cases fatal to admissibility.¹ The proponent, under such circumstances, is entitled to explain the mistake, and if the evidence offered for this purpose is satisfactory, the court may properly admit the book. Thus, where a creditor, in reliance upon a statement of a member of a partnership, that the firm name had been changed, without any change of the members, entered subsequent charges in the new name, his book of accounts containing such entries was, upon proof of these facts, admitted in an action against the partners under the former name.²

§ 3142. (Scope of Evidence; Who May be Charged); Persons Jointly Liable.—Account books containing charges against persons individually are not admissible to establish a joint liability, as, for instance, that of a partnership.¹ Evidence *aliunde* is, however, admissible² either prior or subsequent to the admission of books of account³ to show the existence of such a liability. This fact being established, it is then held that the entries in the account books are proper evidence to prove the items charged.⁴ In the case, however, of work done upon firm property a book containing a charge therefor against one of the two partners has been held admissible against the firm.⁵ And a book showing joint charges against obligors upon a bond has been admitted in an action against one of them who has made no objection to the non-joinder.⁶

§ 3143. (Scope of Evidence; Who May be Charged); Undisclosed Principal.—A party against whom items are charged in an account book may have acted, not in behalf of himself, but as

§ 3141-1. Schettler v. Jones, 20 Wis. 412 (1866). See also, Linn v. Naglee, 4 Whart. (Pa.) 92 (1838).

2. Williamson v. Fox, 38 Pa. St. 214 (1861).

§ 3142-1. Severance & Smith v. Lombardo, 17 Cal. 57 (1860); Kidder v. Norris, 18 N. H. 532 (1847).

2. Bowers v. Still, 49 Pa. St. 65 (1865). See also, Birkey v. McMakin, 64 Pa. St. 343 (1870). Com-

pare Box v. Welch, Quincy (Mass.) 227 (1766).

3. Bowers v. Still, 49 Pa. St. 65 (1865).

4. Bowers v. Still, 49 Pa. St. 65 (1865); Johnston v. Warden, 3 Watts (Pa.) 101 (1834).

5. Thomson v. Flanagan, 6 Phila. (Pa.) 13 (1865).

6. Exum v. Davis, 10 Rich. (S. C.) 357 (1857).

agent for another, and in the course of the latter's business. Under such circumstances evidence *aliunde* is admissible to show that he acted in that capacity. The fact of agency being established, the books then become admissible in an action against the principal to establish the liability of the latter.¹

§ 3144. Rule Strictly Enforced.—Though the rule permitting the introduction of shop books in evidence has been enlarged by judicial administration and legislative enactment beyond the narrow confines within which it was administered in its early days, yet the conditions which are a prerequisite to their admissibility must be fully complied with. They must, to render them admissible, be supported by the suppletory oath of the party or under what is the more modern practice by formal proof or regularity, accuracy and the like.¹ The credit or probative force given to such books arises from the facts of the automatic manner in which they are made in the regular routine of business, contemporaneous with the transactions which they record, the absence of motive to misrepresent and existence of inherent desire in business life to have the book correct; these are all links in the chain of circumstances which tend to establish the correctness of the books and create the relevancy of regularity which renders them admissible as primary evidence. Therefore, it is essential that all the administrative requirements which tend to show the trustworthiness of the books must be complied with.²

§ 3143-1. *Smith v. Jessup & Moore*, 5 Har. (Del.) 121 (1848); *Davis v. Dyer*, 60 N. H. 400 (1880); *McGee v. Cleveland Organ Co.*, 4 Ohio Dec. (Reprint) 481, 2 Clev. L. Rep. 219 (1879); *Hartley v. Brookes*, 6 Whart. (Pa.) 189 (1841).

§ 3144-1. § 3082.

2. Colorado.—*Farrington v. Tucker*, 6 Colo. 557 (1883).

Connecticut.—*Smith v. Vincent*, 15 Conn. 1, 38 Am. Dec. 59 (1842).

Georgia.—*Talbotton R. Co. v. Gibson*, 106 Ga. 229, 32 S. E. 151 (1898).

Illinois.—*Trainor v. German-American Savings, etc., Assoc.*, 204 Ill. 616, 68 N. E. 650 (1903), *reversing* 102 Ill. App. 604 (1902); *Schnellbacher*

v. Frank McLaughlin Plumbing Co., 108 Ill. App. 486 (1902).

Iowa.—*Dorr Cattle Co. v. Chicago G. W. R. Co.*, 128 Iowa 359, 103 N. W. 1003 (1905).

Maryland.—*Hoogewerff v. Flack*, 101 Md. 371, 61 Atl. 184 (1905).

Minnesota.—*Union Central L. Ins. Co. v. Prigge*, 90 Minn. 370, 96 N. W. 917 (1903).

Nebraska.—*Barker v. State*, 73 Neb. 469, 103 N. W. 71 (1905); *Norberg v. Plummer*, 58 Neb. 410, 78 N. W. 708 (1899).

New York.—*Pike State Bank v. Brown*, 165 N. Y. 216, 59 N. E. 1, 53 L. R. A. 513 (1901); *Horton v. Wood*, 66 Hun 632, 21 N. Y. Suppl. 178, 50

§ 3145. (*Rule Strictly Enforced*); Statutory Changes.—The development and growth of this rule of law has to a great extent been due to legislative enactment. The question now as to the admissibility of a party's account books in evidence is in many of the states controlled or regulated by statute, by which, as a general rule, such books are rendered admissible when shown to have been kept in the regular routine of business as an accurate record of daily transactions.¹ The removal of the disqualification of parties as witness, which originally led to the adoption of the rule as a matter of necessity, was in early cases said to have destroyed the reason of the rule.² Thus, in a New York case it was declared that as a result of the rule permitting a party to testify in his own behalf, such books should no longer be received as evidence of the sale and delivery of goods, or of the performance of services, by merely proving the preliminary facts which theretofore made them evidence, and that the party should merely be permitted to resort to them to refresh his memory as to the items, or where from a failure of recollection he is compelled to rely upon them alone, and can swear to what is required to warrant their introduction as evidence to be submitted to the tribunal that is to pass upon the facts.³ In another case, however, decided the

N. Y. St. Rep. 679, *affirmed* 142 N. Y. 632, 37 N. E. 566 (1892); *Schule v. Cunningham*, 8 N. Y. St. Rep. 96, 54 N. Y. Super. Ct. 302 (1887); *In re Paige*, 62 Barb. 476 (1871).

Pennsylvania.—*Samuel v. Pennsylvania R. Co.*, 45 Pa. Super. Ct. 395 (1911).

South Carolina.—*Watkins v. Lang*, 17 S. C. 13 (1881); *Walker v. McMahan*, 3 Brev. 251, 1 Tread. Const. 129 (1812).

Texas.—*Missouri K. & T. Ry. Co. v. Morrison*, 42 Tex. Civ. App. 598, 94 S. W. 73 (1906); *Duty v. Storrs*, (Civ. App. 1902) 70 S. W. 357.

§ 3145-1. *Alabama*.—*Williams v. Gunter*, 28 Ala. 681 (1856).

Florida.—*Lewis v. Meginnis*, 30 Fla. 419, 428, 12 So. 19 (1892); *Robinson v. Dibble's Adm'r*, 17 Fla. 457 (1880).

Georgia.—*Ganahl v. Shoir*, 24 Ga. 17 (1858).

Illinois.—*Patrick v. Jack*, 82 Ill. 81 (1876).

Iowa.—*Hancock v. Hintrager*, 60 Iowa 374, 14 N. W. 725 (1882); *Anderson v. Ames & Co.*, 6 Iowa 486 (1858).

Michigan.—*Morse v. Congdon*, 3 Mich. 549 (1855).

New Jersey.—*Bay v. Cook*, 23 N. J. L. 343, 353 (1850).

Pennsylvania.—*Wall v. Dovey*, 60 Pa. St. 212 (1869).

South Carolina.—*Thomson v. Porter*, 4 Strobb. Eq. 58, 53 Am. Dec. 653 (1850).

Tennessee.—*Neville v. Northcutt & Richey*, 7 Cold. 294 (1869).

Vermont.—*Woodbury v. Woodbury's Estate*, 50 Vt. 152 (1876).

Wisconsin.—*Marsh v. Case*, 30 Wis. 531 (1872).

2. *Nichols v. Haynes*, 78 Pa. St. 174 (1875).

3. *Conklin v. Stamler*, 8 Abb.

same year in that state⁴ it was held that the statute allowing parties to be witnesses had not abrogated the law admitting books of account as evidence, under the rules formerly settled. This latter view is the one which is now generally accepted by the courts.⁵

§ 3146. Weight.—Preliminary inquiries as to the character, authenticity, regularity of the book, and which have reference to its admissibility, are questions for the court to determine in the exercise of its powers of administration.¹ The weight, however, which is to be given to such evidence depends upon the circumstances surrounding each case and is to be determined by the tribunal which decides the question of fact.²

§ 3147. (Weight); Impeachment of Declarant.—A party who offers his books of account in evidence and swears to the same thereby submits himself to attack in respect to his character for truth and veracity at the hands of his adversary.¹ "The plaintiff who swears to his original book of entries puts his general character for truth and veracity, and the general character of his book

Prac. (N. Y.) 395, 422, 17 How. Prac. 399 (1859).

4. Tomlinson v. Borst, 30 Barb. (N. Y.) 42 (1859), *disapproving* Sickles v. Mather, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521 (1838).

5. Georgia.—See *Reviere v. Powell & Murphy*, 61 Ga. 30, 34 Am. Rep. 94 (1878); *Petit v. Teal*, 57 Ga. 145 (1876).

Missouri.—See *Robinson v. Smith*, 111 Mo. 205, 20 S. W. 29, 33 Am. St. Rep. 510 (1892); *Anchor Milling Co. v. Walsh*, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600 (1891).

New Hampshire.—*Swain v. Cheney*, 41 N. H. 232 (1860).

New York.—*Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545 (1900); *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138 (1892); *Dooley v. Moan*, 57 Hun 535, 11 N. Y. Suppl. 239, 33 N. Y. St. Rep. 118 (1890); *Beatty v. Clark*, 44 Hun 126, 8 N. Y. St. Rep. 423 (1887); *Ives v. Waters*, 30 Hun 297 (1883); *Taggart v. Fox*, 11 Daly 159 (1882).

Texas.—See *Missouri Pac. R. Co. v. Johnson*, (Sup. 1888) 7 S. W. 838.

Compare *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122 (1888); *Henderson v. Morris*, 5 Oreg. 24 (1873); *Corr v. Sellers*, 100 Pa. St. 169, 45 Am. Rep. 370 (1882); *Nichols v. Haynes*, 78 Pa. St. 174 (1875).

§ 3146-1. *Pratt v. White*, 132 Mass. 477 (1882); *Burleson v. Goodman & Stroud*, 32 Tex. 229 (1869).

2. *Rexford v. Comstock*, 3 N. Y. Suppl. 876 (1888); *Dickens v. Winters*, 169 Pa. St. 126, 32 Atl. 289 (1895); *Hoover v. Gehr*, 62 Pa. St. 136 (1869); *Funk v. Ely*, 45 Pa. St. 444 (1863); *Burleson v. Goodman & Stroud*, 32 Tex. 229 (1869).

§ 3147-1. *Kitchen v. Tyson*, 7 N. C. 314 (1819); *Funk v. Ely*, 45 Pa. St. 444 (1863); *Barber v. Bull*, 7 Watts & S. (Pa.) 391 (1844); *Seiber v. Johnson Mercantile Co.*, 40 Tex. Civ. App. 600, 90 S. W. 516 (1905). Compare *Nickerson v. Morin*, 3 Wis. 243 (1854); *Winne v. Nickerson*, 1 Wis. 1, 6 (1853).

for honesty and accuracy, in evidence, and invites attack upon either or both.”² “His character was open to the same kind of animadversion that it would have been subject to if he had been a witness in the cause.”³ It is, therefore, the privilege of the party against whom a book of accounts is offered to impeach the same by evidence affecting the character for honesty and good faith of the proponent.⁴ It is, however, decided that the books cannot be impeached by evidence tending to show that the general moral character of the proponent is bad,⁵ or that he has a reputation for keeping inaccurate and false accounts.⁶

§ 3148. (Weight); Impeachment of General Character of Book.—As a general rule where a book of account shows on inspection that it is not properly kept within the requirements of the rule permitting its admission in evidence, it is within the power of the court to reject it.¹ Where this is not clearly apparent it is within the power of the party against whom it is offered to attack the general character of the book. Not only is the adversary entitled to attack the character for truth and veracity of the party offering the books in evidence² but he may also show inaccuracies in respect to entries therein or give evidence of facts or circumstances which tend to show that the book is not fairly and honestly kept as a record of daily transactions in the regular routine of business,³ subject, it is said, to the limitation that the investigation should be confined to a time at or near the period covered by the account in suit.⁴

2. Funk v. Ely, 45 Pa. 444, 448 (1863), per Woodward, J.

3. Crouse v. Miller, 10 Serg. & R. (Pa.) 155, 158 (1823), per Gibson, J.

4. White's Estate, 11 Phila. (Pa.) 100 (1875); Crouse v. Miller, 10 Serg. & R. (Pa.) 155 (1823).

5. Tomlinson v. Borst, 30 Barb. (N. Y.) 42 (1859).

6. Roberts v. Ellsworth, 11 Conn. 290 (1836); Hitt v. Slocum, 37 Vt. 524 (1865). Compare Sheridan v. Tenner, 5 Ohio Cir. Ct. Rep. 19, 3 Ohio Cir. Dec. 10 (1890).

§ 3148-1. Funk v. Ely, 45 Pa. St. 444 (1863).

§ 3103.

2. § 3047.

3. Merchants' Bank v. Rawls, 7 Ga. 191, 50 Am. Dec. 394 (1849); White's Estate, 11 Phila. (Pa.) 100 (1875); Funk v. Ely, 45 Pa. St. 444 (1863). See also, Read v. Smith, 1 Hun (N. Y.) 263, 3 Thomps. & C. 760 (1874); Harrison v. State Cent. Bank, 1 White & W. Civ. Cas. Ct. App., § 375 (1883); Barnes v. Barnes, 106 Va. 319, 56 S. E. 172 (1907). Compare Gardner v. Way, 8 Gray (Mass.) 189 (1857).

§ 3103.

4. Funk v. Ely, 45 Pa. St. 444, 448 (1863), per Woodward, J. “It is to be submitted to the jury to judge of,

§ 3149. Value of the Principle of the Shop Book Rule.— The value and importance of the shop book rule in the early days when a party was incompetent to be a witness in his own behalf is readily perceived. Subsequently, as we have already stated,¹ the rule was recognized by legislative enactments in many states making such books admissible in evidence. The value of this rule as time passed was also recognized by courts in their gradual extension of its application beyond the narrow confines of the earlier days. The principle upon which the rule was founded was necessity arising from inability of a party to be a witness in his own behalf. Similarly, necessity might require the use of a party's account books in other cases than those in which first used, and the recognition of this fact led to the further development and extension of the rule. Not only would the book be of value where a party kept no clerk, but also in the affairs of the larger business or commercial enterprise. In many such cases the book would be the only or best evidence of a sale and delivery of goods, it being practically impossible owing to the number of clerks taking part in a transaction from the time of sale by one clerk to the time of delivery by another who had no knowledge of the nature or character of the goods delivered, to prove a sale and delivery. These and similar factors led to the recognition of the fact that the principle was of value not only within the scope of the original limitations but also to meet other conditions which likewise rendered the book the best if not the only proof available of a completed transaction.

and then it is competent for the adverse party to show its general character by pointing to charges and entries affecting other parties, and by calling witnesses to prove such entries false and fraudulent. That this investigation may not run into excessive departure from the issue on trial, the court should limit it to the time, or near the time, covered by the account in suit, and should suffer no more examination of collateral cases than would bear directly on the general character of the book. If a shop-book exhibit, in respect to customers generally, illegal dates, as on Sunday, or impossible dates, as 31st of June or 30th February, or altered dates, or earlier dates after those

that are later, or any such condemning features they are evidence for the jury upon the general character of the book. The jury may form some opinion from such examination, how far it is entitled to weight in the scales which they are holding. Whilst they should make all due allowances for mistakes, for ignorance and unskilfulness in book-keeping, and for peculiarities in the plaintiff's business, they should insist on the general honesty and accuracy of the book, made in secret by one party against the other, and now offered as a guide to the conscience of the jury."

§ 3149-1. § 3145.

CHAPTER XLVI.

RELEVANCY OF SIMILARITY; UNIFORMITY OF NATURE.

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§ 3150. Relevancy of Similar Occurrences; Uniformity of Nature.—Of the four main exclusionary rules under which relevant evidence is excluded, we have already discussed opinion¹ and hearsay² evidence. The remaining two of such exclusionary rules,

res inter alios and character,³ possess the common attribute that they employ, reasoning by analogy, the happening of a collateral occurrence as evidence of the doing of a particular act or the happening of a given event. In other words, the evidence is designed to show that an event happened under certain conditions because a similar one occurred under the same conditions, or that A. did a particular act because he did a similar act before under a like situation or possessed a trait of character which predisposed him to do it. This chapter treats especially of circumstances under which evidence is admissible to show that a particular event occurred in the realm of *nature* on one occasion because a similar event happened on another.⁴

§ 3151. Preliminary Observations; Rule an Assignment of Irrelevancy.—In accordance with the judicial habit of assigning the secondary, if conclusive, reason for rejecting evidence, much testimony is constantly rejected as *res inter alios* when the real ground for the exclusion is that the fact offered is irrelevant, i. e., has no logical bearing upon the issue involved.¹ As an administrative shortcut, this may have advantages. The fact, however, should not be disguised. Thus, in an action against a bank for

3. §§ 3265, et seq.

4. Uniformity of nature.—"There is a principle implied in the very statement of what Induction is; an assumption with regard to the course of nature and the order of the universe; namely, that there are such things in nature as parallel cases; that what happens once, will, under a sufficient degree of similarity of circumstances, happen again, and not only again, but as often as the same circumstances recur. This, I say, is an assumption, involved in every case of induction. And, if we consult the actual course of nature, we find that the assumption is warranted. The universe, so far as known to us, is so constituted, that whatever is true in any one case, is true of all cases of a certain description; the only difficulty is, to find what description." Mill's *System of Logic*, Bk. III, chap. III, § 1.

§ 3151-1. Alabama.—Thweatt v. McCullough, 84 Ala. 517, 4 So. 399, 5 Am. St. Rep. 391 (1887).

Connecticut.—Hartford Bridge Co. v. Granger, 4 Conn. 458 (1823).

Iowa.—Mier v. Phillips Fuel Co., 130 Iowa 570, 107 N. W. 621 (1906).

Louisiana.—Hughes v. Carey, 15 La. Ann. 348 (1860).

Maryland.—Dement v. Stonestreet, 1 Md. 116 (1851).

Massachusetts.—Howe v. Whitehead, 130 Mass. 268 (1881).

Nebraska.—Patterson v. First Nat. Bank, 73 Neb. 384, 102 N. W. 765 (1905).

New Hampshire.—Foye v. Leighton, 22 N. H. 71, 53 Am. Dec. 231 (1850).

Rhode Island.—Churchill v. Hebdon, 32 R. I. 34, 78 Atl. 337 (1910).

South Carolina.—Wyatt v. Celey, 86 S. C. 538, 68 S. E. 657 (1910).

Texas.—Stockton v. Brown, (Civ. App. 1907) 106 S. W. 423.

money had and received where the plaintiff claimed that certain transactions between him and the president of the bank were with the president as an individual, the court excluded evidence of other transactions of a similar nature with other depositors, 'as *res inter alios*, though no relevancy between the transactions was apparent, and the testimony could well have been excluded as irrelevant.² And, upon an issue involving the construction of an order of sale made by an orphans' court, proof of similar orders made by the same judge in other proceedings was excluded as *res inter alios*, though the evidence was irrelevant.³ An exclusionary rule cannot be said to remove from the consideration of the jury facts which are logically and legally bearing upon the issue.⁴

§ 3152. (Preliminary Observations; Rule an Assignment of Irrelevancy); Negligence.—A good example of this characteristic judicial method is furnished in actions of negligence where the collateral occurrence fails to furnish such a similarity of conditions to those of the act in question as to enable any logical reasoning to be indulged in that the second happened because the first did. Thus, in a negligence action, no inference that a certain act was reasonable or that a certain person acted in a reasonably careful manner can be drawn from the fact that others in the same business have or have not done such act or are or are not in the habit of acting in such a manner.¹ In some jurisdictions, however, such evidence has been considered relevant.²

2. *Patterson v. First Nat. Bank*, 73 Neb. 384, 102 N. W. 765 (1905).

3. *Wyatt's Adm'r v. Steele*, 26 Ala. 639 (1855).

4. See § 3161.

§ 3152-1. *Colorado*.—*Holy Cross Gold Min., etc., Co. v. O'Sullivan*, 27 Colo. 237, 60 Pac. 570 (1900).

Illinois.—*Union Wire Mattress Co. v. Wiegref*, 133 Ill. App. 506 (1907).

Massachusetts.—*Tyler v. Old Colony R. Co.*, 157 Mass. 336, 32 N. E. 227 (1892); *Eastham v. Riedell*, 125 Mass. 585 (1878); *Hill Mfg. Co. v. Providence, etc., Steamship Co.*, 125 Mass. 292 (1878), *reversed* 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. ed. 1038 (1883); *Lane v. Boston, etc., R. Co.*, 112 Mass. 455 (1873).

Vermont.—*Congdon v. Howe Scale Co.*, 66 Vt. 255, 29 Atl. 253 (1894).

United States.—*Henion v. New York, etc., R. Co.*, 25 C. C. A. 223, 79 Fed. 903 (1897); *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 474, 23 L. ed. 356 (1875).

2. *Alabama*.—*Jefferson Fertilizer Co. v. Houston*, 3 Ala. App. 348, 57 So. 98 (1911).

Iowa.—*Hall v. Chicago, etc., Ry. Co.*, 140 Iowa 30, 116 N. W. 113 (1908).

Kentucky.—*Warren v. Jeunesse*, 122 S. W. 862 (1909); *Bridwell v. Moore*, 8 Ky. L. Rep. 535 (1886) (abstract).

Minnesota.—*Anderson v. Pitt Iron*

§ 3153. (*Preliminary Observations; Rule an Assignment of Irrelevancy*); True Ground of Rejection.— Under such circumstances where the evidence of the occurrence of an event is such as to afford no logical bearing upon the proof of the occurrence of another event, the true ground of rejection is irrelevancy. An irrelevant matter is no evidence at all and requires no exclusionary rule to warrant its rejection.¹ Moreover, the evidence of the collateral act or event being circumstantial in its nature, it is deemed secondary,² and, under the principles pertaining to secondary evidence, the testimony of the collateral occurrence may also in some cases be properly excluded as such.³

§ 3154. (*Preliminary Observations*); Collateral Issues.— As an administrative matter, it is confessedly the duty of the court to prevent the jury from becoming confused and possibly misled. Chief among the causes from which such a danger may be apprehended is the reception in evidence of a collateral proposition or transaction. So far as the party against whom this is offered has the right to controvert it, there is danger that the trial may be embarrassed and the truth of the finding rendered uncertain by the fact that the jury are practically called upon to try two issues at once.¹ Against such a result the court will be careful to pro-

Min. Co., 108 Minn. 261, 121 N. W. 915 (1909).

Missouri.—Schiller v. Kansas City Brewery Co., 156 Mo. App. 569, 137 S. W. 607 (1911).

Montana.—Neary v. Northern Pac. Ry. Co., 37 Mont. 461, 19 L. R. A. (N. S.) 446 n, 97 Pac. 944 (1908).

Pennsylvania. — McGeehan v. Hughes, 223 Pa. St. 524, 72 Atl. 856 (1909).

United States.—Ohio Copper Mining Co. v. Hutchings, 96 C. C. A. 653, 172 Fed. 201 (1909).

§ 3153-1. See §§ 1711, 3161.

2. §§ 466, 3161.

3. § 3161.

§ 3154-1. *Alabama*.—Spiva v. Stapleton, 38 Ala. 171 (1861).

California.—Pacheco v. Judson Mfg. Co., 113 Cal. 541, 45 Pac. 833 (1896); Martinez v. Planel, 36 Cal. 578 (1869).

Colorado.—Holy Cross Gold Min. etc., Co. v. O'Sullivan, 27 Colo. 237, 60 Pac. 570 (1900).

Connecticut.—Hoxie v. Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240 (1864).

Illinois.—Chicago, etc., Ry. Co. v. Johnson, 128 Ill. App. 20 (1906).

Iowa.—Dalton v. Chicago, etc., R. Co., 114 Iowa 257, 86 N. W. 272 (1901).

Maryland.—Wise v. Ackerman, 76 Md. 375, 25 Atl. 424 (1892).

Massachusetts.—Wright v. City of Chelsea, 207 Mass. 460, 93 N. E. 840 (1911); Walker v. Williamson, 205 Mass. 514, 91 N. E. 885 (1911); Hathaway v. Tinkham, 148 Mass. 85, 18 N. E. 18 (1888); Com. v. Jackson, 132 Mass. 16 (1882); Emerson v. Lowell Gas Light Co., 3 Allen 410, 417 (1862).

Missouri.—Horr v. Kansas City

tect the rights of the parties. Moreover, the administrative duty to expedite the trial² requires that it shall not be protracted by the introduction of collateral issues.³ The judicial disinclination to permit the formation of such an issue is, therefore, clearly obvious and furnishes a strong ground for excluding the evidence now under consideration. However, there is no unbending exclusionary rule requiring the presiding judge to reject testimony merely because it raises a collateral issue.⁴ If the right of the proponent to a reasonable opportunity to prove his case⁵ requires the receipt of evidence of collateral transactions, the court will not hesitate to admit it though such action may tend to prolong the trial.

§ 3155. (*Preliminary Observations*); Two Uniformities.—

.. Successfully to reason from analogy, to draw logical inferences that things which resemble each other in certain particulars resemble each other in others, it is obviously essential that experience should point to the existence of some underlying uniformity or rule of more or less invariable operation between the things in question. The experience of mankind reveals that there are at least two such uniformities. On the one hand there is a clearly proved and scientifically established uniformity of natural law, the final induction from observed natural phenomena.¹ Men have discovered also, that, while mental action by no means, under ordinary circumstances, is characterized by the invariableness of

Elevated Ry. Co., 156 Mo. App. 651, 137 S. W. 1010 (1911).

New York.—Zucker v. Whitridge, 205 N. Y. 50, 98 N. E. 209 (1912); Jamieson v. Kings County El. R. Co., 147 N. Y. 322, 41 N. E. 693 (1895).

Vermont.—Bateman v. Rutland, 70 Vt. 500, 41 Atl. 500 (1898); Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 Atl. 253 (1891).

Wisconsin.—Allen v. Murray, 87 Wis. 41, 57 N. W. 979 (1894); O'Dell v. Rogers, 44 Wis. 136 (1878).

United States.—Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 16 S. Ct. 618, 40 L. ed. 766 (1895); Laffin v. Chicago, etc., R. Co., 34 Fed. 859 (1888).

2. §§ 544, *et seq.*

3. Foster Ex'rs v. Dickerson, 64 Vt. 233, 24 Atl. 253 (1891).

4. Isbell v. New York, etc., R. Co., 25 Conn. 556 (1857); Reeve v. Dennett, 145 Mass. 23, 28, 11 N. E. 938 (1887). "So far as the introduction of collateral issues goes, that objection is a purely practical one, a concession to the shortness of life. When the fact sought to be proved is very unlikely to have any other explanation than the fact in issue, and may be proved or disproved without unreasonably protracting the trial, there is no objection to going into it." Reeve v. Dennett, 145 Mass. 23, 28, 11 N. E. 938 (1887).

5. §§ 334, *et seq.*

§ 3155-1. § 3150.

natural law, it yet presents evidence of at least a tendency to exhibit recurrent action, the same stimulus more often than not producing a similar result. Should it happen, moreover, that mental action has established, through constant and favorable repetition, a trait of character, the tendency of the latter to influence conduct has become a further result of experience. In other words, a natural or moral uniformity constitute, in general, the legal basis for the reasoning by analogy or the employment of collateral instances. Cases in which the uniformity of nature constitutes the underlying relevancy of the collateral fact are considered in the present chapter. The consideration of moral uniformity in its two aspects of mental action and relevancy of character evidence is reserved for the two final chapters of the present volume.

§ 3156. (*Preliminary Observations; Two Uniformities; A Descending Scale.*)—The uniformity of nature is so invariable as to give rise to *probative* relevancy. That is, under proper circumstances, the proof of the collateral occurrence may *prove* the happening of the one in question. On the other hand, moral uniformity involves so many and such hidden causes as to make it difficult to trace a relation of causation between the collateral act and the actual transaction, i. e., that A. did a particular act at one time because he did a similar act at another. The relevancy of such uniformity, therefore, if any, does not go higher than deliberative. All this is still more true of a predisposing trait of character. In other words, the relevancy created by these uniformities is on a descending scale.

§ 3157. (*Preliminary Observations; Two Uniformities; A Descending Scale*); Unascertainable Antecedents; Physical.—It requires but little reflection to conclude that the difference in probative effect to which allusion has been made¹ between the collateral instances, as based upon various uniformities in the domain of nature or mind, is largely determined and is almost in direct proportion to the extent to which all the antecedent factors, which go to make up the certain result, can be ascertained and determined.² Observation and experiment of the actual phenomena of

§ 3157-1. § 3156.

2. Antecedents. — “Between the instant, and the phenomena which exist at the succeeding instant, there is an invariable order of succession; phenomena which exist at any in-

nature and those regulated by the will of the operator can both be applied to facts which are physical. The operation of unknown and, therefore, unappreciative antecedents is thus reduced to a minimum.

§ 3158. (*Preliminary Observations; Two Uniformities; A Descending Scale; Unascertainable Antecedents*); Psychological.—Possibly, were it feasible to observe and measure all the psychological conditions affecting the doing of a certain act, it would be found that mental action was, in fact, governed by the same regularity and uniformity of action which applies to the operation of natural law.¹ Mental states, in the absence of some

and as we said in speaking of the general uniformity of the course of nature, this web is composed of separate fibres; this collective order is made up of particular sequences, obtaining invariably among the separate parts. To certain facts, certain facts always do, and, as we believe, will continue to succeed. The invariable antecedent is termed the cause; the invariable consequent, the effect. And the universality of the law of causation consists in this, that every consequent is connected in this manner with some particular antecedent, or set of antecedents. Let the fact be what it may, if it has begun to exist, it was preceded by some fact or facts, with which it is invariably connected. For every event there exists some combination of objects or events, some given concurrence of circumstances, positive and negative, the occurrence of which is always followed by that phenomenon. We may not have found out what this concurrence of circumstances may be; but we never doubt that there is such a one, and that it never occurs without having the phenomenon in question as its effect or consequence. On the universality of this truth depends the possibility of reducing the inductive process to rules. The un-

doubted assurance we have that there is a law to be found if we only knew how to find it, will be seen presently to be the source from which the canons of Inductive Logic derive their validity." Mill's System of Logic, Bk. III, Chap. V, § 2.

§ 3158-1. "Correctly conceived, the doctrine called Philosophical Necessity is simply this: that, given the motives which are present to an individual's mind, and given likewise the character and disposition of the individual, the manner in which he will act may be unerringly inferred; that if we knew the person thoroughly, and knew all the inducements which are acting upon him, we could foretell his conduct with as much certainty as we can predict any physical event. This proposition I take to be a mere interpretation of universal experience, a statement in words of what everyone is internally convinced of. No one who believed that he knew thoroughly the circumstances of any case, and the characters of the different persons concerned, would hesitate to foretell how all of them would act. Whatever degree of doubt he may in fact feel, arises from the uncertainty whether he really knows the circumstances, or the character of some one or other of the persons, with the de-

declaration by the person in question, can only be judged, in most cases, by their manifestations. Direct observation or experiment are usually impossible, while the motives for non-action or contrary action can seldom be ascertained. The will may operate for purposes of concealment, and the result is that the most which can properly be claimed is that a man is more likely than not to do a thing because he has done it before or because he has a predisposing trait of character, or *vice versa*. Unfortunately, such conditions seem impossible of attainment.

§ 3159. (*Preliminary Observations*); A Question of Administration.—The use of the evidence under consideration raises, however, not only questions of logic but those of administration, often ones of much nicety. The evidence of the collateral occurrence being circumstantial and thus secondary,¹ its admission is largely within the discretion of the presiding judge.² In exercising his administrative power, he should consider the state of the case;³ the necessity for the resort to secondary rather than primary evidence of the fact desired to be shown;⁴ the danger of misleading or confusing the jury by the raising of collateral issues;⁵ and any other circumstances affecting his discretionary power in the receipt of the evidence offered. The admissibility of the evidence, in many cases, varies with the ratio of danger and advantage; increasing as its relevancy appears more probative, and as the probability that other or better evidence is procurable or that the jury will be misled by the evidence becomes less apparent; and diminishing, in turn, as its relevancy appears less probative, and as the probability of obtaining better evidence or that the jury may be misled becomes more evident.

gree of accuracy required; but by no means from thinking that if he did know these things, there could be any uncertainty what the conduct would be. Nor does this full assurance conflict in the smallest degree with what is called our feeling of freedom. We do not feel ourselves the less free, because those to whom we are intimately known are well assured how we shall will to act in a particular case. We often, on the contrary, regard the doubt what our

conduct will be, as a mark of ignorance of our character, and sometimes even resent it as an imputation." Mill's System of Logic, Bk. VI, Chap. 2. § 2.

§ 3159-1. § 3161.

2. *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833 (1898); *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.) 146, 83 Am. Dec. 621 (1863).

3. § 1742.

4. § 3163.

5. § 3154.

§ 3160. (*Preliminary Observations; A Question of Administration*); Surprise, Prejudice, etc.—The courts recognize that, while a party may reasonably be required and expected to be prepared to try the issues of fact which strictly arise in the case, he can hardly be supposed to be ready, on the instant, to try collateral questions which may arise out of an offer to prove similar acts or occurrences. Against the injury of this danger of *surprise* a litigant may appeal to the administrative power of the court.¹ For obvious reasons, this danger is peculiarly acute and pressing in criminal cases;² in proportion to the seriousness of the possible consequences to the accused. There is danger that the jury may deal with a party's rights, not on the basis of what happened in the case on trial, but because of something which occurred at another time,³ or that the jury may be misled to his prejudice, by evidence well adapted to suggest a guess, rather than prove a fact.⁴

§ 3161. (*Preliminary Observations*); Secondary Evidence.—The so-called exclusionary rules discussed in this and the following chapters are, in reality, not exclusionary rules at all. An exclusionary rule is, properly speaking, applied only to a rule of procedure which not only rejects relevant evidence, but rejects it *absolutely*, i. e., irrespective of the forensic necessities of the proponent's case. Of these, so far as probative facts are concerned, there is but one;—the rule excluding hearsay, except in specified instances.¹ Relevant evidence is, indeed, absolutely excluded under the procedural rules relating to character in certain criminal cases where the existence of a particular mental state is a component proposition involved in the issue.² As has just been seen,³ the relevancy of the evidence thus excluded is, however, more nearly deliberative than probative in its nature, and the proposition is therefore true that the only exclusionary rule which absolutely rejects *probative* facts is the one against Hearsay.

§ 3160-1. Com. v. Jackson, 132 Mass. 16 (1882); People v. Jacks, 76 Mich. 218, 42 N. W. 1134 (1889); Trenton Temperance Hall Assoc. v. Giles, 33 N. J. L. 260 (1869).

2. Lightfoot v. People, 16 Mich. 507, 511 (1868).

3. State v Kirby, 62 Kan. 436, 63 Pac. 752 (1901); Spriggins v. State,

42 Tex. Cr. 341, 60 S. W. 54 (1900).

4. Jamieson v. Kings County El. R. Co., 147 N. Y. 322, 41 N. E. 693 (1895); Thomas v. Parrott, 106 Wis. 605, 82 N. W. 554 (1900).

§ 3161-1. §§ 2574, 2700, 2701, 2702.

2. § 3274.

3. § 3156.

The rule under consideration — that regulating the admissibility of facts whose relevancy is that of similarity — is exclusionary only to the extent that any rule of procedure which *conditionally* excludes a certain class or species of evidence until an administrative necessity is shown for admitting it can properly be so designated. That is to say, it is exclusionary only to the same degree that any other procedural rule would be which excludes secondary evidence until production of the primary is shown to be practically impossible to the proponent. Under certain conditions of an underlying uniformity of causation the fact that an event happened or an act was done at one time tends, more or less strongly, to show that a similar event happened at another time or a similar act was done by the same or another person. This may be called the logic of similarity. Viewed at its best, this is a secondary rather than a primary mode of proof.⁴ The evidence of similarity seeks to establish the doing of an act or the happening of an event indirectly, i. e., circumstantially. It does not purpose to prove the *factum probandum* directly, i. e., by the statements of those who have observed its occurrence. Should it happen that the *res gestae* fact which the probative fact of a similar occurrence tends, mediately or immediately, to prove, can be satisfactorily established by direct evidence, no administrative reason exists for using the circumstantial proof of what happened on a similar occasion. Where, however, as will be more fully seen hereafter,⁵ the *res gestae* fact in question must be established by the use of circumstantial evidence, a necessity for administrative indulgence is shown to be within the reasonable right of the proponent. Under these circumstances, the circumstantial evidence of what happened on similar occasions will, in general, be received.

§ 3162. Rule Stated.— While the uniformity of nature may well furnish a basis of probative fact which possesses a probative force beyond that shown by moral uniformity used as a basis of similarity in conduct,¹ the important administrative circumstance that the proof is circumstantial rather than direct has led the courts to treat the evidence of similar occurrences as secondary in its nature. In the absence, therefore, of an adequate administrative necessity,² the inference that a given state of affairs existed or a

4. §§ 465, 466, 3162.

5. § 3163.

§ 3162-1. § 3156.

2. § 3163.

particular event occurred at a certain time because a similar state of affairs is shown to have existed or a similar act occurred at another, is not one which the court accepts as primary evidence.³ Even, when a suitable forensic necessity is shown on the part of the proponent, some special ground of *relevancy* must also be made to appear. The two states or events must be connected in some special way, other than the mere similarity in certain particulars, in order that the existence of the one, on a particular occasion, may be deemed to be probative of that of the other on a different occasion.

§ 3163. Administrative Requirements; Necessity.—Unlike the rule against hearsay, when not covered by a specific exception,¹ the exclusion prescribed by the present rule is not absolute, but conditional. In other words, it is not so much a rule of procedure as it is a principle of administration. Let but a forensic necessity arise which the court deems adequate for the purpose and the paramount administrative canon that a party has a right to prove a reasonable case by the most probative evidence in his power²

3. Georgia.—Central of Georgia R. Co. v. Duffey, 116 Ga. 346, 42 S. E. 510 (1902); Portner Brewing Co. v. Cooper, 116 Ga. 171, 42 S. E. 408 (1902).

Illinois.—North Chicago St. R. Co. v. Hudson, 44 Ill. App. 60 (1891); Chicago Anderson Pressed Brick Co. v. Reininger, 41 Ill. App. 324, *affirmed* 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249 (1891); Kolb v. Chicago Stamping Co., 33 Ill. App. 488 (1889).

Indiana.—Diamond Block Coal Co. v. Edmonson, 14 Ind. App. 594, 43 N. E. 242 (1895).

Iowa.—Dalton v. Chicago, etc., R. Co., 114 Iowa 257, 259, 86 N. W. 272 (1901).

Maine.—Sargent v. Hutchings, 86 Me. 28, 29 Atl. 926 (1893).

Massachusetts.—Com. v. Campbell, 7 Allen 541, 83 Am. Dec. 705 (1863).

Mississippi.—Gray v. Thomas, 12 Sm. & M. 111 (1849).

Missouri.—Smart v. Kansas City, 91 Mo. App. 586 (1901).

New Hampshire.—Mead v. Merrill, 33 N. H. 437 (1856).

New York.—People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 10 N. Y. Annot. Cas. 256, 62 L. R. A. 193 (1901); Carlson v. Oceanic Steam Nav. Co., 109 N. Y. 359, 16 N. E. 546 (1888); Port Jervis v. First Nat. Bank of Port Jervis, 96 N. Y. 550 (1884).

North Carolina.—Bullock v. Lake Drummond Canal, etc., Co., 132 N. C. 179, 43 S. E. 593 (1903); Grant v. Raleigh, etc., R. Co., 108 N. C. 462, 13 S. E. 209 (1891).

Oregon.—Crossen v. Grandy, 42 Oreg. 282, 70 Pac. 906 (1902).

South Carolina.—Lynn v. Thomson, 17 S. C. 129 (1881).

Texas.—Quanah, etc., Ry. Co. v. Galloway, (Civ. App. 1911) 140 S. W. 368.

Vermont.—Slack v. Bragg, 83 Vt. 404, 76 Atl. 148 (1910).

§ 3163-1. § 2702.

2. § 334.

will require that, so far as the similarity is relevant, the happening of a given event or the existence of a particular state of affairs at one time may be shown by its happening or existence at another. The factors affecting the action of the court in regard to admitting evidence of similarity claimed by the proponent to be necessary to proof of his case are obvious. They are practically the same which govern the administrative action of the court in dealing with any proponent who offers secondary evidence of a fact. In proportion as it appears to the presiding judge that there is but little prospect that better evidence will be attainable, that the danger that the jury may be misled or the trial unduly protracted by the raising of a collateral issue, either does not arise or cannot be avoided, will such secondary evidence be received.³

§ 3164. (*Administrative Requirements; Necessity*); Necessity at Stage of Rebuttal.—As is more fully stated elsewhere,¹ the necessity for resorting to secondary evidence may arise to its proponent at either or both of two points in the presentation of his case. In the first place, he may find it necessary to resort to this species of evidence for making out his original case. He is unfortunately unable to procure any primary evidence whatever. It may, for example, happen that the skill and foresight of a criminal, or even what he would himself probably regard as his good fortune, have placed it entirely beyond the power of a prosecuting officer to obtain any direct evidence by percipient witnesses of certain of the more important of the *res gestae* of a criminal transaction. The representatives of public justice are, therefore, forced to rely entirely upon the secondary proof of circumstantial evidence even at the stage of their evidence in chief.

Even where primary evidence is available for the making out of a proponent's original case, he may be compelled to use secondary evidence for the purpose of meeting, by way of rebuttal, the case which the opponent has made out against him or to corroborate his original evidence;—should the supply of primary evidence available to him have become exhausted. It is as necessary to a litigant to maintain a given forensic position as to acquire it; and the necessity for administrative indulgence may be as great at one stage as at the other.² Where, for example, the non-actor

3. See, § 3159.
§ 3164-1. § 473.

2. Galveston, etc., R. Co. v. Ford,
(Tex. Civ. App. 1898) 46 S. W. 77.

has made an equilibrium against the case set up by the actor, *a fortiori*, if he has established an adverse balance against it, the necessity is upon the actor to restore his *prima facie* case; and, should it happen that the facts of primary probative force have become exhausted, his necessary recourse is the administrative indulgence of the court for the use of secondary probative facts, or even of deliberative ones. His primary evidence has been exhausted; perhaps the primary evidence of both sides has been exhausted. Under these circumstances it is good administration to permit the parties to decide the matter so far as necessary by secondary evidence. For example, the prosecuting officer in a criminal case may have established the *res gestae* by the direct evidence of witnesses. A *prima facie* case being thus established, the government rests. The defendant relies on an alibi established by the equally positive and direct testimony of eye witnesses. A reasonable doubt is created. Possibly, an affirmative evidentiary balance in favor of the defendant is created. It is now open to prosecution, having exhausted its primary, direct evidence, to offer, either in corroboration of its original case or in rebuttal of that of the opponent, any secondary, circumstantial evidence it may have, to remove the doubt, created by the defendant's evidence.

§ 3165. (Administrative Requirements; Necessity); Action of Appellate Courts.— Only in cases where the court has failed to exercise reason will the administrative action of the presiding judge be disturbed on appeal.¹

§ 3166. (Administrative Requirements); Relevancy.— That the secondary evidence of another event or occurrence should be received as evidence that, under the uniformity of nature, a given event occurred or state existed at a particular time, it will be required, as a matter of administration, not only that a suitable forensic necessity should be shown to exist, but also that the evidence offered should be relevant. However great may be the necessity for receiving secondary evidence, the facts offered must, at least, be evidence, i. e., relevant in some one of the aspects of relevancy. It may be expedient, before entering upon the general subject, to make two preliminary observations. The first of these is

§ 3165-1. Isbell v. New York, etc., v. Lockport, 122 N. Y. 403, 25 N. E. R. Co., 25 Conn. 561 (1857); Gillrie 357 (1890).

to the effect that, in connection with the uniformity of nature the relevancy of a particular state or event to the existence of another is, in itself, considered *objective* rather than *subjective*.¹ In other words, it involves and is based upon the uniformity between antecedent and consequent, which experience has observed to exist in the physical universe. By contrast, the relevancy of moral uniformity² is more largely subjective. In the second place, the evidence being used to establish, in a circumstantial manner, by means of a direct and clear proposition of experience, the existence of a *res gestae* fact, its relevancy is *probative*,³ while the slighter causal relation between antecedent and consequent, shown in cases of human conduct subject to the operation of volition, i. e., the relevancy of moral uniformity is, as has been said,⁴ more nearly *deliberative*.

§ 3167. (Administrative Requirements; Relevancy); Relevancy of Similarity.—In dealing with the direct probative force of the inference that under certain antecedents an event happened or state of things came into existence on a particular occasion because, under precisely similar conditions or antecedents, the same event happened or state of affairs came into being, a court or jury may well feel that they are treading upon firm logical ground.¹ One is fairly certain, for example, that the sun gave light on a given occasion because at all previous times it has been observed to do so. In other words, the maximum of probative relevancy is obtained where, as in the uniformity of natural law, the same cause,

§ 3166-1. §§ 1714, 1774.

2. § 3215.

3. § 1712.

4. § 3156.

§ 3167-1. "All phenomena without exception which begin to exist, that is, all except the primeval causes, are effects either immediate or remote of those primitive facts, or of some combination of them. There is no Thing produced, no event happening, in the universe, which is not connected by a uniformity, or invariable sequence, with some one or more of the phenomena which preceded it; insomuch that it will happen again as often as those phe-

nomena occur again, and as no other phenomenon having the character of a counteracting cause shall co-exist." These antecedent phenomena, again, were connected in a similar manner with some that preceded them; and so on, until we reach, as the ultimate step, either the properties of some one primeval cause, or the conjunction of several. The whole of the phenomena of nature were therefore the necessary, or, in other words, the unconditional, consequences of the original collocation of the Permanent Causes." Mill's System of Logic, Bk. III, Chap. V, § 7.

in itself considered, always operates in precisely the same way, where the force is a powerful one and not affected by other forces. Where an occurrence, dependent upon the action of natural law — as distinguished from moral conduct affected by volition — corresponds in all essential particulars to the occurrence involved in the inquiry, the fact is strongly probative that the principal occurrence or state happened or came into existence in the same way. Much valuable light, moreover, may be obtained as to the manner in which the event occurred or state of things came into being on the principal occasion from a consideration of what was observed to happen on a collateral occurrence so conditioned. Such essentially similar occurrences may be obtained in one of two ways: (1) Nature may furnish in actual life the similar instances which aid the inquiry for truth; or (2) questions may be put to nature in the form of *experiments* which reproduce, so far as practicable, the conditions of the actual occurrence or state in question. These methods of reproduction may be considered briefly in this order.

The relevancy of other occurrences may operate in establishing mental conviction by proof of the existence in another case of precisely or substantially the same antecedents or conditions and arguing from the uniformity of nature that the same result which these antecedents produced on the other or so-called *collateral* occasion followed upon that involved in the inquiry. The question, for example, being as to whether the union of two chemical substances produced on a particular occasion a given reaction, evidence would probably be received, if more primary and expeditious proof were unavailable, to the effect that on another occasion, either naturally occurring or artificially induced by way of experiment, the same two chemical substances, under precisely or substantially similar conditions of temperature, moisture, proportion of ingredients, and the like, produced that particular result. In other words, if chemical factor A. and chemical factor B. produced upon a given occasion, under certain conditions, result X, a strong inference will arise, due to the observed uniformity of nature, that the bringing together of A. and B., under substantially similar conditions on any other occasion will also result in the production of X. This may apparently be called the *relevancy of similarity*. This logical relation operates *probatively* and, so far as its ultimate *factum probandum* is concerned, *directly* in the creation of belief as to what happened upon the occasion under investigation.

§ 3168. (*Administrative Requirements; Relevancy; Relevancy of Similarity*); Essentially Similar Occurrences.—The happening of an essentially similar state or event, shows not only the possibility of such an occurrence,¹ where that is disputed—but furnishes an object lesson, as it were, in education and explanation of the state or event in question;—what caused it, or how it happened.² Where it is disputed that the particular event in question actually occurred, the fact that the same event happened or state of things came into being under similar circumstances is also highly probative. Essential similarity on all material parts being established, the evidence is probative, and, if a suitable necessity is shown, will be admitted.³ Thus, for example, in a suit by the owners of land along a certain stream for injuries caused by diverting its waters, damages accruing from a continuance of the same condition of affairs after the bringing of the action may be used in evidence to show the nature and causes of the injury suffered prior to the institution of the suit.⁴ In like manner, the question being as to the damage caused to plaintiff's trees by the escape of gas from the defendant's premises, evidence of the condition of other trees in the vicinity is admissible.⁵ In much the same way, in an action to recover damages for injuries sustained by the fall of a portion of the roof of a structure where the plaintiff was working, the condition of other portions of the roof

§ 3168-1. § 3183.

2. *Polly v. McCall*, 37 Ala. 20 (1860).

3. *Alabama*.—*Decatur Car Wheel, etc., Co. v. Mehaffey*, 128 Ala. 242, 29 So. 646 (1900); *Alabama Lumber Co. v. Keel*, 125 Ala. 603, 28 So. 204, 82 Am. St. Rep. 265 (1900).

Indiana.—*Indiana Natural, etc., Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868 (1900).

Iowa.—*Wilkins v. Omaha, etc., R. Co.*, 96 Iowa 668, 65 N. W. 987 (1896).

Kansas.—*City of Emporia v. Kowalski*, 66 Kan. 64, 71 Pac. 232 (1903).

Maryland.—*Mitchell v. Mitchell*, 10 Md. 234 (1856).

New York.—*Sixth Ave. R. Co. v. Metropolitan El. R. Co.*, 56 Hun 182,

9 N. Y. Suppl. 207, 30 N. Y. St. Rep. 521 (1890).

Pennsylvania.—*Lewis v. Marlborough Tp.*, 13 Montg. Co. Rep. 170 (1897).

Wisconsin.—*Odegard v. North Wisconsin Lumber Co.*, 130 Wis. 659, 110 N. W. 809 (1907).

4. *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453 (1854).

Obstruction in another stream.—The defendant, in an action for the obstruction of a stream, may not show similar conditions in another creek, emptying into the stream below defendant's dam. *Hand v. Catawba Power Co.*, 90 S. C. 267, 73 S. E. 187 (1911).

5. *Evans v. Keystone Gas Co.*, 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681. 30 L. R. A. 615 (1895).

similarly situated may be shown.⁶ In the degree to which it is probable to the court that more probative, i. e., primary, evidence can be procured, or could have been procured by the proponent, and that the jury may be misled, the trial protracted, or the opponent prejudiced, will be the disinclination of the presiding judge to admit the evidence of similar occurrences. The question is purely an administrative one. The burden of establishing relevancy, necessity and consequent admissibility is on the proponent of the evidence.⁷ Identity of circumstances is not required for the admission of proof of the similar occurrence; the administrative power may be exercised in receiving the evidence if the conditions of the two occurrences are essentially similar. The greater the similarity, however, the more probative force attaches to the collateral occurrence.⁸ Admitting the evidence is merely a preliminary ruling by the court and involves no finding as to the

6. *Lamb v. Philadelphia, etc., Ry. Co.*, 217 Pa. 564, 66 Atl. 762 (1907).

7. *Alabama*.—*Gibson v. Hatchett*, 24 Ala. 201 (1854).

California.—*Clark v. Willett*, 35 Cal. 534 (1868).

Connecticut.—*Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533 (1897).

Illinois.—*Jewell Filter Co. v. Kirk*, 200 Ill. 382, 65 N. E. 698 (1902); *Chicago v. Brennan*, 61 Ill. App. 247 (1895).

Indiana.—*Ramsey v. Rushville, etc., Gravel Road Co.*, 81 Ind. 394 (1882).

Iowa.—*Bach v. Iowa Cent. R. Co.*, 112 Iowa 241, 83 N. W. 959 (1900).

Massachusetts.—*Campbell v. Russell*, 139 Mass. 278, 1 N. E. 345 (1885); *Waters' Patent Heater Co. v. Smith*, 120 Mass. 444 (1876); *Standish v. Washburn*, 21 Pick. 237 (1838).

Michigan.—*Smith v. McGill*, 27 Mich. 142 (1873).

Missouri.—*Kirchgraber v. Lloyd*, 59 Mo. App. 59 (1894).

New York.—*Harroun v. Brush Electric Light Co.*, 12 App. Div. 126, 42 N. Y. Suppl. 716 (1896); *Murphy v. McWilliam*, 15 Misc. R. 122, 36 N.

Y. Suppl. 492 (1895); *Lord v. Lord*, 11 N. Y. Suppl. 389 (1890).

Oregon.—*Crossen v. Grandy*, 42 Oreg. 282, 70 Pac. 906 (1902).

Pennsylvania.—*Stremme v. Dyer*, 223 Pa. St. 7, 72 Atl. 274 (1909); *Minnequa Springs Imp. Co. v. Coon*, 10 Wkly. Notes Cas. (Pa.) 502 (1881); *Newbold v. Meade*, 57 Pa. St. 487 (1868).

South Dakota.—*Fairbanks, Morse & Co. v. Heihn et al.*, 29 S. D. 215, 136 N. W. 107 (1912).

Texas.—*Erp v. Raywood, etc., Co.*, (Civ. App. 1910) 130 S. W. 897; *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608 (1897).

Virginia.—*Ellis v. Harris' Ex'r*, 32 Gratt. 684 (1880).

Washington.—*Nelson v. Sibley Contracting Co.*, 66 Wash. 471, 119 Pac. 829 (1912); *Welch v. Fransoli*, 46 Wash. 530, 90 Pac. 644 (1907).

Wisconsin.—*Smith v. Russ*, 22 Wis. 439 (1868).

United States.—*Hammerschlog Mfg. Co. v. Struthers-Wells Co.*, 154 Fed. 326, 83 C. C. A. 198 (1907).

8. *Hines v. Stanley, etc., Mfg. Co.*, 203 Mass. 288, 89 N. E. 628 (1909).

credibility or weight of the testimony. It amounts to a finding that the jury may reasonably receive the evidence and act upon it.⁹

§ 3169. (*Administrative Requirements; Relevancy; Relevancy of Similarity*); Experiments.—Should it be made affirmatively to appear to the presiding judge by the proponent of the evidence¹ that the essential conditions of the actual state or event involved in the inquiry submitted for investigation can be artificially reproduced in an experiment, the results of the latter may be relevant,² and if an adequate administrative necessity exists for receiving them, will be admitted.³ It is not essential in such an

9. *Com. v. Robinson*, 146 Mass. 571, 581, 16 N. E. 452 (1888).

"It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury. The fact of the admission of the evidence by the judge does not in a legal sense give it any greater weight with the jury; it does not affect the burden of proof, or change the duty of the jury in weighing the whole evidence. They must still be satisfied, in a criminal case, upon the whole evidence, beyond a reasonable doubt. Ordinarily, questions of fact are exclusively for the jury, and questions of law for the court. But when, in order to pass upon the admissibility of evidence, the determination of a preliminary question of fact is necessary, the court in the due and orderly course of the trial must necessarily determine it, as far as is necessary for that purpose, and usually without the assistance, at that stage, of the jury. If, under such circumstances, testimony is admitted against a party's objection, it may often happen that he may still ask the jury to disregard it." *Com. v. Robinson*, 146 Mass. 571, 581, 16 N. E. 452 (1888), per C. Allen, J.

§ 3169-1. *California*.—*People v. Hill*, 123 Cal. 571, 56 Pac. 443 (1899).

Georgia.—*Atlanta, etc., R. Co. v. Hudson*, 2 Ga. App. 352, 58 S. E. 500 (1907).

Illinois.—*Chicago, etc., R. Co. v. Logue*, 47 Ill. App. 292 (1892).

Indiana.—*Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564 (1892).

Michigan.—*People v. Thompson*, 122 Mich. 411, 81 N. W. 344 (1899).

Missouri.—*Riggs v. Metropolitan St. Ry. Co.*, 216 Mo. 304, 115 S. W. 969 (1909).

2. Evidence of experiments based on speculative and hypothetical theories where they are not shown to have been based upon facts connected with the crime charged is not admissible. *Harris v. State*, (Tex. Cr. App. 1911) 137 S. W. 373.

If the evidence of an experiment is not material to the issues involved, it should be excluded. *State v. Jacobs*, 26 S. D. 183, 128 N. W. 162 (1910).

3. *California*.—*County of Sonoma v. Stofen*, 125 Cal. 32, 57 Pac. 681 (1899); *People v. Phelan*, 123 Cal. 551, 56 Pac. 424 (1899).

Georgia.—*Atlanta, etc., R. Co. v. Hudson*, 2 Ga. App. 352, 58 S. E. 500 (1907).

Illinois.—*Upthegrove v. Chicago, etc., Ry. Co.*, 154 Ill. App. 460 (1910); *Hauser v. People*, 210 Ill. 253, 71 N. E. 416 (1904).

Indiana.—*Chicago, etc., R. Co. v. Champion*, (Sup. 1892) 32 N. E. 874.

Iowa.—*Kimball Bros. Co. v. Citizens Gas, etc., Co.*, 141 Iowa 632, 118 N. W. 891 (1908); *Burg v. Chicago, etc., R. Co.*, 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419 (1894);

experiment that the conditions of an experiment should be specially prepared for the purpose. Advantage may well be taken of existing conditions for the making of a test which practically affords the results of an experiment. The degree of moisture, for example, in certain ore, may be established by evidence of the degree of moisture exhibited by other ore taken from the same ore body and examined under conditions similar to those affecting the ore in question.⁴ The important consideration is the substantial meeting in the experiment of the actual conditions of the action involved in the inquiry. The effect of a well directed experiment is not, of necessity, to *corroborate* a contention of the proponent. Its primary result is to *test*. It determines, as a preliminary matter, the possibility of the happening of an alleged state or event.

Difference in some essential particular between the actual transaction, as it is claimed to have existed, and the conditions of the experiment, warrants the exclusion of the evidence as to the result obtained by it.⁵ The closer the similarity in the facts proved and

Brooke v. Chicago, etc., R. Co., 81 Iowa 504, 47 N. W. 74 (1890).

Louisiana.—Seibert v. McManus, 104 La. 404, 29 So. 108 (1901).

Massachusetts.—Com. v. Buxton, 205 Mass. 49, 91 N. E. 128 (1910).

Minnesota.—Beckett v. Northwestern Masonic Aid Assoc., 67 Minn. 298, 69 N. W. 923 (1897).

Missouri.—Riggs v. Metropolitan St. Ry. Co., 216 Mo. 304, 115 S. W. 969 (1909).

New Hampshire.—Whiteher v. Boston, etc., R. Co., 70 N. H. 242, 46 Atl. 740 (1899).

North Carolina.—See Cox v. Norfolk, etc., R. Co., 126 N. C. 103, 35 S. E. 237 (1900).

Rhode Island.—Cheetham v. Union Railroad Co., 26 R. I. 279, 58 Atl. 881 (1904).

Texas.—Rupe v. State, 42 Tex. Cr. App. 477, 61 S. W. 929 (1901).

Utah.—Hayes v. Southern Pac. R. Co., 17 Utah 99, 53 Pac. 1001 (1898).

Washington.—Lasityr v. City of Olympia, 61 Wash. 651, 112 Pac. 752 (1911).

United States.—Columbus Constr. Co. v. Crane Co., 98 Fed. 946, 40 C. A. 35; rehearing denied, 101 Fed. 55, 41 C. C. A. 189 (1900); Washington, etc., Steam Packet Co. v. Sickles, 10 How. 419, 13 L. ed. 479 (1850).

4. Vietti v. Nesbitt, 22 Nev. 390, 41 Pac. 151 (1895).

5. Alabama.—Sherrill v. State, 138 Ala. 3, 35 So. 129 (1903); Alabama Great Southern R. Co. v. Burgess, 114 Ala. 587, 22 So. 169 (1896); Rowland v. Ladiga's Heirs, 21 Ala. 9 (1852).

California.—People v. Solani, 6 Cal. App. 103, 91 Pac. 654 (1907).

Florida.—Hisler v. State, 52 Fla. 30, 42 So. 692 (1906); Spires v. State, 50 Fla. 121, 39 So. 181 (1905).

Georgia.—Atlanta, etc., R. Co. v. Hudson, 2 Ga. App. 352, 58 S. E. 500 (1907); De Loach Mill Mfg. Co. v. Tutweiler, etc., Iron Co., 2 Ga. App. 493, 58 S. E. 790 (1907).

Illinois.—Burt v. Garden City Sand Co., 141 Ill. App. 603 (1908); Western Elec. Co. v. Prochaska, 129 Ill. App. 589 (1906); Elgin, etc., Tract.

the facts on which the experiment is based, the greater the probative force of the evidence.⁶

§ 3170. (Administrative Requirements; Relevancy; Relevancy of Similarity; Experiments); Civil Cases.—Experiments may take a wide range. For example, in a civil case, the conditions which affect the stopping of the train which killed the plaintiff's intestate may be reproduced *in pais* by an experiment, and the results obtained may be laid before the jury.¹ A witness may testify as to the result of experiments tending to show the speed at which a street car running around a curve will cause a passenger to fall and the direction of his fall,² or whether a passenger stepping from the platform of a street car which suddenly started up could have fallen as the plaintiff says he did.³ A frequent use of experiments is for the purpose of ascertaining whether a witness, by reason of darkness, atmospheric conditions, or intervening objects, could have seen from a certain spot an act or occurrence. Such an experiment is conducted by the expedient of reproducing, so far as possible, the conditions, and observing the result. If the result of the experiment is adverse to the possibility of the act

Co. v. Wilson, 120 Ill. App. 371 (1905), *aff'd* 217 Ill. 47, 75 N. E. 436.

Iowa.—Brantner v. Chicago, etc., Ry. Co., 136 Iowa 349, 112 N. W. 790 (1907).

Kansas.—Wingfield v. McClintock, 85 Kan. 207, 113 Pac. 394 (1911); Smith v. Brown, 8 Kan. 608 (1871).

Missouri.—Riggs v. Metropolitan St. Ry. Co., 216 Mo. 304, 115 S. W. 969 (1909).

New York.—Green v. Long Island Railroad Co., 131 App. Div. 277, 115 N. Y. Suppl. 590 (1909); People v. Fiori, 123 App. Div. 174, 108 N. Y. Suppl. 416 (1908); Yates v. People, 32 N. Y. 509 (1865).

Oklahoma.—Gibbons v. Territory, 5 Okl. Cr. App. 212, 115 Pac. 129 (1911).

Rhode Island.—Mitchell v. Sayles, 28 R. I. 240, 66 Atl. 574 (1907).

Texas.—Missouri, etc., Ry. Co. of Texas v. Dunbar, 49 Tex. Civ. App. 12, 108 S. W. 500 (1908).

Virginia.—Richards v. Com., 107 Va. 881, 59 S. E. 1104 (1908).

Washington.—Lasityr v. City of Olympia, 51 Wash. 651, 112 Pac. 752 (1911).

Wisconsin.—Wilson v. Chippewa Valley Elec. R. Co., 135 Wis. 18, 114 N. W. 462 (1908).

The presence of conditions not causal, i. e., which cannot affect the result in any material particular, does not impair the value of an experiment. County of Sonoma v. Stofen, 125 Cal. 32, 57 Pac. 681 (1899).

6. Atlanta, etc., R. Co. v. Hudson, 2 Ga. App. 352, 58 S. E. 500 (1907).

§ 3170-1. Byers v. Nashville, etc., R. Co., 94 Tenn. 345, 29 S. W. 128 (1895).

2. Fisher v. Travelers' Ins. Co., 124 Tenn. 450, 138 S. W. 316, 25 Am. & Eng. Ann. Cas. 1246 (1911).

3. Gilbert v. Third Ave. R. Co., 8 N. Y. St. R. 152, 54 N. Y. Super. Ct. 270 (1887).

or occurrence being seen, it may be received in evidence.⁴ In like manner, an experiment may be made, retaining all material conditions, and introducing no other causal elements, as to the carrying capacity of the human voice in the transmission of sounds interpretable as words;⁵ and to what extent, if any, an intervening object will affect the result.⁶ Experiments as to the distance a person can hear the ticking of a watch may be made to determine his power of hearing, and the results placed before the jury.⁷ Chemi-

4. California.—*People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833 (1898).

Georgia.—*Atlanta, etc., R. Co. v. Hudson*, 2 Ga. App. 352, 58 S. E. 500 (1907).

Illinois.—*Hauser v. People*, 210 Ill. 253, 71 N. E. 416 (1904); *Elgin, etc., R. Co. v. Reese*, 70 Ill. App. 463 (1896); *Illinois Cent. R. Co. v. Burns*, 32 Ill. App. 196 (1889).

Kansas.—*Johnson v. Chicago, etc., R. Co.*, 80 Kan. 456, 103 Pac. 90 (1909).

Mississippi.—*Harrison v. Southern Ry. Co.*, 93 Miss. 40, 46 So. 408 (1908).

North Carolina.—*Cox v. Norfolk, etc., Co.*, 126 N. C. 103, 35 S. E. 237 (1900).

South Carolina.—*Walker v. Columbia, etc., R. Co.*, 25 S. C. 141 (1886).

Texas.—*Houston, etc., R. Co. v. Ramsey*, 43 Tex. Civ. App. 603, 97 S. W. 1067 (1906).

Utah.—*Young v. Clark*, 16 Utah 42, 50 Pac. 832 (1897).

Vermont.—*State v. Bean*, 77 Vt. 384, 60 Atl. 807 (1905).

In an action for death at a crossing, it is competent to show by a witness who has made a test at the same place under substantially similar circumstances, that the smoke and steam from an engine in a cut could not be seen at the crossing. *Johnson v. Chicago, etc., R. Co.*, 80 Kan. 456, 103 Pac. 90 (1909).

The distance that a person on a railroad track can be seen by one on an approaching train may be the

subject of an experiment, the result of which is properly presented to the jury. *Nelson v. Old Colony St. Ry. Co.*, 208 Mass. 159, 94 N. E. 313 (1911); *Harrison v. Southern Ry. Co.*, 93 Miss. 40, 46 So. 408 (1908); *Freeman v. Moreman*, (Tex. Civ. App. 1912) 146 S. W. 1045; *Galveston, etc., R. Co. v. Olds*, (Tex. Civ. App. 1908) 112 S. W. 787.

To show that person might have been distinguished.—In an action for injuries to plaintiff, caused by defendant shooting him by mistake for a deer, to show that defendant might readily have distinguished plaintiff from a deer, had he exercised reasonable care, evidence of experiments made after the accident was competent, on proof that the conditions were so far similar to those existing at the time and place of the injury as to render the result of the experiment of substantial value. *Harper v. Holcomb*, 146 Wis. 183, 130 N. W. 1128 (1911).

5. People v. Phelan, 123 Cal. 551, 56 Pac. 424 (1899); *Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427 (1902).

6. Missouri Pac. R. Co. v. Moffatt, 56 Kan. 667, 44 Pac. 607 (1896).

The results of an experiment at a railroad crossing may be admissible as showing that the noise of a train is deadened while passing through a cut. *Johnson v. Chicago, etc., R. Co.*, 80 Kan. 456, 103 Pac. 90 (1909).

7. Wilson v. Chicago City Ry. Co., 144 Ill. App. 604 (1908).

cal or microscopic experiments for the detection of poisons, the ascertainment of deleterious substances in organic or inorganic compounds,⁸ the general determination of the nature of blood, and the like, are familiar in civil cases.

§ 3171. (*Administrative Requirements; Relevancy; Relevancy of Similarity; Experiments*); Criminal Cases.—In criminal cases much light is gained in sifting and testing the respective theories or hypotheses of the prosecution or the defense by means of well-calculated and carefully conducted experiments.¹ Many of these, in practice, are found to relate to the use of fire arms. The uniformity of natural law, operating under fixed conditions, approximating as nearly as practicable those claimed by one of the parties to exist, is capable of lending marked aid to the judicial search for truth. The precise weapon with which the injury was inflicted is usually identified and in possession of the prosecution. Entire correspondence with the actual transaction in this condition of the experiment is thus secured. The question, therefore, is frequently reduced to a determination as to what must have been the conditions under which that particular pistol, rifle or the like, was discharged in order to produce certain effects, which, as a rule, are not disputed. Thus, it may be ascertained at what distance from a deceased person the pistol in question must have been when it was discharged in order to powder mark,² or otherwise in-

8. *Lincoln v. Taunton Copper Mfg. Co.*, 9 Allen (Mass.) 181 (1864) (copper in vegetation).

§ 3171-1. *Alabama*.—*Campbell v. State*, 55 Ala. 80 (1876).

California.—*People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631 (1890).

Colorado.—*Van Wyk v. People*, 45 Colo. 1, 99 Pac. 1009 (1909).

Connecticut.—*State v. Smith*, 49 Conn. 376 (1881).

Idaho.—*State v. Hendel*, 4 Ida. 88, 35 Pac. 836 (1894).

Iowa.—*State v. Sorenson*, 138 N. W. 411 (1912).

Missouri.—*State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330 (1887).

Nebraska.—*Clarence v. State*, 86 Neb. 210, 125 N. W. 540 (1910);

Polin v. State, 14 Nebr. 540, 16 N. W. 898 (1883).

North Carolina.—*State v. Plyler*, 153 N. C. 630, 69 S. E. 269 (1910).

Oregon.—*State v. Fletcher*, 24 Oreg. 295, 33 Pac. 575 (1893).

Washington.—*State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382 (1893), *affirmed*, 164 U. S. 705, 17 Sup. Ct. 997, 41 L. ed. 1183 (1896).

West Virginia.—*State v. Woodrow*, 58 W. Va. 527, 52 S. E. 545, 2 L. R. A. (N. S.) 862, 112 Am. St. Rep. 1001 (1905).

United States.—*Ball v. U. S.*, 163 U. S. 662, 16 Sup. Ct. 192, 41 L. ed. 300 (1895); *United States v. Ried*, 42 Fed. 134 (1895).

2. *Indiana*.—*Thrawley v. State*, 153 Ind. 375, 55 N. E. 95 (1899).

jure³ his clothing. In like manner, information may be obtained as to the relative positions of the deceased and his assailant at the time when the wound which caused death was inflicted. For example, the nature and direction of fatal wounds being observed, it may be ascertained by experiment whether such wounds could have been made by an assailant standing on the ground.⁴

On a question of identity the person alleged to be the offender may be placed among other persons, even those introduced into the courtroom for the purpose, and the identifying witnesses asked to select the person who, they say, did the act in question.⁵ The possibility of a witness identifying a particular person under the circumstances wherein a witness says he identified the accused may be shown by an experiment.⁶

The prosecuting attorney may make such experiments⁷ although it would seem to be in better taste and in accordance with the better practice that they should be made by others.

§ 3172. (Administrative Requirements; Relevancy; Relevancy of Similarity; Experiments); Function of Administration.—Experiments are received as a matter of indulgence. The party offering such evidence has no right to insist upon evidence of the experiment being received, should the presiding judge be of a contrary opinion.¹ The trial judge must, however, act within

Iowa.—*State v. Nowells*, 135 Iowa 53, 109 N. W. 1016 (1906).

New York.—*People v. Fiori*, 123 App. Div. 174, 108 N. Y. Suppl. 416 (1908).

Tennessee.—*Hughes v. State*, 148 S. W. 543 (1912).

Washington.—*State v. Melvern*, 32 Wash. 7, 72 Pac. 489 (1903).

Wisconsin.—*Pollock v. State*, 136 Wis. 136, 116 N. W. 851 (1908).

Where, in a prosecution for homicide, the government claims that, when the fatal shot was fired, the powder burned the eyebrows of deceased, evidence is admissible of experiments on dummies to the effect that it would be impossible at any range, under the circumstances, to burn off the eyebrow. *Streight v. State*, 62 Tex. Cr. App. 453, 138 S. W. 742 (1911).

3. Sullivan v. Com., 93 Pa. St. 284 (1880).

4. Dillard v. State, 58 Miss. 368 (1880).

5. State v. Murphy, 118 Mo. 7, 25 S. W. 95 (1893).

6. Taylor v. State, 135 Ga. 622, 70 S. E. 237 (1911).

7. People v. Crandall, 125 Cal. 129, 57 Pac. 785 (1899).

§3172-1. Georgia.—*Carolina Portland Cement Co. v. Marshall*, 9 Ga. App. 555, 71 S. E. 942 (1911); *Augusta Ry. & Elec. Co. v. Arthur*, 3 Ga. App. 513, 60 S. E. 213 (1908).

Iowa.—*Huggard v. Glucose Sugar Refining Co.*, 132 Iowa 724, 109 N. W. 475 (1906).

Massachusetts.—*Com. v. Buxton*, 205 Mass. 49, 91 N. E. 128 (1910).

Minnesota.—*State v. Ronk*, 91 Minn. 419, 98 N. W. 334 (1904).

the limits prescribed by reason.² Subject to this qualification, the question of using the results of an experiment is a matter of administration. The court, accordingly, may grant or refuse a continuance for the purpose of making an experiment.³ Should the judge fear that the evidence will raise an unnecessary or uncontrollable number of collateral issues,⁴ or its results are likely to prove too variable to be conclusive,⁵ he is entirely warranted in declining to receive the evidence. The presiding judge, moreover, is under constant obligation to expedite the trial of causes so far as is consistent with the ends of justice.⁶ With this in mind, the court may well reject evidence of an experiment if, in the state of the case, the value of its results to the cause of justice will not be commensurate with that of the time used in listening to it.⁷ A slight change of the conditions under which an experiment is conducted may so distort the result as to make evidence thereof harmful.⁸ Thus, it becomes the administrative duty of the presiding judge, in order that the jury may be enlightened rather than confused or misled, to exclude the evidence unless the proponent shows the required similarity of conditions.⁹

For obvious reasons the judge will restrain the jury from making experiments for themselves, out of court.¹⁰ The results of experiments, like any other evidence, should be introduced under the supervision of the court and subject to the inspection of the parties.

In a criminal case, where an experiment illustrating the government's theory of the way in which deceased was killed is well calculated to inflame the passions of the jury, the judge may prop-

Nebraska.—Lillie v. State, 72 Neb. 228, 100 N. W. 316 (1904).

Washington.—Lasityr v. City of Olympia, 61 Wash. 651, 112 Pac. 752 (1911).

2. Woelfel Leather Co. v. Thomas, 68 Ill. App. 394 (1896); Ord v. Nash, 50 Nebr. 335, 69 N. W. 964 (1897); Streight v. State, 62 Tex. Cr. App. 453, 138 S. W. 742 (1911); Hodge v. State, 60 Tex. Cr. App. 157, 131 S. W. 577 (1910).

3. State v. Hendel, 4 Idaho 88, 35 Pac. 836 (1894).

4. Libby v. Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191

(1893); Columbus Constr. Co. v. Crane Co., 98 Fed. 946, 40 C. C. A. 35, rehearing denied, 101 Fed. 55, 41 C. C. A. 189 (1900).

5. Klanowski v. Grand Trunk R. Co., 64 Mich. 279, 31 N. W. 275 (1887).

6. § 544.

7. Ord v. Nash, 50 Nebr. 335, 69 N. W. 964, 966 (1897).

8. Hisler v. State, 52 Fla. 30, 42 So. 692 (1906).

9. See, § 3169.

10. People v. Conkling, 111 Cal. 616, 44 Pac. 616 (1896). See also, § 3173.

erly decline to allow it to be made or proved.¹¹

Court not to experiment.—It has been said that the presiding judge is not at liberty to undertake experiments on his own initiative, calculated to test the accuracy of a witness. Thus, a witness being asked how long an interval of time elapsed between two events, answered, "three minutes." Thereupon the presiding judge engaged in the following colloquy with the witness. The judge: "Do you know how long three minutes is?" The witness answered, "I think I do." The judge: "Well, we will see if you do." (Taking out his watch.) "Now, when I get ready for you to commence I will say, 'now,' and then you commence and tell me when three minutes are past." The judge, to witness: "You may commence and tell me when three minutes are up—now." The judge, after a pause: "Do you understand that you are to tell me when the three minutes are up?" to which the witness answered, "Yes, sir." After a pause the witness said, "Now, I think," when judge replied, "that was not three minutes, that was just three-quarters of one minute." To which remark of the judge the defendant objected, and the objection was overruled and the defendant excepted. This was regarded by the Supreme Court of Illinois¹² as being error;—though, the case otherwise being a clear one, no reversal was ordered. The court said: "Whilst a judge presiding at a trial has a right to put questions to a witness with reference to the issue on trial, and a court of review will allow much latitude, yet comments on the evidence, or creating evidence, or seeking to sustain a witness, by the trial judge, must be condemned, and the action of the trial judge, as shown by this record, would, in a case at all doubtful or close on the facts, require a reversal."

§ 3173. (*Administrative Requirements; Relevancy; Relevancy of Similarity; Experiments*); Province of Jury.—The presiding judge will not permit the jury to try experiments as to relevant matters out of court on their own initiative; still less, to use as evidence in the case the results, if any, so obtained.¹ He

11. *Faulkner v. State*, 43 Tex. Cr. App. 311, 65 S. W. 1093 (1901).

12. *Burke v. People*, 148 Ill. 70, 35 N. E. 376 (1893).

§ 3173-1. *California*.—*People v.*

Conkling, 111 Cal. 616, 44 Pac. 314 (1896).

Minnesota.—*Smith v. St. Paul, etc., R. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550 (1884).

will require that experiments conducted out of court be described and their results stated to the jury by witnesses in the ordinary course of judicial proceedings.² Should the results of the experiment fail to be probative, the entire evidence relating to it will be treated as inadmissible.³ On the other hand, should material results be obtained, the tools or other articles used by the witness in conducting his experiment may be produced in court and used in illustration of his conclusions.⁴ The probative value of an experiment is generally a question for the jury.⁵

§ 3174. (Administrative Requirements; Relevancy; Relevancy of Similarity); Varying Phenomena.—While it may be frankly conceded that should a collateral occurrence involving the uniformity of natural law be presented which should be precisely similar in all its circumstances to the principal case and result in the creation of a particular state or the happening of a given event the results of such collateral occurrence would be highly probative, the administrative difficulty experienced by the courts consists in the fact that such precisely similar collateral occasions are seldom encountered in practice. The rule, therefore, as usually stated, permits the reception of collateral occurrences which are *substantially* similar in their circumstances, i. e., are similar in all essential particulars.¹ Where, however, the collateral occasion fails to present some substantial similarity to the one involved in the inquiry, i. e., where important or material variations in the phenomena of the two occasions are presented, proof of what hap-

Mississippi.—Dillard v. State, 58 Miss. 368 (1880).

Missouri.—State v. Sanders, 68 Mo. 202, 30 Am. Rep. 782 (1878).

Tennessee.—Jim v. State, 4 Humph. 289 (1843).

2. Busby v. State, 77 Ala. 66 (1884); County of Sonoma v. Stofen, 125 Cal. 32, 57 Pac. 681 (1899); People v. Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833 (1898); State v. Knapp, 45 N. H. 148 (1863).

3. *Connecticut*.—State v. Smith, 49 Conn. 376 (1881).

Iowa.—Brooke v. Chicago, etc., R. Co., 81 Iowa 504, 47 N. W. 74 (1890).

Massachusetts.—Eidt v. Cutter, 127 Mass. 522 (1879).

Nebraska.—Polin v. State, 14 Nebr. 540, 16 N. W. 898 (1883).

Oregon.—Leonard v. So. Pac. Co., 21 Oreg. 555, 28 Pac. 887 (1892).

Pennsylvania.—Com. v. Twitchell, 1 Brews. 551 (1869).

4. State v. Nowells, 135 Iowa 53, 109 N. W. 1016 (1906); Com. v. Buxton, 205 Mass. 49, 91 N. E. 128 (1910); Sullivan v. Com., 93 Pa. St. 284 (1880); R. v. Hassaelteine, 12 Cox Cr. C. 404 (1873).

5. McClendon v. State, 7 Ga. App. 784, 68 S. E. 331 (1910).

§ 3174-1. § 3168.

pened on a collateral occasion will be rejected. The instances in which this familiar rule has been applied by the courts are extremely numerous. In certain cases, the probative difficulty apparently is that the uniformity of action between any particular antecedent and consequent, or between a series of antecedents and a set of consequences identified on a particular occasion, is apt to present itself at another time complicated with a large number of additional circumstances which may very possibly affect the result. Thus, for example, the yield of hay on a certain farm in a given year cannot be shown by evidence of the number of acres in gross and the average yield per acre on that farm in past years.² In like manner, a party defending an action brought upon a claim arising out of an accident in a certain mine cannot show that there had been no previous accident in it.³ The more numerous, and complicated, and uncertain the elements in the two occurrences, the less will be the probative force of such elements of similarity as they present. Thus, the fact that if there had been the number of books claimed, in an action on a policy of fire insurance, to have been burned at a fire in a certain building, remnants of them would have been found among the ruins, cannot be proved by showing that on the occasion of another fire, the extent and intensity of which are not shown, remnants of charred or half-burned books were found.⁴ In the same way, the defective nature of a machine cannot be shown, it is said, by evidence of what another machine manufactured by the same company did when set to work.⁵ In like manner, what expenses were necessarily made by an engineer on the construction of one section of a railroad cannot be proved by evidence of what expenses were made upon another section of the same railroad.⁶

On the other hand, where one continuous state or condition of

2. *Patrick v. Howard*, 47 Mich. 40, 10 N. W. 71 (1881).

3. *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 42 N. E. 501 (1895).

"It was not competent for the defendant to show that no accident had ever before happened in the mine. There were too many uncertain and undetermined elements which might affect the safety of its workmen to make the testimony

valuable or proper." *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 75, 42 N. E. 501 (1895), per Knowlton, J.

4. *Names v. Dwelling House Ins. Co.*, 95 Iowa 642, 64 N. W. 628 (1895).

5. *Craver v. Hornburg*, 26 Kan. 94 (1881).

6. *Pensacola, etc., R. Co. v. Atkinson*, 20 Fla. 450 (1884).

affairs is involved in the inquiry, the same administrative considerations do not apply. The presumption of continuance or against change,⁷ operates to render the inference that a state of affairs once shown to exist will continue to do so for a length of time proportionate to the permanence of the state or condition and to the improbability that a modifying cause will intervene. Thus, in an action involving the condition of property at a particular place, its condition at the same place before⁸ or after⁹ the time in question, if the time is within the bounds of relevancy, may be shown. So, too, the speed of an engine at one place is probative evidence of its speed at a place a mile¹⁰ or a mile and a half¹¹ distant where there is no evidence of a change in its rate. A state of affairs or condition of things shown to exist at a time outside the operation of the presumption of continuance will not raise the inference that it existed at the time in question. These considerations apply to permanent facts such as residence,¹² or to fixed bodily states, like a chronic disease of the womb.¹³ By analogy, where an interval not beyond the period of the permanence of an operating cause, occurs after the existence of a prior state or condition, a recurrence of the same state or condition may be a relevant inference.

7. § 1030.

8. *Alabama*.—*Louisville & N. R. Co. v. Wilson*, 162 Ala. 588, 50 So. 188 (1909).

California.—*Brunger v. Pioneer Roll Paper Co.*, 6 Cal. App. 691, 92 Pac. 1043 (1907).

Michigan.—*Lay v. City of Adrian*, 75 Mich. 438, 42 N. W. 959 (1889).

Nebraska.—*Union Pac. R. Co. v. Edmondson*, 77 Neb. 682, 110 N. W. 650 (1906).

Vermont.—*Lincoln v. Central Vt. R. Co.*, 82 Vt. 187, 72 Atl. 821, 137 Am. St. Rep. 998 (1909).

9. *Alabama*.—*Lewy Art Co. v. Agricola*, 169 Ala. 60, 53 So. 145 (1910); *Louisville & N. R. Co. v. Wilson*, 162 Ala. 588, 50 So. 188 (1909).

California.—*Brunger v. Pioneer Roll Paper Co.*, 6 Cal. App. 691, 92 Pac. 1043 (1907).

Illinois.—*City of Chicago v. Jarvis*,

226 Ill. 614, 80 N. E. 1079 (1907).

Iowa.—*Jackson v. Grinnell*, 144 Iowa 232, 122 N. W. 911 (1909).

Missouri.—*Miller v. Town of Canton*, 124 Mo. App. 439, 101 S. W. 709 (1907).

Nebraska.—*Union Pac. R. Co. v. Edmondson*, 77 Neb. 682, 110 N. W. 650 (1906).

Pennsylvania.—*Lockard v. Bare*, 230 Pa. St. 591, 79 Atl. 802 (1911).

Washington.—*Mrozevich v. Wester Steel Corporation*, 61 Wash. 668, 112 Pac. 925 (1911).

10. *Lynch v. Chicago, etc., Ry. Co.*, 208 Mo. 1, 106 S. W. 68 (1907).

11. *Louisville & N. R. Co. v. Woods*, 105 Ala. 561, 17 So. 41 (1894).

12. *Bradford v. Haggerthy*, 11 Ala. 698 (1847).

13. *Walton v. Cottingham*, 30 Tex. 772 (1868).

§ 3175. (*Administrative Requirements; Relevancy; Relevancy of Similarity; Varying Phenomena*); Similar Accidents.

— Evidence of other occurrences which present only certain features of resemblance, others being divergent or unascertainable, is rejected as inadmissible in proportion to the number and probable inferences of the phenomena as to which practical coincidence does not exist. Similar accidents which have only features of resemblance in particulars which are not essential do not have such a relation of relevancy as makes them probative.¹ They are, therefore, inadmissible; — however great the administrative necessity.² Here, as often, the evidence that is rejected by the court is merely the inference that a certain accident occurred at a particular time, because one similar in certain particulars happened at another. Other logical use of such accidents, e. g., to illustrate what happened — as a physical happening under circumstances somewhat analogous, may be freely made.³

§ 3176. (*Administrative Requirements; Relevancy*); Relevancy of Dissimilarity.— The administrative necessity for further use of other occasions beyond this relevancy of similarity is most largely due to the fact that neither in the realm of nature nor mental or moral world do the actual phenomena of what happened on any particular occasion presented for investigation come before the tribunal in such simplicity, absence of complexity, as to leave the result, the obvious effect of a single and sufficient cause. Still less often will it be found to happen in practice that the antecedents and conditions which present themselves on another or *collateral* occasion, are precisely reproduced in exactly the same relations and proportions, and no other, that are shown to have existed on the occasion in question. Instead of the simple antecedents A. and B., being present upon the collateral occasion and resulting in the production of the consequent X., it may frequently happen that there are at least four antecedents present, A., B., C., and D., while the result is no longer simply X., but is complicated into a compound, composite, or blended result XY. It is evident

§ 3175-1. See, §§ 3151, 3167, 3168.

2. Florida Cent., etc., R. Co. v. Mooney, 45 Fla. 286, 33 So. 1010, 110 Am. St. Rep. 73 (1903); Georgia Cent. R. Co. v. Duffey, 116 Ga. 346,

42 S. E. 510 (1902); Smart v. Kansas City, 91 Mo. App. 586 (1901).

3. Aurora v. Brown, 12 Ill. App. 122, affirmed 109 Ill. 165 (1882).

that, in order to make this instance of the uniformity of nature valuable in establishing by circumstantial evidence the proposition that on the occasion involved in the inquiry the union of A. and B., produced X., it is essential that the proposition ABCD equals XY should be reduced, if possible, to the simpler proposition AB equals X or one substantially equivalent to it. It seems equally clear that, while the relevancy of similarity based on the uniformity of nature will alone avail, should this simpler proposition AB equals X be established from the more complicated one ABCD equals XY, to prove that AB on the occasion submitted to judicial inquiry actually produced X, it will directly and of itself have but little effect in evolving from the proposition ABCD equals XY the necessary one that AB equals X. Were it possible to repeat, for an indefinite number of times, the inter-application A., B., C., and D. the uniformity of nature, the relevancy of similarity, would add nothing to our knowledge. It would give us on all occasions, as often as tried, the same enigmatical result XY. The difficulty in the situation obviously is that we do not know the influence, if any, of C. and D. in producing X. Should the proposition or contention of a party in a litigated matter be that A. and B. produce X., the proof that A., B., C., and D. produce XY. is inconclusive, if not entirely lacking in probative force; — for the reason that C. and D., either singly or in combination, may equally well explain the existence of X. or assist to do so. His reliance, in this forensic situation, cannot be upon similar instances, but upon *dissimilar* ones; or, more properly, upon similar instances permitting his use of dissimilar features. Should it happen, as the result of such a use of other instances, that wherever A. and B. were present, X. followed, although neither C. nor D. could have been operative, the possible explanation that C. or D. were instrumental in the production of X. would be no longer tenable. Should it happen, for example, that A., B., and E. should be found to result in XZ., the causal relation between C. or D. and X. would no longer afford an infirmative explanation to the truth of the contention that A. and B. produce X. The proponent may even go further. He may, if he can, show that when A. and B. are *not* present, X. uniformly fails to occur. He may, for example, show that CDE equals YZ; — in which latter case C. and D. may fairly be assumed to have been throughout merely a condition rather than a cause.

This may apparently be termed the relevancy of dissimilarity. It operates, not by way of direct proof of any relevant fact, constituent or probative, but by the indirect process of strengthening the affirmative case or contention of a litigant by the removal of infirmative hypotheses or explanations applicable to it. In other words, evidence in this form of relevancy adds no weight to the positive scale of the proponent's contention; it does much the same office, however, by removing probative force from the negative one. While it is, in a way, a method of using the relevancy of similarity, it is not, as the proof of a precisely similar occurrence would be, directly *probative* as to the existence of a *res gestae* fact. It is, on the contrary, *corroborative* in its mode of operation; and, like all corroboration,¹ its distinctive function is to strengthen an affirmative case already made by eliminating possible infirmative theories or explanations as to it.

§ 3177. (Administrative Requirements; Relevancy; Relevancy of Dissimilarity); Natural Induction.—As has just been said,¹ probative results gained by the use of the relevancy of similarity or other evidence that a given occurrence happened or a particular state of things came into being may, in many cases, be reinforced for forensic purposes by proof of what happened upon other occasions which present features dissimilar to those of the event or state under investigation. This occurs with special frequency where the actual happenings on a given occasion are not disputed, but the real issue between the parties is as to what *caused* them. The contention of the actor is that a particular cause, say A., was the operative antecedent in producing the result X. and that, under the substantive law, his opponent is liable for the effects produced by cause A. The forensic difficulty is that other antecedents, say B. and C. were present on the occasion when result X. came into being. The question in dispute is as to whether B. and C. were efficient causes or part of the efficient cause; or were, on the contrary, mere *conditions* or operative in the creation of some result other than X. In order to corroborate the affirmative case made out by the actor, it may be necessary to eliminate the infirmative hypotheses or explanations which arise from the

possible causal relation between B. or C. and X. This can frequently best be done by proving that on other occasions where A. was present and B. and C. were not, X. continued to appear; or that where B. and C. were present and A. was not, X failed to result. The first has been styled by Mr. John Stuart Mill,² the inductive Method of Agreement,³ the second,⁴ the Inductive Method of Difference.⁵ The subsidiary methods of induction arise from these fundamental ones. Under favorable circumstances, it may be possible to *combine* the Method of Agreement and the Method of Difference into a very satisfactory probative result; — by showing both that wherever A. is present X. follows, regardless of the other factors; and that wherever A. is absent, X. fails to appear whatever other antecedents may be present. This is the Joint Method of Agreement and Difference formulated by Mr. Mill⁶ as a third canon of induction.⁷ On the other hand, where the circumstances do not permit the total separation of A. from B. and C., which is essential to the use of the Method of Agreement or that of Difference, it may still be possible, under appropriate circumstances, to obtain much light as to the causal relations between A., B., C., and X. by varying the *proportions* in which A., B., and C. are made to appear on different occasions of their concurrent relation as antecedents. Should it appear, as a result of such a use of other occurrences, that in exact proportion as A. increases its share in the joint set of antecedents, X. increases in volume, quantity or intensity, and that in the same ratio to which the presence of A. is made to diminish, X. grows less in these and similar quantitative or qualitative particulars, any changes in the volume or intensity of B. or C. being apparently without effect in increasing or diminishing X., these facts are probative under the uniformity of nature, in a greater or less degree according to the circumstances to the effect that A. is the cause of X. This method of reasoning Mill has given the title of the Method of Concomitant Variations.⁸

2. Mill, System of Logic, Bk. III, Ch. 8, § 1.

3. § 3178.

4. Mill, System of Logic, Bk. III, Ch. 8, § 2.

5. § 3179.

6. Mill, System of Logic, Bk. III, Ch. 8, § 4.

7. § 3180.

8. Mill, System of Logic, Bk. III, Ch. 8, § 6.

§ 3178. (*Administrative Requirements; Relevancy; Relevancy of Dissimilarity; Natural Induction*); Method of Agreement.—The method of inductive reasoning by Agreement, formulated into a canon by Mill,¹ is as follows: "If two or more instances of the phenomenon under investigation have only one circumstance in common, the circumstance in which alone all the instances agree, is the cause (or effect) of the given phenomenon." In other words, where the question raised is as to which of several antecedent circumstances is the cause of a given result or effect, other occurrences in which the antecedent circumstances for which liability is claimed were present and the same result followed may be received in evidence;—provided that the facts of the other occurrences are so varied as to leave the antecedent circumstances claimed to have been the cause, the only constant antecedent circumstance.² Such an invariable recurrence in the phenomenon under every variety of circumstance when only one antecedent fact remains constant is, under the uniformity of nature, evidence tending to show that a causal relation exists between the phenomenon and the constant antecedent circumstance.³ Thus, the question being as to whether A. was injured by the unsafe and dangerous character of a sidewalk, evidence of similar accidents to other persons at the same place and about the same time has been received;⁴—not for the purpose of showing that the plaintiff was injured, but for that of exhibiting the dangerous nature of the condition of the sidewalk, that it was capable and calculated to

§ 3178-1. Mill, *System of Logic*, Bk. III, Ch. 8, § 1.

2. *Wilmington Dental Mfg. Co. v. Adams Express Co.*, 8 Houst. (Del.) 329, 32 Atl. 250 (1888); *Whitaker v. Bank of England*, 6 C. & P. 700, 25 E. C. L. 646 (1834). See also, *Hathaway v. Tinkham*, 148 Mass. 85, 19 N. E. 18 (1888).

3. *Alabama*.—*Birmingham v. Starr*, 112 Ala. 98, 20 So. 424 (1895).

Illinois.—*Rowlands v. Elgin*, 66 Ill. App. 66 (1895).

Iowa.—*Heinmiller v. Winston*, 131 Iowa 32, 107 N. W. 1102, 6 L. R. A. (N. S.) 150n, 117 Am. St. Rep. 405 (1906).

Kansas.—*Junction City v. Blades*, 1 Kan. App. 85, 41 Pac. 677 (1895).

Maine.—*Crocker v. McGregor*, 76 Me. 282, 49 Am. Dec. 611 (1884).

New York.—*Kuh v. Metropolitan El. R. Co.*, 31 N. Y. St. Rep. 406, 58 N. Y. Super. Ct. 138, 9 N. Y. Suppl. 710 (1890).

Texas.—*Houston Cotton Oil Co. v. Trammell*, (Civ. App. 1903) 72 S. W. 244, *reversed*, 96 Tex. 598, 74 S. W. 899; *Meyer v. Wolnitzek*, (Civ. App. 1901) 63 S. W. 1058.

England.—*Reg. v. Cooper*, 1 L. R. Q. B. D. 19, 13 Cox Cr. C. 123, 45 L. J. M. C. 15, 33 L. T. Rep. (N. S.) 754, 24 Wkly. Rep. 279 (1875); *Reg. v. Stenson, etc.*, 12 Cox Cr. C. 111, 25 L. T. Rep. (N. S.) 666 (1871).

4. *Rowlands v. Elgin*, 66 Ill. App. 66 (1895); *City of Aurora v. Brown*,

infect injury, that the actual psysical situation of affairs, rather than any subjective quality in the conduct of the plaintiff — which could scarcely have attached to the other persons injured — was in fact the cause of the injury. The same administrative ruling has been applied, not only to other highways,⁵ but to accidents said to have been caused by the dangerous condition of roadbeds,⁶ and the like; or by a defect in a hedge⁷ or other structure. Injuries caused by a given machine⁸ have been held to stand in the same position; — the probative force of the evidence consisting in the fact that, as the other circumstances vary, the condition of that which has caused injury remains approximately constant. In an action by an employee for injuries alleged to have resulted from particles of lead in the air where he worked, to show that such was the cause of his illness, evidence is competent that fellow-workers were also affected with lead poisoning.⁹ This relevancy of dissimilarity is entirely apart from the independent relevancy of these occurrences as showing notice to the responsible authorities by the notoriety of these occurrences themselves.¹⁰ In much the same way, that a certain result was due to a defective system of

12 Ill. App. 122 (1883), *aff'd* 109 Ill. 165 (1883).

5. *Alabama*.—Southern R. Co. v. Posey, 124 Ala. 486, 26 So. 914 (1899).

Colorado.—Sanderson v. Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544 (1884).

Illinois.—Taylorville v. Stafford, 196 Ill. 288, 63 N. E. 124 (1902).

Kansas.—Madison Tp. v. Scott, 9 Kan. App. 871, 61 Pac. 967 (1900).

Kentucky.—Georgetown, etc., Turnpike Road Co. v. Cannon, 12 Ky. L. Rep. 257 (1885).

New Hampshire.—Dow v. Weare, 68 N. H. 345, 44 Atl. 489 (1895).

New York.—Burns v. Schenectady, 24 Hun 10 (1881).

Ohio.—Lake Shore, etc., R. Co. v. Beall, 13 Ohio Cir. Ct. 605, 6 Ohio Cir. Dec. 250, *affirmed* 53 Ohio St. 674 (1895).

Pennsylvania.—Beardslee v. Co-

lumbia Tp., 5 Lack. Leg. N. 290 (1895).

United States.—District of Columbia v. Armes, 107 U. S. 519, 2 S. Ct. 840, 27 L. ed. 618 (1882).

6. *Wilder v. Metropolitan St. R. Co.*, 10 N. Y. App. Div. 364, 41 N. Y. Suppl. 931, 75 N. Y. St. Rep. 1302, *affirmed* 161 N. Y. 665, 57 N. E. 1128 (1896).

7. *Rogers v. New York, etc., Bridge*, 159 N. Y. 556, 54 N. E. 1094 (1899).

8. *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620, 37 S. E. 873 (1900); *Fraser & Chalmers v. Schroeder*, 163 Ill. 459, 45 N. E. 288 (1896); *Van-Doorn v. Heap*, 160 Mich. 199, 16 Det. Leg. N. 1101, 125 N. W. 11 (1910); *Hansen v. Seattle Lumber Co.*, 41 Wash. 349, 83 Pac. 102 (1906).

9. *Shea v. Glendale Elastic Fabrics Co.*, 162 Mass. 463, 38 N. E. 1123 (1894).

10. §§ 3230, 3250.

municipal direction for public affairs, may be shown by proof of similar occurrences.¹¹

Conduct of animals.—The same species of evidence has been received where the uniformity involved is not so much that of nature as that of mental action,¹² i. e., where the operation of the alleged cause for which liability was claimed was more distinctly applied to the volitional action of men or animals. Thus, in an action for injuries to plaintiff by the frightening of a horse by defendant's steam whistle maintained by him in close proximity to a highway, evidence that other horses, at about the same time, had been similarly frightened by the same whistle is competent.¹³ The operation of the evidence of other occurrences in such cases is that of dissimilarity by the elimination of infirmative explanations suggesting the operation of other causes. That the plaintiff's horse was frightened on the occasion of the blowing of this whistle is, perhaps, not in dispute. It is possible, however, for the defendant to claim that the real cause or a material part of the cause lay in the careless nature of the way in which the horse was being driven, in the presence at the time of a steam roller, or by something in the nature and disposition of the animal himself — that he was young, badly broken, inclined to shy, etc. Under these circumstances, evidence that older horses which had other dispositions and were driven by other drivers, were frightened by the whistle under a great variety of circumstances, where the whistle alone remained the constant antecedent of the frightening, may be highly probative. In like manner, on a question whether a building,¹⁴ pile of road scrapings¹⁵ or lumber,¹⁶ steam shovel¹⁷ or roller,¹⁸ escaping

11. *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95 (1878).

12. § 3261.

13. *Crocker v. McGregor*, 76 Me. 282, 49 Am. Dec. 611 (1884); *Hill v. Portland, etc.*, R. R. Co., 55 Me. 438, 92 Am. Dec. 601 (1867); *City of Winona v. Botzet*, 169 Fed. 321, 94 C. C. A. 563 (1909).

14. *House v. Metcalf*, 27 Conn. 631 (1858); *Elgin v. Thompson*, 98 Ill. App. 358 (1901); *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55 (1872).

15. *Brown v. Eastern, etc., R. Co.*, 22 Q. B. D. 391, 58 L. J. Q. B. 212 (1889).

16. *Golden v. Chicago, etc., Ry. Co.*, 84 Mo. App. 59 (1900); *Valley v. Concord, etc., Rd.*, 68 N. H. 546, 38 Atl. 383 (1896).

17. *Heinmiller v. Winston Bros.*, 131 Iowa 32, 107 N. W. 1102, 6 L. R. A. (N. S.) 150, 117 Am. St. Rep. 405 (1906).

18. *City of Elgin v. Thompson*, 98 Ill. App. 358 (1901).

steam,¹⁹ or other unusual phenomenon,²⁰ frightened a horse, the fact that on other occasions, under various circumstances, it had that effect, is competent to establish the causal relationship on that particular occasion.

Replies of opponent.—In reply to such evidence, it is, of course, open to the opponent and, indeed, to avoid its effect, it is necessary for him to contend that new affirmative hypotheses or explanations are introduced by the facts of the collateral occasion. It is precisely this right of the opponent which constitutes the administrative danger of collateral issues which forms an important reason for rejecting evidence of this nature. The opponent may properly contend, if the phenomenon continues to follow when other occurrences are added in which the liability cause is present, that the additional elements presented by these other occasions are the real causes for the constant recurrence of the phenomenon.²¹ It would seem that the opponent should be allowed to show instances when the alleged cause was present and the phenomenon did not occur, i. e., that the result did not follow the presence of that particular antecedent. In some instances the opponent has been permitted to make such showing.²² For example, in negligence cases, it has been held that the defendant may show, in avoidance of the plaintiff's claim that the injury resulted from some act or omission of the defendant, the existence of similar conditions or the doing of similar acts and that no accident or injury resulted therefrom.²³ Thus, a railroad company sued for negligence in permitting a piece of pipe to remain suspended from its water tank—by means of which plaintiff's in-

19. *Gorden v. Boston & M. R. R.*, 58 N. H. 396 (1878). See also, *Lewis v. Eastern R. R.*, 60 N. H. 187 (1880).

20. *Frazee v. City of Cedar Rapids*, 151 Iowa 251, 131 N. W. 33 (1911) (boulder); *Bemis v. Temple*, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254 (1894) (flag); *Smith v. Sherwood Tp.*, 62 Mich. 159, 28 N. W. 806 (1886) (hole in bridge).

21. *Finn v. Clark*, 12 Allen (Mass.) 522 (1866).

22. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525 (1890); *Shirley v. Keagy*, 126 Pa. St. 282, 17 Atl. 607 (1889).

23. *Connecticut*.—*Calkins v. City of Hartford*, 33 Conn. 57, 87 Am. Dec. 194 (1865).

Illinois.—*Town of Fairbury v. Rodgers*, 2 Ill. App. 96 (1878).

Mississippi.—*Southern Ry. Co. v. MacLellan*, 80 Miss. 700, 32 So. 283 (1902).

Missouri.—*Kelley v. Parker-Washington Co.*, 107 Mo. App. 490, 81 S. W. 631 (1904).

New York.—*Havlin v. Krulish*, 26 Misc. R. 381, 56 N. Y. Supp. 275 (1899).

Ohio.—*Hoppe v. Parmalee*, 20 Ohio Cir. Ct. R. 303, 11 O. C. D. 24 (1900).

testate suffered injury — might, it was held, show that the pipe had hung in the same position for years and that no one had received injury from it.²⁴ In like manner, where a party, being sued for the price of a lot of frozen codfish, set up that the fish were worthless because they had been previously thawed before delivery and, in support of this contention, introduced evidence of the thawing temperature during the period prior to delivery, the plaintiff, in reply, was permitted to show that other codfish, at the same place, during the same time, exposed to the same conditions, were in a sound state and had not thawed.²⁵ But the matter is one so peculiarly of administration that it is not surprising to find contrary decisions. In many cases it has been held that the absence of a prior accident has no probative force to show the defendant's absence of negligence and the evidence has, therefore, been rejected.²⁶ Thus, where a ferry-man was sued for damages to cattle which fell overboard and were drowned while in transportation, by reason, as was claimed, of the negligence of the ferry-man in not providing a suitable barrier to restrain the animals, it was held that the defendant could not set up in defense

24. *East Tennessee, etc., R. Co. v. Thompson*, 94 Ala. 636, 10 So. 280 (1891).

25. *Hodgkins v. Chappell*, 128 Mass. 197 (1880).

26. *California*.—*Sheehan v. Hammond*, 2 Cal. App. 371, 84 Pac. 340 (1906).

Illinois.—*Brooks v. Chicago, etc., Coal Co.*, 234 Ill. 372, 84 N. E. 1028 (1908); *Mobile & O. R. Co. v. Valloze*, 214 Ill. 124, 73 N. E. 416 (1905).

Indiana.—*Louisville, etc., R. Co. v. Kemper*, 153 Ind. 618, 53 N. E. 931 (1899); *Bauer v. City of Indianapolis*, 99 Ind. 56 (1884).

Iowa.—*Kirchoff v. Hohnsbehn Creamery Supply Co.*, 148 Iowa 508, 123 N. W. 210 (1909); *Bryce v. Chicago, etc., R. Co.*, 103 Iowa 665, 72 N. W. 780 (1897).

Kentucky.—*Republic Iron & Steel Works v. Gregg*, 24 Ky. L. Rep. 1627,

71 S. W. 900 (1903); *Louisville & N. R. Co. v. Wallace's Adm'r*, 6 Ky. L. Rep. (abstract) 302 (1884).

Massachusetts.—*Marvin v. City of New Bedford*, 158 Mass. 464, 33 N. E. 605 (1893).

Michigan.—*Larned v. Vanderlinde*, 165 Mich. 464, 131 N. W. 165 (1911).

Missouri.—*Chase v. Wabash Ry. Co.*, 156 Mo. App. 696, 137 S. W. 999 (1911); *Kallher v. Parker-Washington Co.*, 155 Mo. App. 372, 137 S. W. 76 (1911).

New Jersey.—*Temperance Hall Ass'n v. Giles*, 33 N. J. L. 260 (1860).

New York.—*Ward v. City of Troy*, 55 App. Div. 192, 66 N. Y. Suppl. 925 (1900).

Wisconsin.—*Mueller v. Northwestern Iron Co.*, 125 Wis. 326, 104 N. W. 67 (1905); *Kreider v. Wisconsin, etc., Pulp Co.*, 110 Wis. 645, 86 N. W. 662 (1901).

that for thirty years other cattle had been transported in safety in a precisely similar boat.²⁷

That this result followed when the alleged cause was not present, may also be shown by the opponent in reply.²⁸ But, naturally, the evidence is not conclusive to the effect that the alleged cause on the occasion in question was not the real one.²⁹ The evidence amounts only to showing that another cause might have produced the same result. It is, however, essential that no new and irrelevant controlling event should have been introduced by the proponent on such occasions.

Administrative details.—The question as to the propriety of admitting this class of evidence is an administrative one. Whether the required necessity has been shown,³⁰ or the proper degree of relevancy³¹ established, are, within the limits prescribed by reason, subject to the administrative function of the presiding judge. For similar reasons, the determination as to how minutely a party may go into the *details* of the other occurrences will be determined by the court.³² In order to admit the evidence, the presiding judge must be satisfied that the relative conditions of the other occurrences are such as to render them probative on the question before the court.³³ Remoteness in point of time, if within the bounds of relevancy, affects merely the weight to be attached to the evidence of other transactions in this connection.³⁴

27. *Lewis v. Smith*, 107 Mass. 334 (1871).

28. *California*.—*Fogel v. San Francisco, etc.*, R. Co., 110 Cal. 17, 42 Pac. 565 (1895); *Remy v. Olds*, 99 Cal. 19, 34 Pac. 216, 21 L. R. A. 645 (1893).

Indiana.—*Lotz v. Scott*, 103 Ind. 155, 2 N. E. 560 (1885).

Massachusetts.—*Bradford v. Boylston, F. & M. Ins. Co.*, 11 Pick. 162 (1831).

England.—*Folkes v. Chadd*, 3 Dougl. 157, 26 E. C. L. 111 (1782).

New South Wales.—*Bode v. Wollongong Gas-Light Co., Ltd.*, 10 State Reports 566, 27 Weekly Notes 155 (1910).

29. *Dorman v. Ames*, 12 Minn.

451, (Gil. 347) (1867); *Haynes v. Burlington*, 38 Vt. 350 (1865).

30. § 3163.

31. § 3166.

32. *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.) 169, 85 Am. Dec. 697 (1864).

33. *Hawks v. Charlemont*, 110 Mass. 110 (1872); *Standish v. Washburn*, 21 Pick. (Mass.) 237 (1838). See also, *O. H. Jewell Filter Co. v. Kirk*, 200 Ill. 382, 65 N. E. 698 (1902), *affirming* 102 Ill. App. 246; *Crossen v. Grandy*, 42 Oreg. 282, 70 Pac. 906 (1902).

34. *Lake Shore, etc., R. Co. v. Beall*, 13 Ohio Cir. Ct. 605, 6 Ohio Cir. Dec. 350, *affirmed*, 53 Ohio St. 674 (1897).

§ 3179. (*Administrative Requirements; Relevancy; Relevancy of Dissimilarity; Natural Induction*); Method of Difference.—John Stuart Mill states his second canon of induction, styled by him the Method of Difference:¹ “If an instance in which the phenomenon under investigation occurs, and an instance in which it does not occur, have every instance in common save one, that one occurring only in the former; the circumstance in which alone the two instances differ, is the effect, or cause, or a necessary part of the cause, of the phenomenon.” Where the relation of cause and effect is to be established, it may not only be shown that in any combination of circumstances where the cause is present and permitted to operate freely, the result followed,² but also that when the cause is absent, however the circumstances may otherwise be similar, the result does not appear.³ Thus, where a person is sued for negligently shelling pop-corn, cracking the kernels and so making the pop-corn valueless, the plaintiff may show that precisely similar pop-corn was shelled, under the same conditions, by other persons without injuring it.⁴ And, in an action for injuries arising from the fright of a horse, to show that the cause of the fright was an unusual noise⁵ or object⁶ under the control of the defendant, it may be shown that, on other occasions in the same place, all of the conditions, except the alleged cause of the animal’s fright, being present, it gave no indications of fear.

§ 3180. (*Administrative Requirements; Relevancy; Relevancy of Dissimilarity; Natural Induction*); Joint Method of Agreement and Difference.—The Joint Method of Agreement and Difference is stated by Mill in the form of a canon of Induction:¹ “If two or more instances in which the phenomenon occurs have only one circumstance in common, while two or more instances in which it does not occur have nothing in common save the absence of that circumstance, the circumstance in which alone the two sets of instances differ, is the effect, or cause, or a necessary part of the cause, of the phenomenon.” Instances of the ap-

§ 3179-1. Mill, *System of Logic*, Bk. III, Ch. 8, § 2.

2. § 3178.

3. *Avery v. Burrall*, 118 Mich 672, 77 N. W. 272 (1898).

4. *Chase v. Blodgett Milling Co.*, 111 Wis. 655, 87 N. W. 826 (1901).

5. *Southern Ry. Co. v. Hutcheson*, 136 Ga. 591, 71 S. E. 802 (1911).

6. *Wiltse v. State Road Bridge Co.*, 63 Mich. 639, 30 N. W. 370 (1886).

§ 3180-1. Mill, *System of Logic*, Bk. III, Ch. 8, § 4.

plication of this canon are so readily suggested as to require but little comment. In case of states or occurrences, the numerous cases, similar in all other essential particulars where the alleged cause is absent and the phenomenon fails to appear, are significant in this connection of the existence of a causal relation, in conjunction with the uniformity of the appearance of the result under all circumstances when the cause is present. The very common statement that a thing never happens except when a given antecedent is present, and then that it always happens — for example, that a horse never shies except when called upon to pass a given pile of lumber and then that he always shies — is not only probative, if credited, in both its branches, were these taken separately; but a high degree of probative force — under the Joint Method of Agreement and Difference — arises from the united force. Thus, in an action against a cold storage company for damage to butter in storage, it may be shown that similar butter belonging to the plaintiff, but kept in another place, was not damaged, while butter of like grade belonging to others than the plaintiff and deposited with the defendant was damaged.² The evidence not only eliminates the hypothesis that damage was caused by any fault inherent in the butter, but tends to show that the condition of the butter was the result of defendant's acts or omissions.

§ 3181. (*Administrative Requirements; Relevancy; Relevancy of Dissimilarity; Natural Induction*); Method of Concomitant Variations.—Still another method of induction is utilized in connection with proof by other occurrences. It is thus stated by Mill:¹ “Whatever phenomenon varies in any manner whenever another phenomenon varies in some particular manner, is either a cause or an effect of that phenomenon, or is connected with it through some fact of causation.” If, in proportion as the quantity of a given element is increased, a corresponding increase in the result takes place; or if, on the other hand, in proportion as the quantity of a given element is diminished, the result decreases or is minimized in the same degree, a relation of cause and effect is rendered probable. Should it occur that, everything else remaining constant, the nearer a horse was brought to a given pile

² Rudell v. Grand Rapids Cold Storage Co., 136 Mich. 528, 11 Det. Bk. III, Ch. 8, § 6.
¹ Leg. N. 98, 99 N. W. 756 (1904).

of lumber, the more frightened he became; and, in proportion as he withdrew from it, his terror diminished in the same proportion, and this correspondence appeared every time the experiment was repeated, *toties quoties*, the fact will be highly probative that a relation of cause and effect existed between the proximity to the pile of lumber and the fright of the animal.²

§ 3182. Inference Other than Similar Occurrences.—It is to be observed that the administrative principle under consideration applies merely to the inference that a certain event occurred at a particular time because one possessing the same characteristics occurred at another; or that a certain state of affairs existed on a given occasion because the same antecedents or causes then present had already produced it on another. Where the proponent does not ask that this inference be drawn in his favor, the administrative rule under consideration may not come into operation in respect to a large number of other inferences which may properly be drawn from the happening of an event or the existence of a state of affairs on another occasion. Thus, in an action against a carrier for loss of goods where the question was whether the goods claimed to have been lost could have been packed in the box delivered to the carrier, evidence that the shipper had previously put similar goods in a similar box is highly probative and should be admitted.¹

§ 3183. (*Inferences Other than Similar Occurrences*); Capability; Causation.—In much the same way, whether a given cause, of any nature, was *capable* of producing a given result may be satisfactorily established by proof that it actually accomplished it on another occasion.¹ The principle under consideration has

2. See, *Valley v. Concord, etc., Rd.*, 68 N. H. 546, 38 Atl. 383 (1893).

§ 3182-1. *Mussellam v. Cincinnati, etc., R. Co.*, 126 Ky. 500, 31 Ky. L. Rep. 908, 104 S. W. 337 (1907).

§ 3183-1 *Illinois*.—*Cooper v. Randall*, 59 Ill. 317 (1871).

Kentucky.—*Carpenter v. Laswell*, 63 S. W. 609, 23 Ky. L. Rep. 686 (1901).

Massachusetts.—*Lane v. Moore*, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430 (1890).

New Hampshire.—*Valley v. Concord, etc., R. Co.*, 68 N. H. 546, 38 Atl. 383 (1896); *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55 (1872).

North Carolina.—*Leathers v. Blackwell's Durham Tobacco Co.*, 144 N. C. 330, 57 S. E. 11, 9 L. R. A. (N. S.) 349n (1907).

Rhode Island.—*Staple v. Rhode Island Suburban Ry. Co.*, 67 Atl. 431 (1906).

apparently no application to such a use of the fact of a similar occurrence. In much the same way the power of a given force² may be established by showing its effect on other occasions, or its effect upon other substances than the one in question upon the same occasion. Thus, to show the force of ice falling from the gutter-spout of a building and injuring a person near a window of an adjoining building, it may be shown that the ice broke windows and boards of other buildings.³ To show that there are causes operating in certain machines which might cause an explosion, prior explosions may be shown.⁴

§ 3184. (*Inferences Other than Similar Occurrences; Capability*); Mechanical Devices.—As an example of the same inference that a given cause was adequate to produce a particular effect because it has done so on another occasion, it is familiar that whenever, in the case of a mechanical contrivance, it is asserted that the machine could not have done the thing alleged concerning it, it is a sufficient answer to prove that it did that precise thing, or one which demonstrated its capacity to do so, on another occasion. Thus, where it was claimed, in an action for injuries caused by a collision with a trolley car, that the car could not have been going at the speed claimed because it was impossible that it should develop that rate of progress at that place on account of insufficient power and bad tracks, evidence is competent that *at other times*, at that same place, under similar conditions, the cars attained a much higher speed than was said to have been impossible.¹ In this most conclusive way, it may be shown that a certain machine is capable of doing a given piece of work,² or inflicting a certain

Texas.—Phoenix Assur. Co. v. Stenson, (Civ. App. 1901) 63 S. W. 542.

United States.—Southern Bell Telephone, etc., Co. v. Watts, 66 Fed. 460, 13 C. C. A. 579 (1895).

2. *City of San Antonio v. Diaz*, (Tex. Civ. App. 1901) 62 S. W. 549. In an action for damages to plaintiff's goods on board defendant's vessel during a violent storm, evidence that other vessels driven into port by the same storm were staunch

and strong was held competent to show the violence of the storm. *Reed v. Dick*, 8 Watts (Pa.) 479 (1839).

3. *Richardson v. Nelson*, 221 Ill. 254, 77 N. E. 583 (1906).

4. *Strong v. Armour & Co.*, 154 Ill. App. 649 (1910).

§ 3184-1. *Rouse v. Detroit Elec. R. Co.*, 128 Mich. 149, 87 N. W. 68 (1901).

2. *Baber v. Rickart*, 52 Ind. 594 (1876); *Waters' Patent Heating Co. v. Smith*, 120 Mass. 444 (1876).

injury.³ In other words, to show the dangerous character of an appliance or its capability for causing a particular injury, it may be shown that the same or a similar appliance has actually caused such an injury.⁴ In the same manner, where there is a question

3. Leather v. Blackwell's Durham Tobacco Co., 144 N. C. 330, 57 S. E. 11, 9 L. R. A. (N. S.) 349 n. (1907).

4. Alabama.—Davis v. Kornman, 141 Ala. 479, 37 So. 789 (1904); Houston Biscuit Co. v. Dial, 135 Ala. 168, 33 So. 268 (1903).

Arkansas.—Chicago Mill & Lumber Co., 99 Ark. 597, 139 S. W. 632 (1911).

California.—Henry v. Southern Pac. R. Co., 50 Cal. 176 (1885).

Connecticut.—Tomlison v. Town of Derby, 43 Conn. 562 (1876); Bailey v. Town of Trumbull, 31 Conn. 581 (1863).

Georgia.—Georgia Cotton-Oil Co. v. Jackson, 112 Ga. 620, 37 S. E. 873 (1901).

Illinois.—Lowe v. Alton, etc., Co., 158 Ill. App. 458 (1910); Vance v. Monroe Drug Co., 149 Ill. App. 499 (1909); City of Kankakee v. Phipps, 135 Ill. App. 585 (1907); City of Chicago v. Jarvis, 226 Ill. 614, 80 N. E. 1079 (1907); Fraser & Chalmers v. Schroeder, 163 Ill. 459, 45 N. E. 288 (1896).

Indiana.—Gagg v. Vetter, 41 Ind. 228, 13 Am. Rep. 322 (1872).

Iowa.—Hunt v. City of Dubuque, 96 Iowa 314, 65 N. W. 319 (1895); Smith v. City of Des Moines, 84 Iowa 685, 51 N. W. 77 (1892).

Kansas.—Missouri Pac. Ry. Co. v. Neiswanger, 41 Kan. 621, 21 Pac. 582, 13 Am. St. Rep. 304 (1889); City of Topeka v. Sherwood, 39 Kan. 690, 18 Pac. 933 (1888).

Kentucky.—Carpenter v. Laswell, 23 Ky. L. Rep. 686, 63 S. W. 609 (1901).

Maine.—Thatcher v. Maine Cent. R. Co., 85 Me. 502, 27 Atl. 519 (1893).

Massachusetts.—Donovan v. Chase-Shawmut Co., 201 Mass. 357, 87 N.

E. 580 (1909); McGinn v. Platt, 177 Mass. 125, 58 N. E. 175 (1900); Spaulding v. Forbes Lithograph Mfg. Co., 171 Mass. 271, 50 N. E. 543, 68 Am. St. Rep. 424 (1898).

Michigan.—Woodworth v. Detroit United Ry., 153 Mich. 108, 15 Det. L. N. 374, 116 N. W. 549 (1908).

Minnesota.—Byard v. Palace Clothing Co., 85 Minn. 363, 88 N. W. 998 (1902); Morse v. Minneapolis & St. L. Ry. Co., 30 Minn. 465, 16 N. W. 358 (1883).

Missouri.—Campbell v. Missouri Pac. Ry. Co., 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530 (1894).

New Hampshire.—Shute v. Exeter Mfg. Co., 69 N. H. 210, 40 Atl. 391 (1898).

New York.—Terry v. Village of Perry, 199 N. Y. 79, 92 N. E. 91, 35 L. R. A. (N. S.) 666, 20 Am. & Eng. Ann. Cas. 796 (1910); Walker v. Newton Falls Paper Co., 111 App. Div. 19, 97 N. Y. Suppl. 521 (1906); Auld v. Manhattan L. Ins. Co., 34 App. Div. 491, 54 N. Y. Suppl. 222, *aff'd* 165 N. Y. 610, 58 N. E. 1085 (1898).

North Carolina.—Dorsett v. Clement-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612 (1902); Raper v. Wilmington & W. R. Co., 126 N. C. 563, 36 S. E. 115 (1900).

Ohio.—Findlay Brewing Co. v. Bauer, 50 Ohio St. 560, 35 N. E. 55, 44 Am. St. Rep. 686 (1893).

Oregon.—Glavin v. Brown & McCabe, 53 Oreg. 598, 101 Pac. 671 (1909).

United States.—Chicago & N. W. Ry. Co. v. Netolicky, 67 Fed. 665, 14 C. C. A. 615, 32 U. S. App. 406 (1895).

whether a horse's foot could be caught between a rail and board, it may be shown that upon another occasion the foot of another horse was caught in the same place.⁵

Railroad fires.— The principle, that the capability of a mechanical device to produce a certain result may be shown by other occasions when such result was actually produced, is frequently applied in cases of injuries from railroad fires. The defendant railroad company, in an action for injuries to property burned by fire claimed to have been set by sparks or fire emitted from one of its locomotives, may assert that its engines were so constructed that a spark of sufficient size to ignite buildings or other property could not have been discharged therefrom. Or it may claim that the property alleged to have been fired was situated at such a distance from the railroad track that it could not have been inflamed by sparks or coal from one of its engines. Where a suitable forensic necessity is shown for admitting circumstantial evidence as to the setting of a fire,⁶ for example, as bearing on the possibility that a fire could have been started by sparks from a locomotive engine controlled by the defendant company,⁷ and whether, in general, such engine was capable of setting such fires, evidence is admissible to the effect that on other occasions a locomotive belonging to the defendant company — not identified as the engine which set the particular fire in question — set other fires by means of sparks.⁸ The other occurrences, if probative, may be subsequent

5. *Newvahner v. Wabash R. Co.*, 126 Mo. App. 643, 105 S. W. 21 (1907).

In an action for the killing of a person on a crossing by reason of having his foot caught on the crossing, evidence that others had their feet or their horses' feet caught in the same place before this accident is admissible to show the defective condition of the crossing; the remoteness of such occurrences merely goes to the weight of the evidence. *Lake Shore & M. S. Ry. Co. v. Beall*, 13 Ohio Cir. Ct. R. 605, 6 O. C. D. 250, *affirmed*, 53 Ohio St. 674 (1895).

6. Such proof is not necessary and, therefore, incompetent where the fact of the setting of the fire is ad-

mitted. *Smith v. Old Colony, etc., R. Co.*, 10 R. I. 22 (1871).

"The question has often been considered by the courts in this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire." *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356 (1875).

7. *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115 (1873); *Smith v. O. & C. & N. R. R. Co.*, 10 R. I. 22 (1871).

8. *Alabama*.—*Louisville, etc., R. Co. v. Malone*, 109 Ala. 509, 20 So. 33 (1895).

California.—*McMahon v. Hetch-*

in point of time, to the fire which is under investigation in the pending case.⁹ The setting of other fires must, however, have oc-

Hetchy, etc., R. Co., 2 Cal. App. 400, 84 Pac. 350 (1905); Butcher v. Vaca Valley, etc., R. Co., 5 Pac. 359 (1885).

Illinois.—Illinois Cent. R. Co. v. McClelland, 42 Ill. 355 (1866).

Iowa.—Black v. Minneapolis, etc., O. R. Co., 122 Iowa 32, 96 N. W. 984 (1903).

Kansas.—Sprague v. Atchison, etc., R. Co., 70 Kan. 359, 78 Pac. 828 (1904).

Kentucky.—Cincinnati, etc., R. Co. v. Winkle, 148 Ky. 726, 147 S. W. 746 (1912); Kentucky Cent. R. Co. v. Barrow, 89 Ky. 638, 20 S. W. 165, 5 Ky. L. Rep. 518 (1883).

Maine.—Dunning v. Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208 (1897).

Massachusetts.—McGinn v. Platt, 177 Mass. 125, 58 N. E. 175 (1900).

Missouri.—Tapley v. St. Louis, etc., Ry. Co., 129 Mo. App. 88, 107 S. W. 470 (1908); Campbell v. Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175 (1894).

Nevada.—Longabaugh v. Virginia City, etc., R. Co., 9 Nev. 271 (1874).

New Hampshire.—Smith v. Boston, etc., R. Co., 63 N. H. 25 (1884); Boyce v. Cheshire R. Co., 42 N. H. 97 (1860), 43 N. H. 627 (1862).

New York.—Collins v. New York Cent. & H. R. R. Co., 109 N. Y. 243, 16 N. E. 50 (1888); Jacobs v. New York Cent. & H. R. R. Co., 107 App. Div. 134, 94 N. Y. Suppl. 954, *affirmed*, 186 N. Y. 586, 79 N. E. 1108 (1905).

North Dakota.—Smith v. Northern Pac. R. Co., 3 N. Dak. 555, 58 N. W. 345 (1894).

Oregon.—Manchester Assur. Co. v. Oregon R. Co., 46 Ore. 162, 79 Pac. 60, 114 Am. St. Rep. 863, 69 L. R. A. 475 (1905).

Rhode Island.—MacDonald v. New York, etc., R. Co., 25 R. I. 40, 54 Atl.

795 (1903); Smith v. Old Colony, etc., R. Co., 10 R. I. 22 (1871).

Tennessee.—Louisville, etc., R. Co. v. Fort, 112 Tenn. 432, 80 S. W. 429 (1904).

Texas.—International, etc., R. Co. v. Newman, (Civ. App.) 40 S. W. 854 (1897); Texas, etc., R. Co. v. Land, 3 White & Willson Civ. Cas. Ct. App. § 50 (1885); Ft. Worth, etc., R. Co. v. Ratliffe, 2 White & Willson Civ. Cas. Ct. App. § 681 (1885).

Vermont.—Smith v. Central Vermont R. Co., 80 Vt. 208, 67 Atl. 535 (1907); Hoskinson v. Central Vermont R. Co., 66 Vt. 618, 30 Atl. 24 (1893).

Virginia.—Kimball v. Borden, 95 Va. 203, 28 S. E. 207 (1897).

Washington.—Noland v. Great Northern R. Co., 31 Wash. 430, 71 Pac. 1098 (1903).

United States.—Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356 (1875).

England.—Piggot v. Eastern Counties R. Co., 3 C. B. (M. G. & S.) 229, 15 L. J. C. P. 235, 10 Jur. 571, 54 E. C. L. 229 (1846).

It is competent to show on an action against a railroad company for destroying a barn by fire that a subsequent engine deposited sparks on the locus, although it is not shown that the engine was of the same kind or in the same condition as one from which it was claimed the fire originated nor that the condition of the weather nor the direction of the wind was the same. The evidence tended to show the possibility and consequent probability that the fire was communicated as claimed. Mathews v. Missouri Pac. R. Co., 142 Mo. 645, 44 S. W. 802 (1897).

9. Smith v. Old Colony, etc., R. Co., 10 R. I. 22 (1871).

curred within the limits of time which render them probative regarding the happening of the fire under consideration by the court.¹⁰ In other words, the collateral fire must have occurred at ¹¹ or about ¹² the time that the fire in question is shown to have happened. Such a general similarity in conditions must be shown to have existed on the two occasions, as allows free effect to the operation of the uniformity of management ¹³ as a basis of probative force.¹⁴

Rebuttal.—Where the defendant railroad company introduces evidence tending to show that its engines were so equipped that they would not emit inflammative sparks or coals, it may be shown in rebuttal that, under similar conditions and about the same time, they did, in fact, set other fires.¹⁵

§ 3185. (*Inferences Other than Similar Occurrences*); Change.—In much the same way the fact of change can usually best be shown by comparing conditions, states, or events with later

10. Louisville, etc., R. Co. v. Miller, 109 Ala. 500, 19 So. 989 (1895).

11. Lake Erie, etc., R. Co. v. Gould, 8 Ind. App. 275, 47 N. E. 941 (1897).

12. Louisville, etc., R. Co. v. Lange, 13 Ind. App. 337, 41 N. E. 609 (1895).
13. § 3189.

14. Louisville, etc., R. Co. v. Miller, 109 Ala. 500, 19 So. 989 (1895); O'Reilly v. King, 72 N. Y. App. Div. 357, 76 N. Y. Suppl. 515, 11 N. Y. Ann. Cas. 75 (1902).

15. *Alabama.*—Alabama Great Southern R. Co. v. Clark, 136 Ala. 450, 34 So. 917 (1903); Louisville, etc., R. Co. v. Malone, 109 Ala. 509, 20 So. 33 (1895).

Arkansas.—Central Arkansas, etc., R. Co. v. Goelzer, 92 Ark. 569, 123 S. W. 781 (1909).

Kentucky.—Chesapeake, etc., Ry. Co. v. Hopkins, 145 Ky. 689, 141 S. W. 45 (1911); Cincinnati, etc., R. Co. v. Sadierville Milling Co., 137 Ky. 568, 126 S. W. 118 (1910).

Maine.—Jones v. Maine Cent. R. Co., 106 Me. 442, 76 Atl. 710 (1910).

Massachusetts.—Bowen v. Boston, etc., R. Co., 179 Mass. 524, 61 N. E.

141 (1901); Ross v. Boston, etc., R. Co., 6 Allen 87 (1863).

New Jersey.—Goodman v. Lehigh Valley R. Co. of New Jersey, 78 N. J. L. 317, 74 Atl. 519 (1909).

North Carolina.—Whitehurst v. Atlantic Coast Line R. Co., 146 N. C. 588, 60 S. E. 648 (1908).

Texas.—Texas, etc., Ry. Co. v. Owen, (Civ. App. 1910) 128 S. W. 1139; Texas, etc., Ry. Co. v. Woolbridge, (Civ. App. 1910) 126 S. W. 603; Texas Cent. R. Co. v. Qualls, (Civ. App. 1909) 124 S. W. 140; St. Louis Southwestern Ry. Co. of Texas v. Alexander Eccles & Co., 53 Tex. Civ. App. 125, 115 S. W. 648 (1909); Missouri, etc., Ry. Co. of Texas v. Dawson Bros., (Civ. App. 1908) 109 S. W. 1110.

Vermont.—E. T. & H. K. Ide v. Boston, etc., R. Co., 83 Vt. 66, 74 Atl. 401 (1909).

Virginia.—Norfolk, etc., Ry. Co. v. Thomas, 110 Va. 622, 66 S. E. 817 (1910).

United States.—Toledo, etc., R. Co. v. Star Flouring Mills, 146 Fed. 953, 77 C. C. A. 203 (1906).

ones. Thus, where it is considered desirable to show the development of real property¹ in order to establish the possibly essential fact of a change in its value,² no more appropriate means for doing so may suggest itself than to show the different condition of the property on two or more occasions. In establishing the fact of change, it will be necessary to prove the existence at different times of distinct states or conditions. Of these the relation, in point of time, between the principal fact under investigation and the collateral event or condition by which the fact of change is established, is not regarded as material. Within the limits of time during which the collateral event or state continues probative³ the collateral fact may precede⁴ or follow⁵ the principal.

§ 3186. (*Inferences Other than Similar Occurrences*); Properties of Matter.—In like manner, the general properties of matter, e. g., that a certain substance, used as a beverage, is poisonous,¹ may be established by proof of what happened on other occasions than that in question. In general, moreover, the nature of

§ 3185-1. *Benjamin v. New York El. R. Co.*, 63 Hun (N. Y.) 629, 17 N. Y. Suppl. 908, 44 N. Y. St. Rep. 538 (1892); *Galway v. Metropolitan El. R. Co.*, 58 Hun 610, 13 N. Y. Suppl. 47, 35 N. Y. St. Rep. 628, *affirmed*, 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788 (1891); *Taylor v. Crowninshield*, 5 N. Y. Leg. Obs. 209 (1847); *Vigel v. Naylor*, 24 How. (U. S.) 208, 16 L. ed. 646 (1860).

2. *Drucker v. Manhattan Ry.*, 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437 (1887).

In an action against an elevated railroad company for damages caused by the construction and operation of defendant's road in the street on which plaintiff's property abuts, evidence as to the effect of the railroad on other property in the same street is admissible. *Doyle v. Manhattan R. Co.*, 128 N. Y. 488, 28 N. E. 495 (1891).

3. *Com. v. Holmes*, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270 (1892); *People v. Keepers*, 14 N. Y.

Suppl. 66, 8 N. Y. Crim. 146, 13 N. Y. St. Rep. 357 (1888); *State v. Jeffries*, 117 N. C. 727, 23 S. E. 163 (1895).

"There is no fixed and definite rule by which it can be determined whether a collateral fact is so remote as to be inadmissible to support the principal fact sought to be established. The question must, to a considerable extent, be decided in each case, on its own circumstances." *Faucett v. Nichols*, 64 N. Y. 377, 384 (1876), per Andrews, J.

4. *Gasper v. Donaldson*, 1 Whart. (Pa.) 227 (1836); *American Surety Co. v. Pauly*, 72 Fed. 470, 18 C. C. A. 644, 38 U. S. App. 254 (1896), *affirmed*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. ed. 977 (1898); *United States v. Rumsey*, Fed. Cas. No. 16,207 (1867).

5. *Silvernail v. Westerman*, 11 Luz. Leg. Reg. (Pa.) 5 (1882).

§ 3186-1. *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. 770 (1897); *State v. Thompson*, 132 Mo. 301, 34 S. W. 31 (1895).

phenomena² can frequently be proved only by showing what occurred at other times. The explosive nature of a certain substance under certain conditions may best be shown by evidence of other explosions of the same substance under similar conditions.³

§ 3187. Other Uniformities than That of Physical Nature.—

Certain uniformities other than that of natural law seem to possess an invariability of action superior to that observable in moral conduct as controlled by volition. The regularity in the operation of municipal law, of the routine operations of a well-established and systematized business,¹ a settled physical or mental habit² present, for example, to a judicial tribunal, the basis of a logical inference that things did happen or even that they will happen on a particular principal occasion in the same manner that they occurred on a previous one which experience shows to be superior in probative force to the simple inference that a person has done a thing at one time because he did it at another. The first and second of these uniformities intermediate, as it were, between that of nature and the one based on the regularity of moral conduct apparently relate more nearly to the happening of physical occurrence than to the conduct of individuals; the third — the force of habit — seems more nearly to concern the doings of individuals than the regular occurrence of physical phenomena. It would follow that the two former are more closely analogous to the uniformity of natural law than is the third; while habit would appear more closely affiliated with moral uniformity and, in fact, to present itself as a culmination and intensification of the uniformity of moral conduct. The distinction, however, is, in truth, more apparent than real; for even where these several intermediate uniformities control or otherwise affect the conduct of individuals, they all operate by minimizing or removing the influence of *volition*. In so doing, they remove conduct from the varying and divergent operation of the will, placing it among the automatic, intuitive, instinctive reflexes of bodily action — analogous to the unconscious or subconscious activities of the vital functions of the

2. *Tomlinson v. Derby*, 43 Conn. 562 (1877); *Holyoke Paper Co. v. Conklin*, 2 Allen (Mass.) 326 (1861).

3. *Delaney v. Framingham Gas, Fuel & Power Co.*, 202 Mass. 359, 88

N. E. 773 (1909). See also, *Nelson v. Sibley Contracting Co.*, 66 Wash. 471, 119 Pac. 829 (1912).

§ 3187-1. §§ 3189, 3190.

2. § 3195.

human body. Such automatic reflexes, as is elsewhere seen in connection with the probative force of regular spontaneous action,³ are, in reality, part of the uniformity of nature, and thereby acquire, even for the inference of conduct, much of the probative force inherent in the regularity of natural law.

§ 3188. (*Other Uniformities than That of Physical Nature*); Municipal Law.—Where a certain territory is under some general local municipal regulation, the particular incidents of such regulation in one section of the territory, e. g., a manor, may be established by showing the existence of such incidents in another portion of the same territory. In such a case the uniformity relied upon seems rather legal and neither natural nor mental. Thus, evidence of the rights of tenants of a neighboring manor has been received to show the rights of a tenant of a particular manor.¹ But on an issue as to the existence of a custom permitting tenants to dig gravel on a particular copyright tenement, it has been held that the existence of a general usage as to digging gravel in like tenements cannot be shown.²

§ 3189. (*Other Uniformities than That of Physical Nature*); Unity of Management; Equipment.—Although somewhat inferior in probative value, but yet occasionally used in case of a suitable administrative necessity and exceptional circumstances conferring probative force, is the unity of occurrence which may be said to arise from unity of business management. If the law of evidence under the procedure rule or administrative principle in question declines to permit, in the absence of probative relevancy and special administrative necessity, the inference that A. did a particular act at one time because he did a similar act at another, still less will the inference be permitted that A. did a given act at one time because B. did a similar act at another.¹

3. §§ 3158, 3195, *et seq.*

§ 3188-1. *Rowe v. Brenton*, 8 B. & C. 737, 3 M. & R. 361, 15 E. C. L. 363 (1828).

In a dispute between the lord of a manor and his tenants as to a custom, deeds between the lords and tenants of neighboring manors are admissible to explain and support the custom. *Lowther v. Raw*, 2

Bro. P. C. 451, 1 Eng. Reprint 1058 (1735).

2. *Wilson v. Page*, 4 Esp. (Eng.) 71 (1801).

§ 3189-1. *McDowell v. Connecticut F. Ins. Co.*, 164 Mass. 394, 41 N. E. 669 (1895); *Foye v. Leighton*, 22 N. H. 71, 53 Am. Dec. 231 (1850). See also, *Kelly v. Durham Traction Co.*, 132 N. C. 368, 43 S. E. 923 (1903).

Nor will this ruling necessarily be affected by the circumstance that A. and B. were, at the time of the occurrence in question, employed by and working for a single corporation or individual employer, and that from this common management, in view of the nature of the acts in question, a certain similarity of requirement and consequent uniformity of conduct among the employees might fairly be inferred with regard to them. While, however, this unity of management, as it may be called, fails to present the underlying uniformity of natural law, or even that of volitional action, i. e., moral uniformity, it still offers a species of quasi-natural uniformity which the courts recognize as a ground of relevancy; — not indeed to the extent of permitting it to serve as the basis of an inference as to volitional action of employees but to establish a certain similarity in the mechanical construction and operation of its equipment. For example, in an action against a railroad company for failure to give the train signals as required by law, it cannot properly be shown that other trains operated by other employees and servants of the same company did not give the signals and that, in fact, they were not usually given.² On the other hand, the locomotive engines belonging to a railroad company will be assumed, in the absence of evidence to the contrary, to possess such a similarity in construction and equipment as to make the setting of a fire by one engine of a given type belonging to the company *probative* to the effect that another fire was set by a different locomotive of the same class owned by the company.³ It will be observed that the proof is not limited to the fact that the locomotive engines of the defendant company were capable of setting fires, for which purpose the evidence would undoubtedly be competent. It is admitted to sustain the more central proposition embodied in the issue that these engines, or one of them, actually set the fire in question.⁴ This is best explained on the ground of administrative necessity caused by the difficulties of making circumstantial proof, in the absence of direct evidence. While it is easy to recognize that the court, in thus admitting evidence of other fires

2. *Eskridge's Ex'r v. Cincinnati, etc.*, R. Co., 89 Ky. 367, 12 S. W. 580, 11 Ky. L. Rep. 557 (1889); *Tuttle v. Fitchburg R. Co.*, 152 Mass. 42, 25 N. E. 19 (1890).

3. *Kentucky Cent. R. Co. v. Barrow*, 89 Ky. 638, 20 S. W. 165, 5 Ky.

L. Rep. 518, 6 Ky. L. Rep. 240 (1883); *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218, 67 Am. Dec. 155 (1856); *Taffe v. Oregon R. & Nav. Co.*, 60 Oreg. 177, 117 Pac. 989 (1911).

4. §§ 3191, *et seq.*

to prove the possibility that such a fire could have been set by such means, or in allowing a party to show the defendant's negligence, is perfectly justified in admitting evidence of what happened upon other occasions, it is, in many cases, much more difficult to recognize the precise ground of relevancy on which presiding judges have admitted evidence that other fires were set by locomotives of the defendant company at about the same time as evidence tending to prove that the fire under investigation was, in fact, set by a locomotive of the defendant. This, however, has been frequently permitted and seems to rest upon the uniformity of business management, a similarity of construction and handling in case of the locomotive, and the uniformity of conduct, to the effect that a careless engineer or fireman will continue to act carelessly.⁵ The uniformity of equipment of a great enterprise, e. g., a railroad company, renders it probable that two articles of the same class in common use by the company are similar. Thus, evidence of the size of its switch lanterns generally is admissible to prove the size of a particular switch lantern.⁶

§ 3190. (*Other Uniformities than That of Physical Nature; Unity of Management*); Operation.—The inference of uniformity in occurrences under similar circumstances which arise in connection with large business enterprises from a unity of management has, however, been extended by the courts from matters of equipment to those connected with the conduct of its employees in various matters connected with the business. Such enterprises can be conducted only by virtue of a rigid system which substitutes regulation for initiative; reducing individual employees to a position of quasi-automatism with but little operation by personal volition. The object, and, to a large extent the result of such a minute and drastic regulation is to produce, within the specified field of operation, a uniform and, as it were, *standardized* course of operation under given circumstances. Aided by the forces of custom and imitation, there is a strong probability that within the field covered by such regulations the employees of the company, of a given class, will act in the same way under like circumstances. This uniformity of conduct, so far as established by experience, will be recognized by the courts in any connection

5. § 3191.

6. *Morisette v. Canadian Pac. Ry. Co.*, 76 Vt. 267, 56 Atl. 1102 (1904).

where the inference is probative.¹ The existence of such a regular routine method of doing certain constantly recurring acts, in many cases, renders it highly probable that the same act will be repeated in a similar manner on a similar occasion. It is, however, required as a condition of admissibility that the court should find that such a regularity in course of business is established. These facts appearing, the presiding judge is justified in admitting evidence of the custom or course of dealing as tending to show that an event, occurrence or an act was done in accordance with it.² Thus, to show the speed at which a street car or train was running at a certain time and place, testimony of the customary speed at such place or under similar circumstances will be admitted.³ In the same way, on the question whether defendant's cars obstructed a highway at a particular time, the customary manner of operating cars at that place may be shown.⁴

§ 3190-1. *Georgia Cent. R. Co. v. Bernstein*, 113 Ga. 175, 38 S. E. 394 (1901); *Anglin v. Barlow*, (Tex. Civ. App. 1898) 45 S. W. 827; *Blaisdell v. Davis*, 72 Vt. 295, 48 Atl. 14 (1900).

2. *Alabama*.—*Home Ins. Co. v. Adler*, 71 Ala. 516 (1882).

California.—*Lake Shore Cattle Co. v. Modoc Land, etc., Co.*, 130 Cal. 669, 63 Pac. 72 (1900).

Connecticut.—*Dwight v. Brown*, 9 Conn. 83 (1834).

Georgia.—*Conyers v. Ford*, 111 Ga. 754, 36 S. E. 947 (1900).

Illinois.—*Stolp v. Blair*, 68 Ill. 541 (1873).

Indiana.—*Hufford v. Neher*, 15 Ind. App. 396, 44 N. E. 61 (1896).

Iowa.—*McGuire v. County*, 133 Iowa 636, 111 N. W. 34 (1907).

Kentucky.—*N. H. Martin v. Logan*, 30 Ky. L. Rep. 799, 99 S. W. 648 (1907); *Smith v. Montgomery's Adm'rs*, 5 T. B. Mon. 502 (1827).

Maine.—*Wood v. Finson*, 91 Me. 280, 39 Atl. 1007 (1898).

Massachusetts.—*L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354 (1894).

Michigan.—*Churchill v. Mace*, 148 Mich. 456, 111 N. W. 1034 (1907); *Ayres v. Hubbard*, 71 Mich. 594, 40 N. W. 10 (1888).

Nebraska.—*Barber v. Martin*, 67 Neb. 445, 93 N. W. 722 (1903).

New Hampshire.—*State v. Boston, etc., R. Co.*, 58 N. H. 410 (1878).

New Jersey.—*Smock v. Smock*, 11 N. J. Eq. 156 (1856).

New York.—*Lowenstein v. Lombard, etc., Co.*, 164 N. Y. 324, 58 N. E. 44 (1900).

North Dakota.—*Grand Forks Lumber, etc., Co. v. Tourtelot*, 7 N. D. 587, 75 N. W. 901 (1898).

Pennsylvania.—*Trego v. Lewis*, 58 Pa. St. 463 (1868).

Texas.—*Matkins v. State*, (Cr. App. 1900) 58 S. W. 108.

Vermont.—*Gibson v. Seymour*, 3 Vt. 565 (1831).

Washington.—*Smith v. Dow*, 43 Wash. 407, 86 Pac. 555 (1906).

Wisconsin.—*Lill's Chicago Brewery Co. v. Russell*, 22 Wis. 178 (1867).

United States.—*Peyton v. Veitch*, 19 Fed. Cas. No. 11,057, 2 Cranch C. C. 123 (1816).

3. *Shaber v. St. Paul, etc., Ry. Co.*, 28 Minn. 103, 9 N. W. 575 (1881); *Lord v. Manchester St. Ry.*, 74 N. H. 295, 67 Atl. 639 (1907); *Stone v. Boston, etc., R. Co.*, 72 N. H. 206, 55 Atl. 359 (1903).

4. *Hall v. Brown*, 58 N. H. 93 (1877).

§ 3191. (Other Uniformities than That of Physical Nature; Unity of Management; Operation); Locomotive Fires.—The action of the court in permitting, in a suit against a railroad company to recover damages for injuries caused by fires communicated from a locomotive, evidence of the setting of fires by other locomotives of the defendant at about the same time and under substantially similar circumstances, is, in part, justified by the inferences to be drawn from unity of management,¹ and a consequent uniformity of regulation, equipment and operation.² A noticeable relaxation of the requirement of relevancy has been introduced into the administration of the rule or principle now under consideration in case of railroad fires. In part, this is due to the difficulty of procuring other evidence.³ The fact that it is an unusual laxity of requirement as to rules concerning *res inter alios* is frankly conceded,⁴ and its justification is found in the compulsion of an exceptional exigency in proof, in the necessary recourse to secondary and circumstantial proof in the absence of direct and primary evidence,⁵ and, finally, the uniformity of

§ 3191-1. *Sheldon v. Hudson R. R. Co.*, 14 N. Y. 218, 221, 67 Am. Dec. 155 (1856), per Denio, C. J., wherein it was said: "The business of running the trains on a railroad supposes a unity of management and a general similarity in the fashion of the engines and the character of the operation. I think, therefore, it is competent *prima facie* evidence, for a person seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that, about the time when it happened, the trains which the company was running past the location of the fire were so managed in respect to the furnaces as to be likely to set on fire objects not more remote than the property burned."

2. *Big River Lead Co. v. St. Louis, etc., R. Co.*, 123 Mo. App. 394, 101 S. W. 636 (1907).

3. *Kansas.*—*Atchison, etc., R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362 (1874).

New York.—*Sheldon v. Hudson River R. Co.*, 14 N. Y. 218, 67 Am. Dec. 155 (1856).

Pennsylvania.—*Henderson v. Philadelphia & R. R. Co.*, 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652 (1891).

Rhode Island.—*MacDonald v. New York, etc., R. Co.*, 25 R. I. 40, 54 Atl. 795 (1903).

Texas.—*Galveston, etc., R. Co. v. Chittim*, 31 Tex. Civ. App. 40, 71 S. W. 294 (1902).

Canada.—*Edwards v. Ottawa Navigation Co.*, 39 U. C. Q. B. 264 (1876).

4. This class of testimony is exceptional in character at the best. *Henderson v. Philadelphia & R. R. Co.*, 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652 (1891).

5. *MacDonald v. New York, etc., R. Co.*, 25 R. I. 40, 54 Atl. 795 (1903); *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449 (1869); *Piggot v. Eastern Counties R. Co.*, 3 C. B. (M. G. & S.) 229, 15 L. J. C. P. 235, 10 Jur. 571, per Coltman, J. (1846).

nature tending to prove that like causes will produce like effects. The reasons which permit the administrative action in receiving this class of evidence are thus graphically stated by the New York Court of Appeals: "These engines run night and day, and with such speed that no particular note can be taken of them as they pass. Moreover, there is such a general resemblance among them that a stranger to the business cannot readily distinguish one from another. It will, therefore, generally happen that when the property of a person is set on fire by an engine, the owner, though he may be perfectly satisfied that it was caused by an engine, and may be able to show facts sufficient legitimately to establish it, yet he may be utterly ignorant what particular engine, or even what particular train did the mischief. It would be, practically, quite impossible by any inquiries to find out the offending engine, for a large proportion of those owned by the company are constantly in rapid motion."⁶

§ 3192. (*Other Uniformities than That of Physical Nature; Unity of Management; Operation; Locomotive Fires*); Successive Steps in Proof.—In order to advance proof that a certain cause is the probable one which produced a certain result, it is first necessary to show that it is capable of producing such result. This may be done by evidence that such result followed the same cause on other occasions. Thus, where there is no direct evidence that a locomotive set the fire in question, in order to establish the probability that the fire was so caused it is necessary to show that it is possible for a locomotive to have set it. So to show the possibility that a locomotive could set a fire or ignite property situated as plaintiff's, evidence of other fires starting from the emission of sparks and coals from similarly constructed locomotives at about the same time is clearly relevant and will be admitted.¹ But to entitle a person to recover damages for the burning of his property, he must show more than a *possibility* that the fire was caused by the defendant railroad company. The accompanying circumstances and the inferences to be drawn from the unity of manage-

It is indirect evidence, if it be evidence at all. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356 (1875). But *compare*, *Kansas City, etc., R. Co. v. Perry*, 65 Kan. 792, 70 Pac. 876 (1902); *Peffer v.*

Missouri Pac. R. Co., 98 Mo. App. 291, 71 S. W. 1073 (1903).

6. *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218, 220, 67 Am. Dec. 155 (1856), per Denio, C. J.

§ 3192-1. § 3184.

ment may establish the *probability* that the fire in question was the result of the defendant's acts or omissions.

§ 3193. (*Other Uniformities than That of Physical Nature; Unity of Management; Operation; Locomotive Fires*); Identified Engines.—Where the locomotive which is claimed to have set the fire in question is identified upon the evidence from among the engines of the defendant company, testimony that on other occasions, prior, or subsequent,¹ to that fire, the engine set other fires,² or emitted sparks or coals,³ is competent;—provided the time

§ 3193-1. Butcher v. Vaca Valley, etc., R. Co., 67 Cal. 518, 8 Pac. 174 (1885); Johnson v. Railroad Co., 140 N. C. 574, 53 S. E. 362 (1906).

2. *Arkansas.*—Central Arkansas, etc., R. Co. v. Goelzer, 92 Ark. 569, 123 S. W. 781 (1909).

California.—Butcher v. Vaca Valley, etc., R. Co., 67 Cal. 518, 8 Pac. 174 (1885); Henry v. Southern Pac. R. R. Co., 50 Cal. 176 (1875).

Florida.—Florida East Coast Ry. Co. v. Smith, 61 Fla. 218, 55 So. 871 (1911); Jacksonville, etc., Ry. Co. v. Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65 (1891).

Georgia.—Hendricks v. Southern R. Co., 123 Ga. 342, 51 S. E. 415 (1905); Brown v. Benson, 101 Ga. 753, 29 S. E. 215 (1897).

Illinois.—Baltimore, etc., R. Co. v. Tripp, 175 Ill. 251, 51 N. E. 833 (1898); Lake Erie, etc., R. Co. v. Middlecoff, 150 Ill. 27, 37 N. E. 660 (1894); Lake Erie, etc., R. Co. v. Kirts, 29 Ill. App. 175 (1888).

Indiana.—Chicago & E. R. Co. v. Kreig, 22 Ind. App. 393, 53 N. E. 1033 (1899); Lake Erie, etc., R. Co. v. Gould, 18 Ind. App. 275, 47 N. E. 941 (1897).

Iowa.—Tyler v. Chicago, etc., R. Co., 102 Iowa 632, 71 N. W. 536 (1897); Lanning v. Chicago, etc., R. Co., 68 Iowa 502, 27 N. W. 478 (1886); Slossen v. R. Co., 60 Iowa 215, 14 N. W. 244 (1882).

Kansas.—Tuttle v. Missouri Pac. Ry. Co., 86 Kan. 28, 119 Pac. 370 (1911).

Massachusetts.—Loring v. Worcester, etc., R. Co., 131 Mass. 469 (1881); Ross v. Boston & W. R. Co., 6 Allen 87 (1863).

Missouri.—Patton v. St. Louis, etc., R. Co., 87 Mo. 115, 56 Am. Rep. 446 (1885).

Montana.—Diamond v. Northern Pac. R. Co., 6 Mont. 581, 13 Pac. 367 (1887).

New Hampshire.—Haseltine v. Concord R. Co., 64 N. H. 545, 15 Atl. 143 (1888).

New Jersey.—Austin v. Pennsylvania R. Co., 82 N. J. L. 416, 81 Atl. 739 (1911).

New York.—Jacobs v. New York Cent., etc., R. Co., 107 App. Div. 134, 94 N. Y. Suppl. 954 (1905), *aff'd*, 186 N. Y. 586, 79 N. E. 1108 (1906); Webb v. Rochester, etc., R. Co., 49 N. Y. 420 (1872); Field v. N. Y. Central, etc., R. Co., 32 N. Y. 339 (1865); Hinds v. Barton, 25 N. Y. 544 (1862).

North Carolina.—Whitehurst v. Atlantic Coast Line R. Co., 146 N. C. 588, 60 S. E. 648 (1908); Cheek v. Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488, 47 S. E. 400 (1904).

Pennsylvania.—Henderson v. Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652 (1891); Philadelphia, etc., R. Co. v. Schultz, 93 Pa. St. 341 (1880).

is within the limits of relevancy,⁴ and that it shall have been made to appear to the presiding judge that the jury might reasonably find, on the evidence as it then stands, a probability that the fire in question was set, in point of fact, by the identified locomotive.⁵

South Dakota.—Smith v. Chicago, etc., R. Co., 4 S. D. 71, 55 N. W. 717 (1893).

Texas.—St. Louis Southwestern Ry. Co. of Texas v. Alexander Eccles & Co., 53 Tex. Civ. App. 125, 115 S. W. 648 (1909); Texas, etc., R. Co. v. Scottish Union Nat. Ins. Co., 32 Tex. Civ. App. 82, 73 S. W. 1088 (1903); Missouri, etc., R. Co. v. Pfluger, (Civ. App. 1894), 25 S. W. 792.

Virginia.—Norfolk, etc., R. Co. v. Briggs, 103 Va. 105, 48 S. E. 521 (1904); Brighthope R. Co. v. Rogers, 76 Va. 443 (1881).

Wisconsin.—Menominee River Sash, etc., Co. v. Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176 (1895); Stertz v. Stewart, 74 Wis. 160, 42 N. W. 214 (1889).

United States.—Toledo, etc., R. Co. v. Star Flouring Mills Co., 146 Fed. 953, 77 C. C. A. 203 (1906).

3. *Alabama*.—Southern Ry. Co. v. Darwin, 156 Ala. 311, 47 So. 314 (1908); Alabama Great Southern R. Co. v. Clark, 136 Ala. 450, 34 So. 917 (1902), 145 Ala. 459, 39 So. 816 (1906).

Arkansas.—Central Arkansas, etc., R. Co. v. Goelzer, 92 Ark. 569, 123 S. W. 781 (1909).

Kentucky.—Taylor v. Louisville, etc., R. Co., 19 Ky. L. Rep. 717, 41 S. W. 551 (1897).

North Carolina.—Aman v. Rowland Lumber Co., 75 S. E. 931 (1912); Whitehurst v. Atlantic Coast Line R. Co., 146 N. C. 588, 60 S. E. 648 (1908); Atlantic Coast Line R. Co., 140 N. C. 574, 53 S. E. 362 (1906); Knott v. Cape Fear, etc., Ry. Co., 142 N. C. 238, 55 S. E. 150 (1906).

Pennsylvania.—Melingier v. Pennsylvania R. Co., 229 Pa. St. 122, 78 Atl. 66 (1910); Pennsylvania R. Co. v. Watson, 33 Leg. Int. 329 (1876).

Texas.—Fleming v. Pullen, (Civ. App. 1906) 97 S. W. 109; Texas, etc., Ry. Co. v. Scottish Union Nat. Ins. Co., 32 Tex. Civ. App. 82, 73 S. W. 1088 (1903).

Wisconsin.—Brusberg v. Milwaukee, etc., R. Co., 55 Wis. 106, 12 N. W. 416 (1882).

4. *California*.—Butcher v. Vaca Valley, etc., R. Co., 67 Cal. 518, 8 Pac. 174 (1885) (evidence of a fire two weeks afterward admitted).

Kentucky.—Stowe v. Louisville, etc., R. Co., 140 Ky. 291, 131 S. W. 4 (1910) (other fires three months before and four months afterwards not admissible).

North Carolina.—Knott v. Cape Fear & N. Ry. Co., 142 N. C. 238, 55 S. E. 150 (1906) (two months prior is admissible); Cheek v. Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488, 47 S. E. 400 (1904).

Pennsylvania.—Mellingier v. Pennsylvania R. Co., 229 Pa. 122, 78 Atl. 66 (1910) (evidence of emission of sparks $2\frac{1}{2}$ miles from place of fire and an hour later admitted).

Wisconsin.—Menominee River Sash, etc., Co. v. Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176 (1895).

5. *Alabama*.—Southern Ry. Co. v. Darwin, 156 Ala. 311, 47 So. 314, 130 Am. St. Rep. 94 (1908); Louisville, etc., R. Co. v. Miller, 109 Ala. 500, 19 So. 989 (1895).

Arkansas.—Railway Co. v. Jones, 59 Ark. 105, 26 S. W. 595 (1894).

Indiana.—Chicago, etc., R. Co. v. Ross, 24 Ind. App. 222, 56 N. E. 451 (1900).

Nevada.—Longabaugh v. Virginia City, etc., R. Co., 9 Nev. 271, 288 (1874).

Ohio.—Pennsylvania Co. v. Rossman, 13 Ohio Cir. Ct. 111, 7 Ohio Dec. 119 (1896).

To render the evidence of such other fires probative, it must, moreover, be shown that the state of repair of the engine and other attendant conditions were substantially the same on the two occasions.⁶ Where the locomotive which is claimed to have set the fire is thus identified, it is generally held that the proponent is not entitled to show that fires were set by other engines of the company, or that other engines emitted sparks or coals, at about that time.⁷ The offending engine, being segregated from the rest, what

6. *Boyce v. Cheshire R. Co.*, 43 N. H. 627 (1862); *Collins v. New York Central, etc., R. Co.*, 109 N. Y. 243, 16 N. E. 50 (1888).

"In order to permit evidence, such as this, of what happened six months after the fire, it would be necessary to show either that through the fault of its construction sparks of that size could be emitted, or else that the engine was in the same condition of repair that it was when the fire in question occurred. As we have said, the evidence is pretty clear that the plan of construction would not permit sparks of that size to escape; and, therefore, the more important it would be to show, if such evidence is to be admitted, that the engine was in the same condition that length of time after the happening of the fire that it was in when the fire occurred. It will rest with the trial court, upon the new trial, to satisfy itself upon this state of things before permitting evidence of that nature to be given." *Collins v. New York Central, etc., R. Co.*, 109 N. Y. 243, 250, 16 N. E. 50 (1888), per Peckham, J.

7. *Arkansas*.—*St. Louis, etc., R. Co. v. Jones*, 59 Ark. 105, 26 S. W. 595 (1894).

Colorado.—*Crissey & Fowler Lumber Co. v. Denver, etc., R. Co.*, 17 Colo. App. 275, 68 Pac. 670 (1902).

Florida.—*Florida East Coast Ry. Co. v. Smith*, 61 Fla. 218, 55 So. 871 (1911); *Jacksonville, etc., Ry. Co. v. Peninsular Land, etc., Co.*, 27 Fla.

1, 157, 9 So. 661, 17 L. R. A. 33, 65 (1891).

Georgia.—*Akins v. Georgia, etc., R. Co.*, 111 Ga. 815, 35 S. E. 671 (1900).

Illinois.—*Illinois Cent. R. Co. v. Bailey*, 222 Ill. 480, 78 N. E. 833 (1906); *Lake St. El. R. Co. v. Peterson*, 93 Ill. App. 118 (1901); *First Nat. Bank v. Lake Erie & W. R. Co.*, 65 Ill. App. 221, *affirmed*, 174 Ill. 36, 42, 50 N. E. 1053 (1898).

Indiana.—*Cleveland, etc., R. Co. v. Loos*, 38 Ind. App. 1, 77 N. E. 948 (1906); *Lake Erie & W. R. Co. v. Miller*, 24 Ind. App. 662, 57 N. E. 596 (1900); *Chicago, etc., R. Co. v. Gilmore*, 22 Ind. App. 466, 53 N. E. 1078 (1899).

Indian Territory.—*Missouri, etc., R. Co. v. Wilder*, 3 Ind. Ter. 85, 53 S. W. 490 (1899).

Kansas.—*Sprague v. Atchison, etc., R. Co.*, 70 Kan. 359, 78 Pac. 828 (1904); *Atchison, etc., R. Co. v. Osborn*, 58 Kan. 768, 51 Pac. 286 (1897).

Michigan.—*Ireland v. Cincinnati, etc., R. Co.*, 79 Mich. 163, 44 N. W. 426 (1890).

Missouri.—*Campbell v. Missouri Pac. R. Co.*, 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530 (1893); *Coale v. Hannibal, etc., R. Co.*, 60 Mo. 227 (1875); *Lester v. Kansas City, etc., R. Co.*, 60 Mo. 265 (1875).

Nebraska.—*Bradley v. Chicago, etc., R. Co.*, 90 Neb. 28, 132 N. W. 725 (1911); *Abbot v. Chicago, etc., R. Co.*, 88 Neb. 227, 130 N. W. 438 (1911).

North Carolina.—*Hygienic Plate-*

other engines may have done is judicially regarded as immaterial for the purposes of the case.⁸ This proposition, however, has been controverted and evidence of other fires set by other locomotives has been received, though the offending engine is identified.⁹ To be probatively relevant such other fires must have occurred at

Ice Mfg. Co. v. Raleigh, etc., R. Co., 126 N. C. 797, 36 S. E. 279 (1900).

Ohio.—*Pennsylvania Co. v. Rossman,* 13 Ohio Cir. Ct. 111, 7 Ohio Dec. 119 (1896).

Pennsylvania.—*Shelly v. Philadelphia, etc., R. Co.,* 211 Pa. St. 160, 60 Atl. 581 (1905); *Henderson v. Philadelphia, etc., R. Co.,* 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652 (1891).

Texas.—*Nussbaum & Scharff v. Trinity & Brazos Valley Ry. Co.,* (Civ. App. 1912) 149 S. W. 1083; *Morgan & Bros. v. Missouri, etc., Ry. Co. of Texas,* 50 Tex. Civ. App. 420, 110 S. W. 978 (1908); *San Antonio, etc., R. Co. v. Home Ins. Co.,* (Civ. App. 1902) 70 S. W. 999.

Virginia.—*Norfolk, etc., R. Co. v. Briggs,* 103 Va. 105, 48 S. E. 521 (1904).

Wisconsin.—*Allard v. Chicago, etc., R. Co.,* 73 Wis. 165, 40 N. W. 685 (1888); *Gibbons v. Wisconsin, etc., R. Co.,* 58 Wis. 335, 17 N. W. 132 (1883).

United States.—*Lesser Cotton Co. v. St. Louis, etc., R. Co.,* 114 Fed. 133, 52 C. C. A. 95 (1902).

"If the issue had been of negligence in the construction or management of the engine only, and the engine, which could only have caused the damage, had been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible under the decisions of this court." *Campbell v. Missouri Pac. R. Co.,* 121 Mo. 340, 350, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530 (1894), per Macfarlane, J.

"Where the injury complained of is shown to have been caused, or, in

the nature of the case, could only have been caused by sparks from an engine which is known and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation. Evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded." *Henderson v. Philadelphia, etc., R. Co.,* 144 Pa. St. 461, 477, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652 (1891), per Clark, J.

8. Former fires by the same engine are admissible as evidence tending to prove its defective condition or construction, or improper management, and those set out by other engines are excluded because they are matters collateral to the issue, and not evidence of the imperfect condition or bad management of the particular locomotive. *Jacksonville, etc., Ry. Co. v. Peninsular Land, etc., Co.,* 27 Fla. 1, 9 So. 661, 17 L. R. A. 33 (1891).

9. Kentucky.—*Louisville, etc., R. Co. v. Home Ins. Co. of New York,* 146 Ky. 281, 142 S. W. 398 (1912); *Chesapeake, etc., R. Co. v. Richardson,* 30 Ky. L. Rep. 786, 99 S. W. 642 (1907).

Montana.—*Diamond v. Northern, etc., R. Co.,* 6 Mont. 580, 13 Pac. 367 (1887).

Nevada.—*Longabaugh v. Virginia City, etc., R. Co.,* 9 Nev. 271 (1874).

New York.—*Sheldon v. Hudson R. Co.,* 14 N. Y. 218, 67 Am. Dec. 155 (1856). Compare *Chandler v. Rutland R. Co.,* 140 App. Div. 68, 124 N. Y. Suppl. 1046 (1910).

Washington.—*Asplund v. Great Northern Ry. Co.,* 64 Wash. 164, 114 Pac. 1043 (1911).

about the same time, but the length of time before or after the fire in question to which may be addressed the inquiry of other fires is within the administrative control of the presiding judge.¹⁰

Rebuttal. The railroad, on the other hand, is entitled to rebut the evidence of fires set on other occasions by the identified engine with proof of occasions on which the locomotive, under precisely similar conditions, passed the observers *without* setting fires.¹¹

§ 3194. (*Other Uniformities than That of Physical Nature; Unity of Management; Operation; Locomotive Fires*); Unidentified Engines.—Where no particular engine is identified as having set the fire in question, evidence is admissible of the setting of fires by any engines of the defendant company at other times and places, apparently near in point of time and under conditions sufficiently similar to those attending the fire under investigation to be probative.¹ Such evidence tends to show a negligent habit

10. *Louisville, etc., R. Co. v. Home Ins. Co. of New York*, 146 Ky. 281, 142 S. W. 398 (1912).

11. *Atchinson, etc., R. Co. v. Stanford*, 12 Kans. 354 (1874).

§ 3194-1. *Alabama*.—*Alabama Great Southern R. Co. v. Clark*, 136 Ala. 450, 34 So. 917 (1903); *Alabama, etc., R. Co. v. Johnston*, 128 Ala. 283, 29 So. 771 (1901).

California.—*McMahon v. Hetch-Hetchy, etc., R. Co.*, 2 Cal. App. 400, 84 Pac. 350 (1905).

Florida.—*Florida East Coast Ry. Co. v. Smith*, 61 Fla. 218, 55 So. 871 (1911); *Florida East Coast Ry. Co. v. Welch*, 53 Fla. 145, 44 So. 250, 12 Am. & Eng. Ann. Cas. 210 (1907).

Idaho.—*Fodey v. Northern Pac. Ry. Co.*, 21 Idaho 713, 123 Pac. 835 (1912).

Illinois.—*Lake St. El. R. Co. v. Peterson*, 93 Ill. App. 118 (1901); *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355 (1866).

Indiana.—*Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296 (1893); *Pittsburgh, etc., R. Co. v. Noel*, 77 Ind. 110 (1881).

Indian Territory.—*St. Louis, etc.,*

R. Co. v. Lawrence, 4 Ind. Terr. 611, 76 S. W. 254 (1903).

Iowa.—*Black v. Minneapolis, etc., R. Co.*, 122 Iowa 32, 96 N. W. 984 (1903).

Kentucky.—*Illinois Central R. Co. v. Scheible*, 24 Ky. L. Rep. 1708, 72 S. W. 325 (1903); *Kentucky Cent. R. Co. v. Barrow*, 89 Ky. 638, 20 S. W. 165, 5 Ky. L. Rep. 518 (1883).

Maine.—*Dunning v. Maine Central R. Co.*, 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208 (1897).

Maryland.—*Sims v. American Ice Co.*, 109 Md. 68, 71 Atl. 522 (1908); *Annapolis, etc., R. Co. v. Gantt*, 39 Md. 115 (1873).

Massachusetts.—*Bowen v. Boston, etc., R. Co.*, 179 Mass. 524, 61 N. E. 141 (1901).

Mississippi.—*Alabama, etc., R. Co. v. Aetna Ins. Co.*, 82 Miss. 770, 35 So. 304 (1903).

Missouri.—*Matthews v. Missouri Pac. R. Co.*, 142 Mo. 645, 44 S. W. 802 (1898); *Haley v. St. Louis, etc., R. Co.*, 69 Mo. 614 (1879).

Nebraska.—*Abbot v. Chicago, etc., R. Co.*, 88 Neb. 727, 130 N. W. 438 (1911).

of the defendant company in the construction, equipment and management of its engines, and thus tends to show its negligence in a particular case. It also has a tendency to show that the fire in question was caused by an engine of the defendant company. The state of the law on this point is summarized by the Supreme Court of Pennsylvania:² "It may therefore be considered as

Nevada.—Longabaugh v. Virginia City, etc., R. Co., 9 Nev. 271 (1874).

New Hampshire.—Boyce v. Cheshire, 42 N. H. 97 (1860).

New York.—Higgins v. Long Island R. Co., 129 App. Div. 415, 114 N. Y. Suppl. 262 (1908); Field v. New York Central R. Co., 32 N. Y. 339 (1865); Sheldon v. Hudson R. R. Co., 14 N. Y. 218, 67 Am. Dec. 155 (1856).

Ohio.—Pennsylvania Co. v. Rossman, 13 Ohio Cir. Ct. Rep. 111, 7 Ohio Cir. Dec. 119 (1896); Martz v. Cincinnati, etc., R. Co., 12 Ohio Cir. Ct. 144, 5 Ohio Cir. Dec. 451 (1896).

Oregon.—Taffe v. Oregon R. & Nav. Co., 60 Oreg. 177, 117 Pac. 989 (1911); Koontz v. Oreg., etc., R. Co., 20 Oreg. 3, 23 Pac. 820 (1890).

Pennsylvania.—Shelly v. Philadelphia, etc., R. Co., 211 Pa. St. 160, 60 Atl. 581 (1905); Henderson v. Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299 (1891).

Rhode Island.—Gorham Mfg. Co. v. New York, etc., R. Co., 27 R. I. 35, 60 Atl. 638 (1905); MacDonald v. New York, etc., R. Co., 25 R. I. 40, 54 Atl. 795 (1903).

Tennessee.—Louisville, etc., R. Co. v. Short, 110 Tenn. 713, 77 S. W. 936 (1903).

Texas.—Missouri, etc., Ry. Co. of Texas v. Dawson Bros., (Civ. App. 1908) 109 S. W. 1110; Missouri, etc., R. Co. v. Carter, 95 Tex. 461, 68 S. W. 159 (1902).

Vermont.—Ide v. Boston, etc., R. Co., 83 Vt. 66, 74 Atl. 401 (1909); Smith v. Central Vermont Ry. Co., 80 Vt. 208, 67 Atl. 535 (1907).

Virginia.—Norfolk, etc., Ry. Co. v.

Thomas, 110 Va. 622, 66 S. E. 817 (1910).

Washington.—Noland v. Great Northern Ry. Co., 31 Wash. 430, 71 Pac. 1098 (1903).

Wisconsin.—Gibbons v. Wisconsin Valley R. Co., 58 Wis. 335, 17 N. W. 132 (1883).

United States.—Lesser Cotton Co. v. St. Louis, etc., R. Co., 114 Fed. 133, 52 C. C. A. 95 (1902); Chicago, etc., R. Co. v. Gilbert, 52 Fed. 711, 3 C. C. A. 264 (1902); Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356 (1875).

England.—Piggot v. Eastern Counties R. Co., 3 C. B. 229, 15 L. J. C. P. 235, 10 Jur. 571, 54 E. C. L. 229 (1846).

Canada.—Robinson v. R. Co., 23 New Bruns. 323 (1883).

"Where there is no proof of what particular engine set the fire, and the circumstantial evidence is such that there is a strong probability that some engine on the road did set the fire, then it may be proper to show that the engines on that road generally emitted sparks, or that some one or more of them did so at other times and places." Gibbons v. Wisconsin Valley R. Co., 58 Wis. 335, 340, 17 N. W. 132 (1883), per Orton, J.

An engine is not "identified" where there are four which might have set the fire in question. Smith v. Central Vermont Ry. Co., 80 Vt. 208, 67 Atl. 535 (1907).

2. Henderson v. Philadelphia, etc., R. Co., 144 Pa. St. 461, 487, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652 (1891), per Clark, J.

settled, in cases of this kind, where the offending engine is not clearly or satisfactorily identified, that it is competent for the plaintiff to prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged."

§ 3195. (*Other Uniformities than That of Physical Nature*); Force of Habit; Physical.—A source or cause of uniformity in action, lying as it were intermediate between that of nature on the one hand and that of moral uniformity culminating in character¹ on the other, is supplied by the force of habit. On its more physical side, the doing of a particular act when repeated for such a number of times as to become habitual, draws near to the uniformity of nature and gains a corresponding probative power. The reflexes between mental or sensory stimuli and motor reaction along these customary paths of least resistance, become automatic, instinctive, intuitive;—thereby acquiring, much of the unvolitional character of the uniformity of natural law. In its relations to the physical world the evidentiary force of the fact that an alleged actor was in the *habit* of doing acts similar to the one in question, is more probative that he acted in a similar way on another occasion than would be the proof of the fact that he did a single individual act of the same nature at another time or even that he did a number of such acts. Viewing psychology as a natural science, it seems justifiable to conclude that the doing of a particular act under a given stimulus—the graving of a channel along the sensory nerves, making a particular groove in the cortex of the brain to a path of motor discharge—makes it perceptibly easier to do the same act again. Each time the connected series is repeated the graving becomes deeper and more indelible, the groove in the brain substance smoother and freer from impediment, the path of motor discharge more inevitable by the forces which impel to action. The change in the brain and nerve system which has been effected is apparently much the same as that from a tangled thicket to a well traveled highway. The action, at first volitional, grows automatic, ceases to be the creation of a conscious mind. In fact, the resolute and continued application of the will,

may be essential to check or even observe the intuitive reflex between stimulus and motor action which this habit has now created. In its more physical side the dexterity of the experienced handy-craftsman, the skill of the trained mechanic, are familiar instances of the cogency of the inference that what a man habitually does on a number of occasions, he will be very apt to continue to do whenever a similar impulse is made operative upon his mind.

§ 3196. (*Other Uniformities than That of Physical Nature; Force of Habit*); Metaphysical.—On its more psychic or spiritual side, the *impulse* to follow the leading of a physical habit is, as it were, intensified by repeated acquiescence of the metaphysical or metapsychic nature *pari passu* with the gravings of physical channels for motor discharge. Such is the apparent relation between the physical and metaphysical realms of nature that the well grooved paths of the nervous and cerebral motor reaction to a particular stimulus are co-existent with, and by their intensity, condition a mental or moral impulse, a tendency or inclination to do the same or analogous acts. In other words, the growth of a physical habit almost of necessity creates or assists to create a trait of character which, in turn, is apt to result in the development of appropriate mental or physical habits. Habit thus becomes, as it were, a stepping stone or half-way stage between the prompting to repeat a single volitional act and the more subtle but also, in a sense, more settled tendencies to action which are to be considered under the term *character*.¹ In other words, each physical habit has apparently its mental and spiritual counterpart; and, as far as the metaphysical habits are concerned, it may be said with much truth that A's character is the total sum of his habits.

§ 3197. (*Other Uniformities than That of Physical Nature; Force of Habit; Metaphysical*); Position of Habit in the Law of Evidence.—In the law of evidence, habit may properly be regarded as intermediate in probative force between the uniformity of nature and moral uniformity. Intrinsically, its proving power is less than that of relevancy based upon the uniformity of nature, but greater than that arising from moral uniformity disassociated from the element of habit; and still greater than the purely deliberative inference that a person will act in accordance with an

appropriate trait of character. While, in certain respects, the trait of character viewed either as cause or effect is of superior consequence, it is evidently further removed than is the physical habit from the uniformity of nature, which, as has been seen,¹ is at the basis of probative relevancy, the proper field of the law of evidence. It would seem, therefore, that as a matter of principle the probative force of a habit should be regarded as greater than that of the doing of a particular similar act, and *a fortiori*, than any probative relevancy which may properly be found to attach to the establishment in evidence of the existence on the part of an alleged actor of a particular trait of character. While there is, beyond all dispute, a *general and pervasive* potency in the metaphysical development of the individual, and consequently of his future conduct, which is resident and inherent in the formation of a particular trait of character or of disposition, which has led all great moral teachers, with striking uniformity, to regard such a development as of far greater ultimate moment than the presence of any particular bodily habit; it still remains true that the influence of character upon conduct is lacking in a certain direct and *specific* relation between physical or mental stimulus and motor reaction which, in the field of physical nature, is essential to the probative element necessary in the law of evidence.

§ 3198. (*Other Uniformities than That of Physical Nature; Force of Habit*); Evidence of Habit Rejected.—While, as has been said,¹ the probative force of an established habit gives rise to a stronger inference that the alleged actor will conduct himself in accordance with it under similar circumstances than would result from evidence that the person in question had done a particular act on a similar occasion, the moral uniformity at the basis of the habit is not so esteemed by the courts as to lead them to treat the evidence of habit as primary. Accordingly, in the absence of an adequate forensic necessity on the part of the proponent² and some showing of special relevancy,³ such evidence will be rejected.⁴ In other words, where there is direct evidence to the

§ 3197-1. § 3150.

§ 3198-1. § 3195.

2. § 3163.

3. § 3166.

4. *Alabama*.—Louisville, etc., Co. v. Bouldin, 110 Ala. 185, 20 So. 325 (1895).

Connecticut.—Morris v. East Haven, 41 Conn. 252 (1874).

Illinois.—Jones v. Cline, 84 Ill. App. 428 (1899); Chicago, etc., R. Co. v. Gibbons, 65 Ill. App. 550 (1895).

Iowa.—Dalton v. Chicago, etc., R. Co., 114 Iowa 257, 86 N. W. 272

same effect⁵ or, in general, whenever evidence of habit is not required to meet some exigency of proof,⁶ the propriety of rejecting the evidence seems an administrative commonplace in most cases.

Administrative requirements.—Where proof of habit is not essential in order that a party may be allowed a reasonable opportunity to prove his case, sound administrative principles require the rejection of the evidence. Evidence of habit involves the proof of isolated instances when the habit was manifested. That the trial should be expedited consistently with the protection of the substantive rights of the parties, that the dangers arising from the injection into the case of collateral issues may be avoided, that the jury may not be misled by an array of similar instances furnishing the proof of the habit, — justify the refusal to admit the evidence. As was said by the Court of Appeals of New York,⁷ “Habit is an inference from many acts, each of which presents an issue to be tried and necessarily involves direct and naturally invites cross-examination. The circumstances surrounding each act present another issue, and thus many collateral issues would be involved which would not only consume much time, but would tend to distract the jury and lead them away from the main issue to be decided. From the want of previous notice the other party

(1901); *Hood v. Chicago, etc., R. Co.*, 95 Iowa, 331, 64 N. W. 261 (1895).

Kentucky.—*Louisville, etc., R. Co. v. Berry*, 9 Ky. L. Rep. (abstract) 683 (1887).

Maine.—*Chase v. Maine Cent. R. Co.*, 77 Me. 62, 52 Am. Rep. 744 (1885).

Maryland.—*Baltimore & O. R. Co. v. State*, 107 Md. 642, 69 Atl. 439 (1908).

Mississippi.—*Dowling v. State*, 5 Sm. & M. 664 (1846).

New Hampshire.—*Bourassa v. Grand Trunk Ry. Co.*, 75 N. H. 359, 74 Atl. 590 (1909).

New York.—*Zucker v. Whitridge*, 205 N. Y. 50, 98 N. E. 209 (1912).

Rhode Island.—*Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 33, 23 Atl. 732 (1885).

Vermont.—*Scott v. Bailey*, 73 Vt. 49, 50 Atl. 557 (1900).

5. *Illinois.*—*Chicago, etc., R. Co. v.*

Pearson, 82 Ill. App. 605, *aff'd*, 184 Ill. 386, 56 N. E. 633 (1900); *Cleveland, etc., R. Co. v. Moss*, 89 Ill. App. 1 (1899).

Kansas.—*Atchison, etc., R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780 (1888).

New York.—*Zucker v. Whitridge*, 205 N. Y. 50, 98 N. E. 209 (1912).

Rhode Island.—*Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732 (1885).

South Carolina.—*Bedenbaugh v. Southern Ry. Co.*, 69 S. C. 1, 48 S. E. 53 (1904).

Texas.—*Gulf, etc., R. Co. v. Hamilton*, 17 Tex. Civ. App. 76, 42 S. W. 358 (1897).

6. *State v. Fitchette*, 88 Minn. 145, 92 N. W. 527 (1902).

7. *Zucker v. Whitridge*, 205 N. Y. 50, 66, 98 N. E. 209 (1912), *per Vann, J.*

would not be prepared to meet such evidence, and after all the testimony of this character was in the fact would remain that, as no one is always careful, the subject of inquiry, although careful on many occasions, might have been careless on the occasion in question."

§ 3199. (Other Uniformities than That of Physical Nature; Force of Habit; Evidence of Habit Rejected); Animals.—Intermediate between the habits in which volition plays a part and those of the body which are entirely beyond the control of the will, though perhaps the result of acts originally *volitional*, are the habits of animals. While volition seems present in instinct, it has by no means the directing power manifested by the human being. The uniformity of action between a given stimulus and the conduct to which it leads — the essential element of relevancy in this connection — is much more invariable, more nearly approaching the uniformity of natural law. The inference, therefore, that an animal acted on a given occasion as it had been in the habit of doing, is much stronger than that a man would yield to a similar impulse under like circumstances. The court will, therefore, the more readily deem the evidence relevant.¹ In so doing, the habit itself may be proved by showing occasions on which the animal manifested the existence of the habit.² Thus, the characteristic habit of a horse to make the same turn in a road which he has recently done, to stop at a house where he has formerly been, and the like, is recognized by courts as suggesting a uniformity of action which makes prior conduct relevant as to subsequent, and *vice versa*. For example, in a prosecution for arson, the question being whether a horse was driven along a certain road at a certain time, the fact that four days after, without guidance, it made the same turns, is deemed competent.³

§ 3199-1. *Mayfield Lumber Co. v. Lewis*, 142 Ky. 727, 135 S. W. 420 (1911); *Folsom v. Concord, etc., R. Co.*, 68 N. H. 454, 38 Atl. 209 (1896); *Rumbaugh v. McCormick*, 80 Ohio St. 211, 88 N. E. 410 (1909).

2. *Massachusetts*.—*Palmer v. Coyle*, 187 Mass. 136, 72 N. E. 844 (1905); *Lynch v. Moore*, 154 Mass. 335, 28 N. E. 277 (1891); *Todd v. Rowley*, 8 Allen 51 (1864).

New Hampshire.—*Whittier v.*

Franklin, 46 N. H. 23, 88 Am. Dec. 185 (1865).

Vermont.—*Morgan v. Hendricks*, 80 Vt. 284, 67 Atl. 702 (1907).

Washington.—*Harris v. Carstens Packing Co.*, 43 Wash. 647, 86 Pac. 1125, 6 L. R. A. (N. S.) 1164n. (1906).

Wisconsin.—*Hadtke v. Grzyll*, 130 Wis. 275, 110 N. W. 225 (1907).

3. *State v. Ward*, 61 Vt. 153, 185, 17 Atl. 483 (1888), per Taft, J.,

It is not to be inferred, however, that the evidence though admissible is necessarily primary. It may be doubted, for example, whether the habit of an animal to do a particular act, would be received as evidence that he did it on a particular occasion, where there was direct evidence that he did or did not do it at that time. The same administrative principle treating evidence of habit merely as secondary evidence that conduct on a particular occasion was in accordance with it — is applied by the courts not only to human conduct, but to that of animals. That an animal did a particular act upon a given occasion cannot, as a general rule, be proved by showing that he did a similar act upon another. It cannot, for example, be proved that a dog has killed certain sheep by evidence that he has killed others.⁴ The physical capability of

wherein it was said: "The testimony of the state tended to show that the person who set the fire took a team from the stable in St. Johnsbury, drove to the Noyesville road in Walden, then on the Hazen and Goodenough roads to a point on the latter, where he left the team, went to the Foster buildings, fired them, went back to the sleigh, turned it about, and returned to St. Johnsbury, by the same route over which he traveled in going from it; that in going to the place where the team was left in the road, in passing from one road to the other a sharp angle was turned in each instance. Under exceptions the state was permitted to show that the horse, driven over the same route within four days after the fire, left to itself and without guidance, instead of passing the two roads, at the point of junction, voluntarily made the turns conforming to the route leading to the tracks and place of turning on the Goodenough road. Was the admission of this testimony error, or, in other words, was this testimony evidence in the strict sense of the term? 'The word evidence is applied to that which renders evident' and is defined to be any matter of fact, the effect, tendency, or design of which

is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. Best on Evidence, s. 11. Does the fact that when the horse was driven into the vicinity of Foster's on Saturday, he voluntarily left the road upon which he was traveling and turned into the Hazen and Goodenough roads, have a tendency to produce in the mind a persuasion that he had been there the prior Wednesday? If so, it was evidence of the fact. The testimony tended to show that the horse had the habit of turning into premises and roads where he had before been driven, and everyone familiar with horses is aware of their constant habit and custom in that respect; so much so that they can often be trusted to go without drivers in such places. We think the testimony had a tendency to create in the mind a persuasion that the horse had been there before; to render that fact evident. The question is not how strong a persuasion, but had it a tendency to create any? We think the invariable answer would be yes, and the testimony was properly admitted."

4. East Kingston v. Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174 (1868).

an animal to perform certain acts will be treated in the same way. What quantity of hay a sick horse will eat in a week cannot be shown by evidence of what another horse, in good condition, could consume in the same period.⁵

§ 3200. (*Other Uniformities than That of Physical Nature; Force of Habit*); When Admissible; Necessity.—Where the inference of conduct from habit is a probative one, the secondary evidence of a habit may be used as giving rise to an inference of conduct, by way of moral uniformity, when evidence of this nature is reasonably necessary to the case of the proponent. Should such a suitable forensic necessity for the use of the secondary evidence of habit as a basis for the inference of conduct in accordance with it, be made to appear to the court, the presiding judge may properly admit the evidence. This forensic necessity may occur in the proof of the proponent's original case or when it becomes necessary for him to corroborate his original evidence or to rebut the case made by his opponent, although the supply of primary evidence has become exhausted. Thus, on the proponent's original case, when direct evidence is not procurable as to A's conduct under particular circumstances, either because the latter is dead, declines to speak, or for some other reason, resort may be had to the secondary probative fact that he was in the habit of doing certain things in some material particular.¹

§ 3201. (*Other Uniformities than That of Physical Nature; Force of Habit; When Admissible; Necessity*); Corroboration and Rebuttal.—When the direct evidence produced by a party as to the conduct of A is controverted and a conflict of testimony is thereby created on the point, or where the direct primary evidence falls short of producing the required quantum of probative force, the proponent may, in corroboration or supplement of his primary evidence as to A's conduct, introduce the secondary cir-

5. *Carlton v. Hescox*, 107 Mass. 410 (1871).

§ 3200-1. *Stollery v. Cicero, etc.*, Ry. Co., 243 Ill. 290, 90 N. E. 709 (1910); *Devine v. National Safe Deposit Co.*, 145 Ill. App. 322 (1908); *Chicago v. Doolan*, 99 Ill. App. 143 (1900); *McNulta v. Lockridge*, 137

Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362, *affirmed*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. ed. 196 (1891); *Orr v. Jason*, 1 Ill. App. 439 (1877); *Smith v. Montgomery*, 5 T. B. Mon. (Ky.) 502 (1827); *Smock v. Smock*, 11 N. J. Eq. 156 (1856); *Outlaw v. Hurdle*, 46 N. C. 150, 165 (1853).

cumstantial fact of habit.¹ In much the same way, a litigant may introduce secondary evidence at the stage of rebuttal should an adequate forensic necessity for doing so arise at that stage.² Thus, on a question whether a testator, alleged to have mortgaged certain property, borrowed a large sum of money, his habits of living and doing business may properly be received in the absence of more primary evidence.³

According to the circumstances of the case, the court may decline to permit secondary evidence of *res inter alios* as part of or the whole of the original case of the proponent; but may limit the use of this evidence to the necessity arising at the stage of rebuttal. In other words, the presiding judge may require that the proponent, as a condition of being allowed to use secondary evidence, including *res inter alios*, should first have established, *prima facie*, his original case, by primary evidence, — using the secondary evidence only at the stage of rebuttal.⁴

§ 3202. (Other Uniformities than That of Physical Nature; Force of Habit; When Admissible; Necessity); Criminal Cases.

— This necessity frequently arises in criminal cases by reason of the characteristic secrecy with which the offense was committed. In certain classes of offenses, moreover, the fact of an absolute contradiction between two persons of equal credibility, or lack of it, may, in connection with the element of secrecy, make it neces-

§ 3201-1. *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848 (1894); *Lannis v. Louisville, etc., R. Co.*, 16 Ky. L. Rep. 446 (1894) (abstract); *Parkinson v. Nashua, etc., R. Co.*, 61 N. H. 416 (1881).

2. *Bourassa v. Grand Trunk Ry. Co.*, 75 N. H. 359, 74 Atl. 590 (1909); *Gulf, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1897) 42 S. W. 584.

3. *Taylor v. Crowninshield*, 5 N. Y. Leg. Obs. 209 (1847).

“The mortgagor was a gentleman between 55 and 60 years of age, worth upwards of sixty thousand dollars of personal property in addition to the premises in question and other real estate, having on deposit in the bank, from September to December, of the year 1842, upwards

of two thousand dollars, and from May to August previous, upwards of five thousand dollars, lending in the latter month from that deposit, three thousand five hundred dollars on mortgage; he was of retired habits with but few associates, parsimonious in expenditure, not engaged in, but on the contrary, averse to business, relying on the advice and agency of others, to whom, it is established, he did not apply on this occasion, and with his property invested in bond and mortgage.” *Taylor v. Crowninshield*, 5 N. Y. Leg. Obs. 209, 218 (1847), per Robertson, V. C.

4. *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.) 146, 83 Am. Dec. 621 (1863).

sary to resort to secondary evidence for the purpose of establishing a balance of probability on the one side or the other. For example, in attempting to draw an inference as to whether, under a given set of circumstances, a complaining witness consented to an act of sexual immorality, her habitual unchastity is a highly probative fact. It is accordingly received in evidence.¹

§ 3203. (*Other Uniformities than That of Physical Nature; Force of Habit; When Admissible*); Relevancy.—Whether the forensic necessity of the proponent for the use of secondary evidence in the way of habit as a basis of an inference as to conduct, arises at the state of original proof or at that of corroboration,¹ it is, in either case, essential that the habit in question should be shown to be probatively relevant to some issue raised in the case. For example, the fact that an individual has an objectionable personal habit is not competent unless it be such as to render it probable that the latter acted in the manner asserted.² Experience, on the other hand, sustains the proposition that a man is apt to do what he is in the habit of doing. The probative force, therefore, is greater in case of an established habit than in that of an isolated act.³ Habit, of course, means something more than the fact that a person has done the same thing before.⁴ The probative force of such a habit has frequently been recognized by the courts. As the Supreme Court of New Hampshire said,⁵ in a case where the plaintiff's intestate had been killed by one of defendant's trains at a highway crossing of its tracks;—"Several witnesses testified, subject to the defendant's exception, that during the three years preceding the death of the plaintiff's intestate they often saw him drive over the crossing in question, and that he always drove slowly and watched for trains. It was conceded at the argument

§ 3202-1. *Florida*.—*Rice v. State*, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245 (1895).

Kentucky.—*Cox v. Com.*, 140 Ky. 65, 130 S. W. 819 (1910).

New York.—*Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309 (1874).

North Carolina.—*State v. Murray*, 63 N. C. 31 (1868).

Utah.—*U. S. v. Bredemeyer*, 6 Utah 143, 22 Pac. 110 (1889).

Vermont.—*State v. Reed*, 39 Vt. 417, 94 Am. Dec. 337 (1867).

§ 3203-1. §§ 3200, 3201.

2. *Starett v. Chesapeake & O. R. Co.*, 33 Ky. L. Rep. 309, 110 S. W. 282 (1908); *Shoe Co. v. Hicks*, 70 Mo. App. 301 (1897).

3. *Davis v. Concord, etc., R. Co.*, 68 N. H. 247, 48 Atl. 388 (1894).

4. *Dalton v. Chicago, etc., R. Co.*, 114 Iowa 257, 86 N. W. 272 (1901); *Com. v. Ryan*, 134 Mass. 223 (1883).

5. *Davis v. Concord, etc., R. Co.*, 68 N. H. 247, 248, 44 Atl. 388 (1894), per Smith, J.

that the evidence was competent as tending to show that the deceased on approaching the crossing on the morning of the accident was watching for the train, that he stopped or drove slowly, and looked up and down the track to ascertain whether a train was approaching. It has repeatedly been held in this state that such evidence is competent, upon the ground that 'a person is more likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it.'"

*Consequently, when the necessity arises*⁶ for employing this species of evidence, it may well be held by the court to be relevant. The probative force of habit, whether the question arises in a civil or criminal case, is based principally upon the fact that habitual conduct is largely free from the complicating and confusing element of volition which makes the relevancy of moral conduct merely deliberative; but, on the contrary, brings such conduct in line with the activities of the body which are under the control of the subconscious or subliminal mind, i. e., are of the automatic nature, practically under the uniformity of natural law.⁷ In fact, the probative strength of habit is in proportion to the extent to which it assumes this automatic character.

Such is the general rule whenever a physical condition has been created whereby the body habitually acts in a special way beyond the control of the will. Under such circumstances, the uniformity of operation of an appropriate cause is greatly increased. Thus, in an action for causing a miscarriage through the performance of an abortion upon the body of a woman, evidence is admissible, with strong probative force, that the woman was physically unable to carry a foetus for the full period of gestation but habitually suffered a miscarriage on such occasions.⁸

§ 3204. (Other Uniformities than That of Physical Nature; Force of Habit; When Admissible; Relevancy); Criminal Cases.—The administrative requirement that evidence of habit is only to be received, whatever the forensic necessity of the proponent, when the habit offered is relevant to an issue raised in the case is naturally enforced with particular stringency in criminal cases. The relevancy may be either probative *per se*, or consist of a deliberative inference raised by corroboration to a probative

6. § 3200.

7. §§ 3195, 3196.

8. *Slattery v. People*, 76 Ill. 217 (1875).

efficiency. But whichever may be the manner in which the inference operates, the court will insist upon a close causal connection between the conduct in issue and the habit tendered in evidence. Thus, on an issue of consent to sexual immorality, the complainant's habitual use of indecent language is not admissible.¹ Such a habit may, however, bear on other issues than consent; for example, motive.²

Habit a Constituent Fact.—It may in certain classes of offenses be a part of the government's original case to prove the existence of a habit, or customary mode of doing things. In other words, the existence of an habitual course of conduct may be a component proposition in the issue before the jury. Looking at the matter from the standpoint of evidence rather than that of allegation, viewing the matter from the point of the actor rather than that of the pleader, the realm of natural happenings rather than that of intellect, the existence of this subordinate or component proposition of the issue implies proof of a corresponding *constituent fact*.³ The operation of the evidence of such a constituent fact is independently relevant,⁴ rather than probative. This is true of all constituent and *res gestae* facts and is apparently the real meaning of the expression that the *res gestae* are relevant *per se*, or, as it is often said, admissible *per se*. In this connection, proof of a habit is not *probative* as to conduct, it is merely a constituent fact in the *res gestae* and, as such, independently relevant by reason of its mere existence.⁵ Thus, the state may be called upon to show that the person accused of the offense is an habitual gambler⁶ or criminal.⁶ In much the same way the state may be required to show that a house⁷ or a room in it, is habitually resorted to for certain purposes.⁸ The right to prove habit in such a case follows as a matter of course.

§ 3204-1. *People v. Kuches*, 120 Cal. 566, 52 Pac. 1002 (1898).

2. *Kelly v. State*, 49 Ga. 12 (1873); *People v. Harris*, 136 N. Y. 423, 33 N. E. 65 (1893).

3. §§ 47, 49.

4. § 1728.

5. *Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335 (1892); *Com. v. Moore*, 2 Dana (Ky.) 402 (1834).

6. *State v. Carr*, 146 Mo. 1, 47 S. W. 790 (1898).

Offenses, the prosecution of which is barred by a statute of limitation are, it is said, not provable in this connection. *World v. State*, 50 Md. 49 (1878).

7. *State v. Gorham*, 67 Me. 247 (1877).

8. *Com. v. Ferry*, 146 Mass. 203, 15 N. E. 484 (1888) (selling pools).

§ 3205. (Other Uniformities than That of Physical Nature; Force of Habit; When Admissible); Independent Relevancy.—

Where the existence of a habit is offered, not as constituting a basis of moral uniformity which makes it probable that one who has habitually done a particular thing in the past will continue to do it on a certain occasion, but because, as a fact, in and of itself, it is relevant for some other purpose, the evidence is not within the procedural rule or administrative principle under consideration. The fact, so regarded, is admissible as a matter of course, as other facts would be.¹ Thus, where mortuary tables are offered as a deliberative fact affecting the question of damages as showing the expectancy of plaintiff's life, evidence should be received of his habit of drinking alcohol as a beverage.² So where, in an action for injuries to an employee, the issue is as to the competency of a fellow servant, his habits relative to the use of intoxicating liquors may be shown.³ Likewise in an action where the issue is whether the plaintiff has been imposed upon by the fraudulent

§ 3205-1. California.—*People v. Kuches*, 120 Cal. 566, 52 Pac. 1002 (1898).

Connecticut.—*State v. Jerome*, 33 Conn. 265 (1866).

Georgia.—*Atlanta, etc., R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763 (1894).

Michigan.—*Layzell v. J. H. Sommers Coal Co.*, 156 Mich. 268, 15 Det. L. N. 404, 117 N. W. 179 (1908).

Mississippi.—*Dowling v. State*, 5 Sm. & M. 664 (1846).

New York.—*Warner v. New York Cent. R. Co.*, 45 Barb. 299, *reversed*, 44 N. Y. 465 (1866).

Texas.—*Washington L. Ins. Co. v. Berwald*, (Civ. App. 1903) 72 S. W. 436, *affirmed*, 97 Tex. 111, 76 S. W. 442.

2. *Townsend v. Briggs*, 99 Cal. 481, 34 Pac. 116 (1893). "The mortuary tables had been introduced by respondent as evidence tending to show what was the probable expectation of life of persons of his age; these tables, as we understand it, are based upon what experience shows to be the average expectation of life

of all persons of that age; and, therefore, in rebuttal of that evidence, appellant was entitled to prove any fact tending to show that respondent's expectation of life was below such average. We apprehend that an insurance company would not take the same risk upon every man of respondent's age without particular inquiry as to his condition, upon the theory that the average expectation of life of persons of his age was a certain number of years. If we assume that the tables established a *prima facie* case of respondent's expectation of life, the appellant clearly had the right to overcome that *prima facie* case by showing facts which lessened that expectation. And the fact that respondent had the habit of drinking liquor to excess, or was a drunkard, was certainly a fact proper to be proved in that connection." *Townsend v. Briggs*, 99 Cal. 481, 485, 34 Pac. 116 (1893), per McFarland, J.

3. *Layzell v. Sommers Coal Co.*, 156 Mich. 268, 15 Det. L. N. 404, 117 N. W. 179 (1908).

artifices of the defendant, evidence is admissible as to the plaintiff's habits, his customary improvidence, carelessness, and the like.⁴

§ 3206. (*Other Uniformities than That of Physical Nature; Force of Habit; When Admissible; Independent Relevancy*); Knowledge.—The existence of a habit may be independently relevant as part of the knowledge upon which a person informed of it based his conduct. For example, that A knew of a certain habit on the part of B may be a relevant fact in deciding whether A had a reasonable or probable cause for instituting criminal proceedings against B.¹ In like manner, in an action by a servant for injuries sustained by reason of a vicious horse of the defendant, to show the latter's knowledge of the character of the horse, evidence of other occasions upon which its disposition was manifested may be shown.²

4. *Kauffman v. Swar*, 5 Pa. St. 230 (1847).

§ 3206-1. *Mark v. Merz*, 53 Ill. App. 458 (1893).

2. *Palmer v. Coyle*, 187 Mass. 136, 72 N. E. 844, (1905); *Morgan v. Hendricks*, 80 Vt. 284, 67 Atl. 702 (1907).

CHAPTER XLVII.

RELEVANCY OF SIMILARITY; MORAL UNIFORMITY.

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§ 3207. *Res Inter Alios*; A Modern Meaning.—In the last chapter¹ we considered the relevancy of collateral occurrences based upon the uniform action of natural law. In the present chapter we proceed to the consideration of the relevancy of similar collateral acts of a given individual where the underlying uniformity is that of mind as exhibited in mental acts. The final chapter² also treats of the instances where the underlying uniformity is that of mind, but only where exhibited by a relevant trait of character.

Testimony of collateral occurrences, based solely upon mental uniformity, is frequently excluded as *res inter alios* or as *res inter alios acta*. The phrase *res inter alios* is an abbreviation of the maxim, *res inter alios acta alteri nocere non debet*, meaning a transaction between two parties ought not to operate to the disadvantage of a third.³ The maxim itself indicates a ground of irrelevancy in a particular instance, i. e., where it is proposed to affect a person by the acts of others for whose doings he is in no way responsible. The original proposition seems to admit of no question; of course, a particular individual cannot be affected by acts of third persons with whom he is not connected in some legal way or by an independent transaction of his own on another occasion. But the phrase, as used at the present time, is employed in a much broader sense. As now used, it seems to relate to the use of collateral occurrences or acts of the person in question which by their general similarity suggest an inference, usually nothing more than a probable one, that the particular act or event in question took place. While the original proposition was confined to acts of others, its modern sense authorizes the use of the term in relation to mere *natural events*⁴ or acts of the party *himself* at another time.

§ 3208. (*Res Inter Alios*); Civil Cases.—The general rule relative to the principle now under consideration may be thus stated: The question being whether A. did or omitted to do a certain act, no evidence is admissible of other similar acts or omissions which, by their general resemblance, thereto, suggest a probable inference that A. did or omitted to do the act in question, unless the two transactions are connected in some particular manner. Although it is undoubtably true that, so far as concerned in the exhibition of the constituent mental state, the most conspicuous use of the rule occurs in proceedings brought for the punishment of crime,¹ it is, nevertheless, equally applicable to civil cases.² Thus, where

3. Broom's Legal Maxims, p. 954.

Taken from Roman Law.—“As to the maxim *Res inter alios acta*, it is taken from the Roman law, but it is not to be found there in its present shape. It is from Cod. vii. 60. 1, where it reads: *Inter alios res gestas aliis non posse facere praejudicium saepe constitutum est.*”

Thayer, Bedingfield's Case, 15 Amer. L. Rev. 5 (1881).

4. § 3150, *et seq.*

§ 3208-1. § 3210.

2. Alabama.—Hall v. Cardwell, 5 Ala. App. 481, 59 So. 514 (1912); Martin v. Jesse French Piano & Organ Co., 151 Ala. 289, 44 So. 112 (1907).

the issue in an action of ejectment was whether a certain return of execution was deficient, it could not be shown that other returns of executions made by the same officer were thus defective.³ Likewise, where the question is the accuracy of entries in certain books, testimony of the inaccuracy of other entries, having no connection with the transactions in issue, is not admissible.⁴ And in an action for boarding a horse, wherein the defendant claimed that the plaintiff agreed to board the animal for its use, it was held that evidence that the plaintiff had previously offered to keep another horse for its use should not be admitted.⁵ Nor, to show the payment of certain state and county taxes, is evidence to be received that city taxes have been paid.⁶

Connecticut.—Parsons v. Utica Cement Co., 82 Conn. 333, 73 Atl. 785, 135 Am. St. Rep. 278 (1909).

Colorado.—Chicago, etc., Ry. Co. v. Rhodes, 21 Colo. App. 229, 121 Pac. 769 (1912).

Georgia.—Hutchinson Lumber Co. v. Dickerson, 127 Ga. 328, 56 S. E. 491 (1907).

Kentucky.—Stoner v. Nall, 149 Ky. 124, 148 S. W. 8 (1912).

Maine.—Provencher v. Moore, 105 Me. 87, 72 Atl. 880 (1909).

Maryland.—Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108n (1906).

Michigan.—Cone v. American Electric Fuse Co., 145 Mich. 536, 108 N. W. 991, 13 Det. Leg. N. 637 (1906).

Missouri.—Howell v. Sherwood, 242 Mo. 513, 147 S. W. 810 (1912).

New York.—Manse v. Hossington, 205 N. Y. 33, 98 N. E. 203 (1912); People v. Teal, 196 N. Y. 372, 89 N. E. 1086, 25 L. R. A. (N. S.) 120n, 17 Am. & Eng. Ann. Cas. 1175 (1909); *In re* Paul Jones & Co., 117 App. Div. 775, 102 N. Y. Suppl. 983 (1907).

North Carolina.—Jeffords v. Albemarle Water-Works, 157 N. C. 10, 72 S. E. 624 (1911).

North Dakota.—American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99 (1910); Sucker State Drill Co. v. Wirtz Bros., 17 N. D. 313, 115

N. W. 844, 18 L. R. A. (N. S.) 134n. (1908).

South Carolina.—Puryear v. Ould, 81 S. C. 456, 62 S. E. 863 (1908); Southern Ry., Carolina Division v. Howell, 79 S. C. 281, 60 S. E. 677 (1908).

South Dakota.—Norbeck v. Nicholson Co. v. Mallock, 26 S. D. 54, 127 N. W. 471 (1910).

Texas.—State v. Quillen, (Tex. Civ. App. 1909) 115 S. W. 600; Sabine Valley Telephone Co. v. Oliver, 46 Tex. Civ. App. 428, 102 S. W. 925 (1907).

Vermont.—Holbrook v. Quinlan & Co., 84 Vt. 411, 80 Atl. 339 (1911).

Washington.—Sudden & Christenson v. Morse, 48 Wash. 101, 92 Pac. 901 (1907).

West Virginia.—Beard v. Indemnity Co., 65 W. Va. 283, 64 S. E. 119 (1909).

United States.—Whitney v. Martin, 192 Fed. 843 (1912); Salmon v. Helena Box Co., 158 Fed. 300, 85 C. C. A. 551 (1907).

3. Howell v. Sherwood, 242 Mo. 513, 147 S. W. 810 (1912).

4. Parsons v. Utica Cement Co., 82 Conn. 333, 73 Atl. 785, 135 Am. St. Rep. 278 (1909).

5. Provencher v. Moore, 105 Me. 87, 72 Atl. 880 (1909).

6. State v. Quillen (Tex. Civ. App. 1909) 115 S. W. 600.

§ 3209. (*Res Inter Alios; Civil Cases*); Negligence and Due Care.—The principle involved is well illustrated in negligence cases. Thus, as stated in another place,¹ in an action founded upon an allegation of negligence, no inference that a certain act was reasonable or that a certain person acted in a reasonably careful manner can be drawn from the fact that others in the same business have or have not done such act or are or are not in the habit of acting in such a manner. This proposition, as to which there is some conflict of judicial authority,² is within the meaning of the original *res inter alios* proposition. The modern use of the maxim is well illustrated by the familiar rule that similar accidents or similar acts of negligence by a party at another time are not admissible to show his negligence in a particular case.³

§ 3209-1. § 3152.

2. § 3152.

3 *Alabama*.—*Louisville & N. R. Co. v. Miller*, 109 Ala. 500, 19 So. 989 (1896).

Arkansas.—*St. Louis, etc., Ry. Co. v. Jones*, 59 Ark. 105, 26 S. W. 595 (1894).

California.—*Pacheco v. Judson Mfg. Co.*, 113 Cal. 541, 45 Pac. 833 (1896).

Colorado.—*Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 92 Pac. 922, 15 L. R. A. (N. S.) 775n. (1907).

Florida.—*Florida, etc., R. Co. v. Mooney*, 45 Fla. 286, 33 So. 1010, 110 Am. St. Rep. 73 (1903).

Georgia.—*City Council of Augusta v. Lombard*, 93 Ga. 284, 20 S. E. 312 (1893); *Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706 (1890).

Illinois.—*Harmon v. Peoria Ry. Co.*, 160 Ill. App. 453 (1912); *Illinois Cent. R. Co. v. Borders*, 61 Ill. App. 55 (1895).

Indiana.—*Cleveland, etc., Ry. Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644 (1888); *Ramsey v. Rushville, etc., Road Co.*, 81 Ind. 394 (1882).

Iowa.—*Potter v. Cave*, 123 Iowa 98, 98 N. W. 569 (1904).

Kentucky.—*Black Diamond Coal & Mining Co. v. Price*, 108 S. W. 345, 33

Ky. L. Rep. 334 (1908); *Southern Ry. Co. in Kentucky v. Winchester*, 105 S. W. 167, 32 Ky. L. Rep. 19 (1907); *Hutcherson v. Louisville & N. R. Co.*, 52 S. W. 955, 21 Ky. L. Rep. 733 (1899).

Maine.—*Damren v. Trask*, 102 Me. 39, 65 Atl. 513 (1906).

Maryland.—*Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424 (1892).

Massachusetts.—*Menard v. Boston & M. R. Co.*, 150 Mass. 386, 23 N. E. 214 (1890); *Gahagan v. Boston & L. R. Co.*, 1 Allen 187 (1861); *Robinson v. Fitchburg & W. R. Co.*, 7 Gray 92 (1856).

Michigan.—*Fox v. Peninsular White Lead & Color Works*, 92 Mich. 243, 52 N. W. 623 (1892).

Minnesota.—*Davidson v. St. Paul, etc., R. Co.*, 34 Minn. 51, 24 N. W. 324 (1885).

Mississippi.—*Tribette v. Illinois Cent. R. Co.*, 71 Miss. 212, 13 So. 899 (1893).

Missouri.—*Calxaterra v. Iovaldi*, 123 Mo. App. 347, 100 S. W. 675 (1906); *Van Edwards v. Barber Asphalt Pav. Co.*, 92 Mo. App. 221 (1902).

New Hampshire.—*Wentworth v. Smith*, 44 N. H. 419, 82 Am. Dec. 228 (1862).

New York.—*Gardner v. Schenec-*

§ 3210. (*Res Inter Alios*); Criminal Cases.—A familiar doctrine of criminal law of great importance to the accused announces that one cannot be proved to have been guilty of a particular crime by the simple showing that he has committed a similar one at about the same time.¹ Whatever may be the ground for admitting in a criminal case evidence of a collateral crime, it is not found in the

tady Ry. Co., 128 App. Div. 12, 112 N. Y. Suppl. 369 (1908).

Ohio.—Lake Shore, etc., R. Co. v. Gaffney, 9 Ohio Cir. Ct. R. 32, 2 Ohio Dec. 212, 6 O. C. D. 94 (1894); Findlay Brewing Co. v. Bauer, 50 Ohio St. 560, 35 N. E. 55, 40 Am. St. Rep. 686 (1893).

Oregon.—Davis v. Oregon, etc., R. Co., 8 Oreg. 172 (1879).

Texas.—Gulf, etc., Ry. Co. v. Rowland, 82 Tex. 166, 18 S. W. 96 (1892); Missouri Pac. Ry. Co. v. Mitchell, 75 Tex. 77, 12 S. W. 810 (1889).

Vermont.—Coates v. Town of Caanan, 51 Vt. 131 (1878).

Virginia.—Moore v. City of Richmond, 85 Va. 538, 8 S. E. 387 (1888).

Wisconsin.—Mayer v. Milwaukee St. Ry. Co., 90 Wis. 522, 63 N. W. 1048 (1895); Barrett v. Village of Hammond, 87 Wis. 654, 58 N. W. 1053 (1894).

§ 3210-1. *Alabama*.—Robinson v. State, 5 Ala. App. 45, 59 So. 321 (1912); Gray v. State, 160 Ala. 107, 49 So. 678 (1909).

Arkansas.—Jones v. State, 88 Ark. 579, 115 S. W. 166 (1909).

California.—People v. Bartnett, 15 Cal. App. 89, 113 Pac. 879 (1910); People v. Tomalty, 14 Cal. App. 224, 111 Pac. 513 (1910); People v. Argentos, 156 Cal. 720, 106 Pac. 65 (1910).

District of Columbia.—Ryan v. U. S., 26 App. D. C. 74 (1905).

Florida.—Wallace v. State, 41 Fla. 547, 26 So. 713 (1899).

Georgia.—Denham v. State, 5 Ga. App. 303, 63 S. E. 62 (1908); Clarke v. State, 5 Ga. App. 93, 62 S. E. 663 (1908); Nesbit v. State, 125 Ga. 51, 54 S. E. 195 (1906).

Kentucky.—Johnson v. Com., 144 Ky. 287, 137 S. W. 1079 (1911); Morse v. Com., 129 Ky. 294, 111 S. W. 714, 33 Ky. L. Rep. 831, 894 (1908); Raymond v. Com., 123 Ky. 368, 96 S. W. 515, 29 Ky. L. Rep. 785 (1906).

Louisiana.—State v. Oden, 130 La. 598, 58 So. 351 (1912); State v. Holland, 120 La. 429, 45 So. 380, 14 Am. & Eng. Ann. Cas. 692 (1907).

Michigan.—People v. Loomis, 162 Mich. 651, 126 N. W. 985, 17 Det. L. N. 406 (1910); People v. Giddings, 159 Mich. 523, 124 N. W. 546, 16 Det. L. N. 1024, 18 Am. & Eng. Ann. Cas. 844 (1910).

Minnesota.—State v. Fitchette, 88 Minn. 145, 92 N. W. 527 (1902).

Mississippi.—Slaydon v. State, 58 So. 977 (1912).

Missouri.—State v. Phillips, 233 Mo. 299, 135 S. W. 4 (1911); State v. Missouri Pac. Ry. Co., 219 Mo. 156, 117 S. W. 1173 (1909).

Nebraska.—Morgan v. State, 56 Neb. 696, 77 N. W. 64 (1898).

New York.—People v. Morral, 141 App. Div. 153, 125 N. Y. Suppl. 976 (1910); People v. Geyer, 196 N. Y. 364, 90 N. E. 48 (1909); People v. Dudenhausen, 195 N. Y. 554, 88 N. E. 1127 (1909).

North Carolina.—State v. Hight, 150 N. C. 817, 63 S. E. 1043 (1909).

North Dakota.—State v. Hazlett, 16 N. D. 426, 113 N. W. 374 (1907).

Oklahoma.—Hooper v. State, 7 Okl. Cr. App. 43, 121 Pac. 1087 (1912); Rea v. State, 3 Okl. Cr. App. 269, 105 Pac. 381 (1909).

Oregon.—State v. O'Donnell, 36 Oreg. 222, 61 Pac. 892 (1900).

Pennsylvania.—Com. v. House, 223

general similiarity of the two transactions, however closely related in time.² The reason for admissibility must be sought elsewhere. Not only is such evidence calculated to confuse and mislead the jury by raising collateral issues,³ but to operate to the prejudice of the accused by proving that he has committed the particular crime on trial mainly by showing that he has been guilty of another. Moreover, such evidence lies very close to proving bad character by showing particular instances of misconduct, a method of proof which is forbidden.⁴

§ 3211. (*Res Inter Alios; Criminal Cases*); Corpus Delicti not Provable by Other Occurrences.—Under the general administrative rule that the *corpus delicti* must be clearly proved, the court will be disinclined, where any other course is practically possible, to allow it to be circumstantially proved by evidence of similar occurrences.¹

§ 3212. (*Res Inter Alios; Criminal Cases; Corpus Delicti not Provable by Other Occurrences*); Administrative Necessity.—The exclusion of collateral offenses to prove the *corpus delicti* is not, however, absolute, but yields to the paramount canon of administration that the proponent is at liberty to prove his case by secondary evidence if that is the best proof in his power.¹ Thus the government, having no direct evidence, may prove the *corpus delicti* by circumstantial or secondary evidence.² Many cases,

Pa. St. 487, 72 Atl. 804 (1909); Com. v. Wilson, 186 Pa. St. 1, 40 Atl. 283, 42 W. N. C. 285 (1898).

South Carolina.—State v. Van Buren, 86 S. C. 297, 68 S. E. 568 (1910).

South Dakota.—State v. Fulwider, 28 S. D. 622, 134 N. W. 807 (1912); State v. La Mont, 23 S. D. 174, 120 N. W. 1104 (1909).

Tennessee.—Gardner v. State, 121 Tenn. 684, 120 S. W. 816 (1908).

Texas.—Pitts v. State, 60 Tex. Cr. App. 524, 132 S. W. 801 (1910); Clark v. State, 59 Tex. Cr. App. 246, 128 S. W. 131 (1910); Waterhouse v. State, 57 Tex. Cr. App. 590, 124 S. W. 633 (1910).

Utah.—State v. Williams, 36 Utah 273, 103 Pac. 250 (1909).

Washington.—State v. Craddick, 61 Wash. 425, 112 Pac. 491 (1911).

United States.—Marshall v. U. S., 197 Fed. 511 (1912); Dyar v. U. S., 186 Fed. 614, 108 C. C. A. 478 (1911).

2. Res gestae.—For some consideration of the rule that the prosecution is at liberty to prove the *res gestae* of the offense on trial though it should involve proof of another crime, similar or dissimilar in its nature to that on trial, see §§ 2588, *et seq.*

3. § 3154.

4. §§ 3341, *et seq.*

§ 3211-1. See, People v. Bird, 124 Cal. 32, 56 Pac. 639 (1899).

§ 3212-1. §§ 334, 339.

2. Florida.—Holland v. State, 39 Fla. 178, 22 So. 298 (1897).

Iowa.—State v. Wescott, 130 Iowa

moreover, of circumstantial evidence present great difficulty in establishing the proof of the *corpus delicti* apart from the facts, often of a collateral nature, which tend to connect the accused with the commission of the crime.³

§ 3213. Administrative Requirements; Necessity.—The evidence of collateral acts being secondary in its nature, must fulfill the requirements which judicial administration imposes upon the reception of the inferior grade of proof. It must be shown that the fact offered is reasonably necessary to proof of the proponent's case.

§ 3214. (*Administrative Requirements; Necessity*); Absence of Actual Observers.—The necessity for using evidence of this grade is that the case can be proved in no other way. Crimes are frequently, if not generally, committed under conditions which preclude the possibility of observers. This being so, the necessary proof is often entirely lacking except by the use of secondary facts or what is commonly called circumstantial evidence. In such cases evidence of collateral acts by the person in question may properly be received.

§ 3215. (*Administrative Requirements*); Relevancy.—Judicial administration requires not only that the use of secondary evidence should be necessary, but also that the evidence offered should be relevant, both objectively and subjectively.

§ 3216. (*Administrative Requirements*); Relevancy of Similarity.—In the case of a collateral act by A. whose relevancy is that of the uniformity of mind, the proving power is that of simi-

1, 104 N. W. 341 (1905); *State v. Keeler*, 28 Iowa 551 (1870).

Kansas.—*State v. Winner*, 17 Kan. 298 (1876).

Kentucky.—*Johnson v. Com.*, 81 Ky. 325 (1883).

Michigan.—*People v. Vanderpool*, 1 Mich. N. P. 264 (1870).

Missouri.—*State v. Coats*, 174 Mo. 396, 74 S. W. 864 (1903).

Texas.—*Brown v. State*, 1 Tex. App. 154 (1876).

Vermont.—*State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 312 (1858).

West Virginia.—*State v. Flanagan*, 26 W. Va. 116 (1885).

Wisconsin.—*Schwantes v. State*, 127 Wis. 160, 106 N. W. 237 (1906).

United States.—*Dimmick v. U. S.*, 135 Fed. 257, 70 C. C. A., 141 (1905).

England.—*Regina v. Burton, Dearsley Cr. C.* 282 (1854).

3. See *Com. v. Williams*, 171 Mass. 461, 50 N. E. 1035 (1898).

larity. There is seen to be such a uniformity in the mental reactions of a given individual, say A., to a particular mental stimulus that the fact of his action on a particular occasion in a given way, a certain motive being operative, furnishes evidence that, the same stimulus being present, he acted in a like way on another occasion. The collateral occurrence operates, in many cases, to corroborate the existence of the connection claimed by the prosecution to exist between a particular stimulus and the actual conduct of the accused. Where conduct under a given set of circumstances is shown, it may be due to the presence of any particular adequate stimulus embraced within these circumstances. It may be probable that one of these stimuli was the operative one. Such proof, however, is lacking in conclusiveness. Additional proof is, therefore, required. It is often found in the relevant use of other occasions upon which A. has been called upon to act. As other instances of the doing of similar acts by A. are introduced into evidence, the number of possible stimuli to which the mind of A. could have reacted, of necessity, becomes smaller, the evidence of design becomes more imposing, the claim that the incriminating conduct was the result of accident or other innocent motive may be practically eliminated. Adding further instances may suffice to demonstrate that the motive or other mental state claimed by the prosecution to have been the true cause of the particular conduct by A. was in fact the actual one.

§ 3217. (*Administrative Requirements; Relevancy of Similarity*); Proof of Mental State.—A constituent element of many offenses is a mental state of the alleged perpetrator of the crime. The crime, for example, charged against A. may be that of receiving stolen goods, *knowing* them to have been stolen. In such a case, A's knowledge of the stolen character of the goods is a necessary fact to be shown by the prosecution. Or a given act may be charged to have been done by him with *intent* to defraud. Thus, with regard to a great many offenses, some particular psychological state on the part of the alleged offender is a constituent element of the crime. In the absence of admissions by the person charged with the commission of an act, his mental state in connection with the doing of such act can rarely be shown except by the manifestations of such state to prove the existence of which, the use of collateral acts may be of great value, and, in many cases, the only mode of proof.

Force of separate indictment, separate acquittal, etc.—The evidence of other transactions of a similar and connected nature is regarded solely as it bears upon the present proof of a psychological constituent of the case under investigation. That a separate indictment has been found for the commission of the collateral act,¹ or that the accused has been tried for his liability for the other transaction and acquitted,² furnishes no ground for rejecting the circumstantial evidence which it supplies as to the existence of the mental state in question on the principal occasion.

A contrary view.—This proposition, however, has not met with universal acceptance, though undoubtedly sound, in point of principle.³ The passing of a forged bank bill would be equally probative as to the knowledge with which a second bank bill had been uttered, whatever may have been the action of the court, jury, or prosecuting attorney in disposing of the liability for it. The attempt to fetter the action of the human mind in its search for truth by exclusions of relevant testimony based on analogies derived from the substantive law—whether of *res adjudicata* or other branch of positive law—is, as it were, a relic of barbarism. The collateral transaction should be admissible in evidence for the establishment of a mental state, although, in the particular case, the *res gestae*, perhaps on some other point were not deemed sufficient to warrant affirmative action by the court.

English rule.—In England, it has been held that a subsequent

§ 3217-1. *McCartney v. State*, 3 Ind. 353, 354, 56 Am. Dec. 510 (1852), per Perkins, J., wherein it was said: "We can see no reason why the fact that indictments had been found, or that convictions or acquittals had been had upon them, should affect the admissibility of such utterings. Neither the indictments, nor the records of conviction or acquittal, need be, nor, it strikes us, (though the point is not for decision in this case) should be, given in evidence; but the facts and attendant circumstances alone of the utterings as though no indictments had been found."

2. *California.*—*People v. Frank*, 28 Cal. 507 (1865).

Maryland.—*Bell v. State*, 57 Md. 108 (1881).

New Jersey.—*State v. Robinson*, 16 N. J. L. 507 (1838); *State v. Van Houten*, 3 N. J. L. 672, 4 Am. Dec. 407 (1810).

South Carolina.—*State v. Houston*, 1 Bailey 300 (1829).

Vermont.—*State v. Leonard*, 72 Vt. 102, 47 Atl. 395 (1900).

3. *State v. Tindal*, 5 Harr. (Del.) 488 (1853), wherein it was held, on a prosecution for the passing of counterfeit notes, that the entire weight of the evidence of similar crimes introduced for the purpose of showing the guilty knowledge of the accused was destroyed when evidence that he was acquitted for the collateral crimes was introduced.

offense, made the subject of a separate indictment, is not admissible for the purpose of showing the guilty knowledge of the accused.⁴

The effect of the Statute of Limitations.—A divergence of judicial opinion—analogous to that which has arisen as to the use of a collateral occurrence as proof of a party's mental state on the particular occasion when the conduct used as probative is the subject of a separate indictment especially where that indictment has been tried and resulted in acquittal—will be found to exist as to the propriety of using, for this purpose of showing mental state, the facts of an evidentiary occasion which reveal the *res gestae* of a separate offense for which the perpetrator cannot now be tried, for the reason that such a prosecution would be barred by the *Statute of Limitations*. By a parity of reasoning, and upon the sound view, the elapsing of a statutory period of limitation for the prosecution of the collateral transaction should not affect its availability as evidence of the psychological state which is a constituent fact. No statute of limitations runs, or should be permitted to run, against the ascertainment of truth in any connection where the truth, when obtained, may be used. Such, however, is not the general rule. It has, on the contrary, been held that where the prosecution of an offense has been barred by the statute of limitations no evidence of the transaction can be given for any purpose.⁵ The rule is, of course, otherwise where the offense is a continuing one.⁶

§ 3218. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State); Influence on Conduct.—The reasoning in cases where it is sought to prove a particular mental state by collateral occurrences when the same mental state was manifested proceeds, apparently, by a process of elimination, it being assumed that only the stimulus to conduct which fairly suffices to explain the action of A. in all the instances adduced is the truly operative one. Moreover, only stimuli sufficient to influence the conduct of the alleged actor are to be considered in such connection.

4. *Rex v. Smith*, 2 C. & P. 633 (1827).

5. *State v. Guest*, 100 N. C. 410, 6 S. E. 253 (1888); *State v. Potter*, 52 Vt. 33 (1879); *Wolfson v. U. S.*, 101 Fed. 430, 41 C. C. A. 422 (1900);

writ of certiorari denied, 180 U. S. 637, 21 Sup. Ct. 919, 45 L. ed. 710 (1901).

6. *People v. David*, 52 Mich. 569, 18 N. W. 362 (1884); *Reg. v. Beighton*, 18 Cox. Cr. C. 535 (1897).

§ 3219. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State*); Remoteness in Time.—That the collateral occurrence should comply with the condition of relevancy imposed by judicial administration in case of secondary evidence, it must not be too remote in point of time to tend to prove the actual state of mind with which the act in question was done.¹ Ordinarily the similar occurrences which are shown in evidence to prove a mental state are transactions which took place at about the time of the act which is under investigation.² However, the length of time which will cause evidence of a collateral fact to lose all relevancy or to become probatively so weak as to warrant its exclusion cannot be determined by any fixed rule. The precedents show a variety of lengths of time.³ The question is properly one for the administrative discretion of the court.⁴

§ 3220. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State*); Remoteness in Causation.—A similar occurrence offered to prove a mental state must not exhibit

§ 3219-1. *Bannon v. P. Bannon Sewer Pipe Co.*, 136 Ky. 556, 119 S. W. 1170 (1909); *Horn v. State*, (Tex. Cr. App. 1912) 150 S. W. 948; *Deitz v. State*, 149 Wis. 462, 136 N. W. 166 (1912).

2. *Anson v. People*, 148 Ill. 494, 35 N. E. 145 (1893); *Crum v. State*, 148 Ind. 401, 47 N. E. 833 (1897); *Harding v. State*, 54 Ind. 359 (1876); *Cornell v. State*, 85 Md. 1, 36 Atl. 117 (1897); *Bishop v. State*, 55 Md. 138 (1880); *Reed v. State*, 15 Ohio 217 (1846); *Reg. v. Ollis*, 2 Q. B. 758 (1900).

3. *California*.—*People v. Frank*, 28 Cal. 507 (1865) (Forgery; fact that accused had passed another draft 20 days after received to show knowledge.)

Georgia.—*Shaw v. State*, 60 Ga. 246 (1878) (Uxoricide; that defendant had beaten his wife four years before admitted.)

Michigan.—*Shipman v. Seymour*, 40 Mich. 274 (1879) (Fraudulent statement made to a third party two months before admitted to show

fraudulent intent in purchasing goods in contemplation of insolvency.)

Missouri.—*State v. Jackson*, 112 Mo. 585, 20 S. W. 674 (1892) (Obtaining money by fraud; that same parties had done a similar act three months before admitted to show criminal intent.)

Nebraska.—*Burlington v. State*, 61 Nebr. 276, 85 N. W. 77 (1901) (Forged deed made a "short time" before one in question admitted to show intent.)

South Carolina.—*State v. Allen*, 56 S. C. 495, 35 S. E. 204 (1900) (Forgery of a teacher's pay certificate; that accused has forged similar certificates within a period of four months after admitted to show intent.)

England.—*Rex v. Ball, R. & R.* 132 (1807) (Forgery, fact that accused had uttered another forged note about three months before admitted to show knowledge.)

4. The length of time over which an inquiry concerning other offenses should be permitted to extend is

such slight causal connection between the stimulus and the conduct in case of the collateral occurrence or as between the collateral and main transactions or otherwise as to render it of no logical bearing in discovering the true stimulus under which the main action was done.¹ Thus, on the trial of an indictment for horse stealing, where the defendants claimed that they took the horses intending to ride them one night and then turn them loose, it was error to admit evidence for the purpose of showing criminal intent, that the defendants stole saddles and bridles for the horses.² Likewise, where in a prosecution for breaking and entering a building in the night-time with intent to commit larceny, the breaking was admitted; but the defendant claimed that he was too intoxicated to entertain intent, evidence of two former convictions for larceny was inadmissible, it not being shown that such larcenies were committed under circumstances similar to those in the case at bar.³

§ 3221. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State*); Mental State Must be Relevant.

— The mental state which the collateral occurrence tends to establish must obviously be the same or relevant to the existence of that involved in the main transaction; in other words, to the discovery of the true mental stimulus which influenced the conduct of the actor.

§ 3222. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State*); Intent and Intention.— Conspicuous among the mental states to which the administrative principle above outlined is applied is that of intent or intention, re-

within the sound legal discretion of the presiding judge. *State v. Hall*, 45 Mont. 498, 125 Pac. 639 (1912).

§ 3220-1. *Miller v. State*, (Tex. Cr. 1912) 144 S. W. 239.

“On the trial of an indictment for obtaining property by false representations or pretenses, the allegation that they were made with an intent to defraud may be proved by transactions with other parties which tend to show a fraudulent scheme to obtain property, . . . provided the dealings are sufficiently connected in point of time and character to authorize an inference that the transac-

tion was in pursuance of the same general purpose.” *People v. Peckens*, 153 N. Y. 576, 592, 47 N. E. 883 (1897), per Martin, J.

“The transactions must be so connected in point of time, and so similar in their other relations, that the same motive may reasonably be imputed to them all.” *Hall v. Naylor*, 18 N. Y. 588, 589 (1859), per Comstock, J.

2. *Endaily v. State*, 39 Ark. 278 (1881).

3. *People v. Henry*, 129 Mich. 100, 88 N. W. 77 (1901).

sulting in the familiar rule that, where the issue involves one's intent in doing an act, other acts of a similar character done by the same person are admissible to illustrate or establish the intent with which the particular act was done.¹ By the process of elimination to which reference has been made the various circumstances

§ 3222-1. *Alabama*.—Wright v. State, 138 Ala. 69, 34 So. 1009 (1903).

Arkansas.—Ross v. State, 92 Ark. 481, 123 S. W. 756 (1909); State v. Dulaney, 87 Ark. 17, 112 S. W. 158, 15 Am. & Eng. Ann. Cas. 192 (1908).

California.—People v. Grow, 16 Cal. App. 147, 116 Pac. 369 (1911); People v. Gray, 66 Cal. 271, 5 Pac. 240 (1884).

Colorado.—Warford v. People, 43 Colo. 107, 96 Pac. 556 (1908).

Delaware.—State v. Effer, (Gen. Sess. 1910) 78 Atl. 411.

District of Columbia.—Ryan v. U. S., 26 App. D. C. 74 (1905).

Florida.—Presley v. State, 57 So. 605 (1912).

Georgia.—Lee v. State, 8 Ga. App. 413, 69 S. E. 310 (1910).

Idaho.—State v. McGann, 8 Idaho 40, 66 Pac. 823 (1901).

Illinois.—People v. Zito, 237 Ill. 434, 86 N. E. 1041 (1909); People v. Hagenow, 236 Ill. 514, 86 N. E. 370 (1908); Joseph Taylor Co. v. Dawes, 122 Ill. App. 389 (1905).

Indiana.—Crum v. State, 148 Ind. 401, 47 N. E. 833 (1897).

Iowa.—McGuire v. Iowa County, 133 Iowa 636, 111 N. W. 34 (1907); State v. Roseum, 119 Iowa 330, 93 N. W. 295 (1903).

Kansas.—State v. Lowe, 6 Kan. App. 110, 50 Pac. 912 (1897).

Kentucky.—Morse v. Com., 129 Ky. 294, 111 S. W. 714, 33 Ky. L. Rep. 831, 894 (1908).

Louisiana.—State v. High, 116 La. 79, 40 So. 538 (1906); State v. Johnson, 111 La. 935, 36 So. 30 (1904).

Maryland.—Lamb v. State, 66 Md. 285, 7 Atl. 399 (1886); Bell v. State, 57 Md. 108 (1881).

Massachusetts.—Com. v. Sawtelle,

141 Mass. 140, 5 N. E. 312 (1886); Com. v. Sinclair, 138 Mass. 493 (1885).

Michigan.—People v. Minney, 155 Mich. 534, 119 N. W. 918, 15 Det. L. N. 1094 (1909).

Missouri.—State v. Hyde, 234 Mo. 200, 136 S. W. 316 (1911); Powell v. St. Louis, etc., R. Co., 229 Mo. 246, 129 S. W. 963 (1910); State v. Spaugh, 200 Mo. 571, 98 S. W. 55 (1906).

Montana.—State v. Newman, 34 Mont. 434, 87 Pac. 462 (1906).

New York.—People v. Morse, 196 N. Y. 306, 89 N. E. 816 (1909); People v. Dudenhausen, 195 N. Y. 554, 88 N. E. 1127 (1909); People v. Weinsheimer, 190 N. Y. 537, 83 N. E. 1129 (1907), *affirming* 117 App. Div. 603, 102 N. Y. Suppl. 579 (1907).

North Dakota.—State v. Merry, 20 N. D. 337, 127 N. W. 83 (1910).

Oklahoma.—Smith v. State, 3 Okla. Cr. App. 629, 108 Pac. 418 (1910).

Oregon.—State v. Hembree, 54 Ore. 463, 103 Pac. 1008 (1909).

South Dakota.—State v. Fulwider, 28 S. D. 622, 134 N. W. 807 (1912).

Texas.—Wright v. State, 56 Tex. Cr. App. 353, 120 S. W. 458 (1909); Wyatt v. State, 55 Tex. Cr. App. 73, 114 S. W. 812 (1908); Holland v. State, 55 Tex. Cr. App. 27, 115 S. W. 48 (1908).

Washington.—State v. Dana, 59 Wash. 30, 109 Pac. 191 (1910).

Wisconsin.—Dietz v. State, 149 Wis. 462, 136 N. W. 166 (1912).

United States.—Prettyman v. U. S., 180 Fed. 30, 103 C. C. A. 384 (1910); Walsh v. U. S., 174 Fed. 615, 98 C. C. A. 461 (1909); Williamson v. U. S., 207 U. S. 425, 28 S. Ct. 163, 52 L. ed. 278 (1908).

of collateral cases may be so employed as by the elimination of possible, but actually inert, causes, the true intention and motive of conduct may be made to stand forth with distinction. In other words, the collateral transactions should have such a relation to the main occurrence as to corroborate the hypothesis that a particular cause relied on in the affirmative hypothesis is the actual one by the removal of infirmative hypotheses or explanations. That this should be possible certain conditions of time, space, and causation should be met, it being at all times understood that the mere fact of a general similarity between the two occurrences is not sufficient to admit the evidence. This method of reasoning is practically the Method of Agreement as outlined by Mr. Mill.² Among the nice tasks committed to counsel and rendered effective by judicial administration, few are capable of producing better or more convincing results than the careful adjustment of collateral issues for the establishment of intention and other mental states. Intent, however, is not a constituent of every civil cause of action;³ nor is such mental state an essential element of every crime.⁴ In such a case, the reason for admitting the testimony of the collateral occurrence must be founded, if at all, upon some other ground.

§ 3223. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Intent and Intention); Fraud.

— The general principle is well illustrated by the civil cases where one of the essential elements to the cause of action is to prove that an act was done fraudulently or with intent to defraud. To eliminate the possible infirmative hypothesis that the act in question was done innocently or was the result of an accident or honest mistake, it may be shown that the perpetrator of the act had committed similar acts, i. e., frauds of a like nature.¹ It is

2. § 3178.

3. Tracy v. McKinney, 82 Mo. App. 506 (1900).

4. State v. Holland, 120 La. 429, 45 So. 380, 14 Am. & Eng. Ann. Cas. 692 (1907); People v. Minney, 155 Mich. 534, 119 N. W. 918, 15 Det. L. N. 1094 (1909); State v. Smith, 55 Oreg. 408, 106 Pac. 797 (1910).

§ 3223-1. *Alabama*.—Davidson v. Kahn, 119 Ala. 364, 24 So. 583 (1898).

California.—Butler v. Collins, 12 Cal. 457 (1859).

Colorado.—Mayo v. Wahlgreen, 9 Colo. App. 506, 50 Pac. 40 (1897).

Connecticut.—Smith v. Brockett, 69 Conn. 492, 38 Atl. 57 (1897).

Delaware.—Freeman v. Topkis, 1 Marv. 174, 40 Atl. 948 (1893).

Florida.—Charles v. State, 58 Fla. 17, 50 So. 419 (1909).

Illinois.—Walker v. Montgomery, 249 Ill. 378, 94 N. E. 527 (1911);

evident that, to afford proof of the fraudulent intent in the main transaction, the collateral transaction must be of such a nature that the same intent can be imputed to the party in question on both occasions.² Moreover, the testimony of the collateral occasion being admissible only on the question of the mental state of

Standard Mfg. Co. v. Brons, 118 Ill. App. 632 (1905).

Indiana.—*Hartford Life Ins. Co. v. Hope*, 40 Ind. App. 354, 81 N. E. 595 (1907); *Hoffman et al. v. Anderson*, 145 Ind. 613, 44 N. E. 629 (1896).

Indian Territory.—*Swoffard Bros. Dry-Goods Co. v. Smith-McCord Dry Goods Co.*, 1 Ind. Terr. 314, 37 S. W. 103 (1896).

Iowa.—*Gibson v. Seney*, 138 Iowa 383, 116 N. W. 325 (1908); *Elbert v. Mitchell*, 131 Iowa 598, 109 N. W. 181 (1906); *Zimmerman v. Brannon*, 103 Iowa 144, 72 N. W. 439 (1897).

Kansas.—*People's Bank of Minneapolis v. Reid*, 86 Kan. 245, 120 Pac. 339 (1912).

Kentucky.—*First Nat. Bank v. Wisdom's Ex'rs*, 111 Ky. 135, 63 S. W. 461, 23 Ky. L. Rep. 530 (1901).

Massachusetts.—*Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551 (1892); *Costello v. Crowell*, 139 Mass. 588, 2 N. E. 698 (1885).

Michigan.—*Beard v. Hill*, 131 Mich. 246, 90 N. W. 1065, 9 Det. L. N. 297 (1902); *Beebe v. Knapp*, 28 Mich. 53 (1873).

Missouri.—*Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906n, 113 Am. St. Rep. 709n. (1906).

New Hampshire.—*Bradley v. Obear*, 10 N. H. 477 (1839).

New Jersey.—*State v. Flanagan*, 83 N. J. L. 379, 84 Atl. 1046 (1912).

New York.—*Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 269 (1859).

North Carolina.—*Pritchard v. Smith*, 160 N. C. 79, 75 S. E. 803 (1912).

Ohio.—*Wilmot v. J. N. Lyon & Co.*, 7 Ohio Dec. 394, 11 Ohio Cir. Ct. R. 238 (1897).

Pennsylvania.—*Homewood People's Bank v. Marshall*, 223 Pa. 289, 72 Atl. 627 (1909); *Wheeler v. Ahlers*, 189 Pa. St. 138, 42 Atl. 40 (1899); *Tainter v. Hyneman*, 6 Phila. 202 (1867).

South Carolina.—*State v. Talley*, 77 S. C. 99, 57 S. E. 618, 11 L. R. A. (N. S.) 938n, 122 Am. St. Rep. 559 (1907); *Brown v. Newell*, 64 S. C. 27, 41 S. E. 835 (1902).

South Dakota.—*First Nat. Bank v. Harvey*, 137 N. W. 365 (1912).

Texas.—*Compagnie Des Metaux Unital v. Victoria Mfg. Co.*, (Civ. App. 1908) 107 S. W. 651.

Utah.—*Ogden Valley Trout & Resort Co. v. Lewis*, 125 Pac. 687 (1912).

Vermont.—*Eastman v. Premo*, 49 Vt. 355, 24 Am. Rep. 142 (1876).

Virginia.—*Piedmont Bank v. Hatcher*, 94 Va. 229, 26 S. E. 505 (1897).

Washington.—*Carnahan v. Moore*, 70 Wash. 623, 127 Pac. 195 (1912).

United States.—*Colt v. U. S.*, 190 Fed. 305, 111 C. C. A. 205 (1911); *U. S. v. Dexter*, 154 Fed. 890 (1907); *Wright v. Stewart*, 130 Fed. 905 (1904); *affirmed, Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499 (1906); *United States v. Kenney*, 90 Fed. 257 (1898); *Castle v. Bullard*, 64 U. S. 172, 16 L. ed. 424 (1859).

Fraud opens wide the door for all fairly relevant evidence including evidence as to similar, but unconnected facts in order to show systematically fraudulent intention on the part of the party sought to be charged." *Hinckley v. Freich*, 112 Minn. 239, 127 N. W. 940 (1910).

2. *White v. Beal & Fletcher Co.*, 65 Ark. 278, 45 S. W. 1060 (1898); *J. H. Beers & Co. v. Gurney*, 7 Ohio C.

the perpetrator, it cannot be used to show the commission of the fraud in the particular case.³

§ 3224. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Intent and Intention*); Offences against the Person.—The intent with which the act in question is done is an essential element of nearly every criminal offense against one's person. This constituent fact of intent, as in other cases of proof of mental states, may be shown by evidence of collateral occasions upon which the unlawful intent was manifested. Thus, in a prosecution for a homicide, evidence of another offence by the accused will be received to show the defendant's intent in the particular case.¹ Such evidence tends to eliminate possible defenses, such as that the death in question was the result of an accident, or that the accused, when committing the deed, was acting in self defense. In the same way, where a person is the victim of an assault not resulting in his death, other assaults made by the accused may assist the jury in determining the intent with which the particular act was done.² So, too, in a prosecution for robbery, collateral acts of the same nature may be shown to illustrate the intent of the accused in committing the act in question.³

D. 411, 14 Ohio Cir. Ct. R. 82 (1897);
Witliff v. Spreen, 51 Tex. Civ. App.
544, 112 S. W. 98 (1908).

3. Tracy v. McKinney, 82 Mo. App.
506 (1900); Ogden Valley Trout &
Resort Co. v. Lewis, (Utah 1912) 125
Pac. 687.

§ 3224-1. *California*.—People v.
Manasse, 153 Cal. 10, 94 Pac. 92
(1908).

Florida.—West v. State, 42 Fla.
244, 28 So. 430 (1900).

Illinois.—People v. Hagenow, 236
Ill. 514, 86 N. E. 370 (1908); Painter
v. People, 147 Ill. 444, 35 N. E. 64
(1893).

Kentucky.—Miracle v. Com., 148
Ky. 453, 146 S. W. 1136 (1912).

Louisiana.—State v. Deschamps,
42 La. Ann. 567, 7 So. 703, 21 Am. St.
Rep. 392 (1890).

Nebraska.—Clark v. State, 79 Neb.
482, 113 N. W. 804 (1907).

North Carolina.—State v. Register,
133 N. C. 746, 46 S. E. 21 (1903).

Pennsylvania.—Com. v. Birriolo,
197 Pa. St. 371, 47 Atl. 355 (1900).

Texas.—Cortez v. State, 43 Tex. Cr.
App. 375, 66 S. W. 453 (1902).

Virginia.—Nicholas v. Com., 91
Va. 741, 21 S. E. 364 (1895).

Wisconsin.—Zoldoske v. State, 82
Wis. 580, 52 N. W. 778 (1892).

2. *Alabama*.—Lawrence v. State, 84
Ala. 424, 5 So. 33 (1887).

Colorado.—Warford v. People, 43
Colo. 107, 96 Pac. 556 (1908).

Iowa.—State v. Merkley, 74 Iowa,
695, 39 N. W. 111 (1888).

Michigan.—People v. Loomis, 162
Mich. 651, 126 N. W. 985, 17 Det. L.
N. 406 (1910).

Missouri.—State v. Pennington, 124
Mo. 388, 27 S. W. 1106 (1894).

Rhode Island.—State v. McDonald,
14 R. I. 270 (1883).

Texas.—Dool v. State, (Cr. App.
1912) 150 S. W. 626.

3. State v. Ward, (Iowa 1902) 91
N. W. 898. But see, State v. Spray,
174 Mo. 569, 74 S. W. 846 (1903).

Where the defendant is accused of threatening injury to a person with intent to extort money or property, other threats and acts of extortion may be received to show the intent in the particular case.⁴ Where, however, no particular intent is required to be shown to support a conviction for an offense against a person, the necessity for proof of the collateral occurrence does not arise and sound administrative principles require the rejection of such evidence.⁵

§ 3225. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Intent and Intention); Offences against Property.—Among instances in which collateral occurrences are employed for the purpose of establishing intent are those of prosecutions for offenses against property. Thus, in offenses based on the unlawful appropriation of property, such as larceny,¹ or embezzlement,² evidence of this character may be ad-

4. *State v. Ventrees*, 33 Nev. 509, 112 Pac. 42 (1910); *People v. Weinseimer*, 190 N. Y. 537, 83 N. E. 1129 (1907); *State v. Louanis*, 79 Vt. 463, 65 Atl. 532, 9 Am. & Eng. Ann. Cas. 127 (1907).

5. *State v. Holland*, 120 La. 429, 45 So. 380, 14 Am. & Eng. Ann. Cas. 692 (1907).

§ 3225-1. *Alabama*.—*Curtis v. State*, 78 Ala. 12 (1884).

California.—*People v. Arnold*, 17 Cal. App. 68, 118 Pac. 729 (1911).

Michigan.—*People v. Nagle*, 137 Mich. 88, 100 N. W. 273, 11 Det. L. N. 223 (1904).

Minnesota.—*State v. Southall*, 77 Minn. 296, 79 N. W. 1007 (1899).

Missouri.—*State v. Phillips*, 160 Mo. 503, 60 S. W. 1050 (1901).

Nebraska.—*Cohoe v. State*, 82 Neb. 744, 118 N. W. 1088 (1908).

New York.—*People v. Lovejoy*, 37 App. Div. 52, 55 N. Y. Suppl. 543; 13 N. Y. Cr. Rep. 411 (1899).

Oklahoma.—*Davis v. State*, 7 Okl. Cr. App. 322, 123 Pac. 560 (1912); *Beberstein v. Territory*, 8 Okl. 467, 58 Pac. 641 (1899).

Texas.—*Ellington v. State*, 63 Tex. Cr. App. 420, 140 S. W. 1102 (1911);

Melton v. State, 63 Tex. Cr. App. 362, 140 S. W. 230 (1911); *Petty v. State*, 59 Tex. Cr. App. 536, 129 S. W. 615 (1910); *Reese v. State*, 44 Tex. Cr. App. 34, 68 S. W. 283 (1902); *Brown v. State*, (Cr. App. 1900) 59 S. W. 1118; *Gilbraith v. State*, 41 Tex. 567 (1874).

2. *Arkansas*.—*Storms v. State*, 81 Ark. 25, 98 S. W. 678 (1906).

California.—*People v. Hatch*, 163 Cal. 368, 125 Pac. 907 (1912); *People v. Robertson*, 6 Cal. App. 514, 92 Pac. 498 (1907); *People v. Cobler*, 108 Cal. 538, 41 Pac. 401 (1895); *People v. Gray*, 66 Cal. 271, 5 Pac. 240 (1884).

Georgia.—*Mangham v. State*, (App. 1912) 75 S. E. 512.

Kentucky.—*Morse v. Com.*, 129 Ky. 294, 111 S. W. 714, 33 Ky. L. Rep. 831 (1908).

Massachusetts.—*Com. v. Sawtelle*, 141 Mass. 140, 5 N. E. 312 (1886); *Com. v. Bennett*, 118 Mass. 443 (1875); *Com. v. Tuckerman*, 10 Gray 173 (1857).

North Carolina.—*State v. Hight*, 150 N. C. 817, 63 S. E. 1043 (1909).

Texas.—*Lawshe v. State*, 57 Tex. Cr. App. 32, 121 S. W. 865 (1909);

missible for such purpose. Similarly, where the crime charged is that of receiving stolen property,³ obtaining property by false pretenses,⁴ and the like, the evidence of a collateral crime is received to show the intent of the accused when committing the particular act. He may claim that the act in question was an accident or mistake, or that he took the property in good faith in a belief of his ownership. The proof of the collateral occurrences tends to avoid such possible defenses and to show that the particular act was done with unlawful intent. In much the same way, on a

Smith v. State, 52 Tex. Cr. App. 527, 107 S. W. 844 (1908); *Goodwyn v. State*, (Cr. App. 1901) 64 S. W. 251.

United States.—*Brown v. U. S.*, 142 Fed. 1, 73 C. C. A. 187 (1905).

3. *Michigan*.—*People v. Henssler*, 48 Mich. 49, 11 N. W. 804 (1882).

Missouri.—*State v. Sarony*, 95 Mo. 349, 8 S. W. 407 (1888); *State v. Bayne*, 88 Mo. 604 (1886).

New York.—*Shippy v. People*, 86 N. Y. 375, 40 Am. Rep. 551 (1881).

North Carolina.—*State v. Walton*, 114 N. C. 783, 18 S. E. 945 (1894).

Ohio.—*State v. Finney*, 1 Wkly. Law Bul. 30 (1876).

Tennessee.—*Rafferty v. State*, 91 Tenn. 655, 16 S. W. 728 (1891).

Texas.—*Harwell v. State*, 22 Tex. App. 251, 2 S. W. 606 (1886).

4. *Arkansas*.—*Johnson v. State*, 75 Ark. 427, 88 S. W. 905 (1905).

California.—*People v. Emmons*, 13 Cal. App. 487, 110 Pac. 151 (1910); *People v. Whalen*, 154 Cal. 472, 98 Pac. 194 (1908).

Colorado.—*Housh v. People*, 24 Colo. 262, 50 Pac. 1036 (1897).

Illinois.—*People v. Weil*, 244 Ill. 176, 91 N. E. 112 (1910).

Iowa.—*State v. Gibson*, 132 Iowa 53, 106 N. W. 270 (1906); *State v. Seligman*, 127 Iowa 415, 103 N. W. 357 (1905); *State v. Soper*, 118 Iowa 1, 91 N. W. 774 (1902).

Kansas.—*State v. Hetrick*, 84 Kan. 157, 113 Pac. 383, 34 L. R. A. (N. S.) 642n. (1911).

Massachusetts.—*Com. v. Lubinsky*, 182 Mass. 142, 64 N. E. 966 (1902).

Michigan.—*People v. Hoffman*, 142 Mich. 531, 105 N. W. 838, 12 Det. L. N. 805 (1905).

Missouri.—*State v. Donaldson*, 243 Mo. 460, 148 S. W. 79 (1912); *State v. Wilson*, 223 Mo. 173, 122 S. W. 701 (1909); *State v. Roberts*, 201 Mo. 702, 100 S. W. 484 (1907); *State v. Rosenberg*, 162 Mo. 358, 62 S. W. 435 (1901); *State v. Wilson*, 143 Mo. 334, 44 S. W. 722 (1898); *State v. Beauleigh*, 92 Mo. 490, 4 S. W. 666 (1887).

Nebraska.—*State v. Sparks*, 79 Neb. 504, 511, 113 N. W. 154, 114 N. W. 598 (1908).

New Jersey.—*State v. Flanagan*, 83 N. J. L. 379, 84 Atl. 1046 (1912).

New York.—*People v. Cohen*, 148 App. Div. 205, 133 N. Y. Suppl. 103 (1911); *People v. Levin*, 194 N. Y. 554, 87 N. E. 1124 (1909); *People v. Weber*, 130 App. Div. 593, 115 N. Y. Suppl. 453 (1909); *People v. Garrahan*, 19 App. Div. 347, 46 N. Y. Suppl. 497; *affirmed*, 154 N. Y. 769, 49 N. E. 1102 (1897); *People v. Wicks*, 11 App. Div. 539, 42 N. Y. Suppl. 630; *affirmed*, 154 N. Y. 766, 49 N. E. 1102 (1896).

Oregon.—*State v. Germain*, 54 Oreg. 395, 103 Pac. 521 (1909).

South Carolina.—*State v. Talley*, 77 S. C. 99, 57 S. E. 618, 11 L. R. A. (N. S.) 938n., 122 Am. St. Rep. 559 (1907).

prosecution for injury to property, such as burglary⁵ or arson,⁶ the government may show the commission of other offenses by the accused. Likewise, where the accused is charged with forgery⁷ or the uttering of counterfeit money,⁸ proof of collateral acts may be made to illustrate the intent of the defendant in the commission of the principal act.

§ 3226. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Intent and Intention); Sexual Offences.—As a general proposition, in prosecutions for sexual offenses, the intent with which the act was done is not such an essential element in the government's case, that proof of a collateral offense will be admitted for that purpose. Thus, in a prosecution for rape, adultery or incest the evidence of other offenses is not admitted to show the defendant's intent, but is frequently received to show some other fact, such as the relation of the parties or the

5. *Kentucky*.—*Mulligan v. Com.*, 144 Ky. 246, 137 S. W. 1062 (1911); *Thomas v. Com.*, 1 Ky. L. Rep. 122 (1880).

Louisiana.—*State v. Morgan*, 129 La. 154, 55 So. 747 (1911).

Missouri.—*State v. Toohey*, 203 Mo. 674, 102 S. W. 530 (1907).

Pennsylvania.—*Com. v. Shepherd*, 2 Pa. Dist. Rep. 345 (1893).

Texas.—*Overstreet v. State*, (Cr. App. 1912) 150 S. W. 899.

Vermont.—*State v. Valwell*, 66 Vt. 558, 29 Atl. 1018 (1894).

6. *Hinkle v. State*, 174 Ind. 276, 91 N. E. 1090 (1910); *Knights v. State*, 58 Neb. 225, 78 N. W. 508, 76 Am. St. Rep. 78 (1899); *Kramer v. Com.*, 87 Pa. St. 299 (1878); *State v. Huffman*, 69 W. Va. 770, 73 S. E. 292 (1912).

7. *Alabama*.—*Wright v. State*, 138 Ala. 69, 34 So. 1009 (1903); *McDonald v. State*, 83 Ala. 46, 3 So. 305 (1887).

California.—*People v. Bird*, 124 Cal. 32, 56 Pac. 639 (1899).

Maryland.—*Bell v. State*, 57 Md. 108 (1881).

Missouri.—*State v. Hodges*, 144

Mo. 50, 45 S. W. 1093 (1898); *State v. Minton*, 116 Mo. 605, 22 S. W. 808 (1893).

Montana.—*State v. Newman*, 34 Mont. 434, 87 Pac. 462 (1906).

New York.—*People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62 (1887).

North Dakota.—*State v. Murphy*, 17 N. D. 48, 115 N. W. 84, 17 L. R. A. (N. S.) 609n., 16 Am. & Eng. Ann. Cas. 1133 (1908).

Texas.—*Howard v. State*, (Cr. App. 1912) 143 S. W. 178; *Pelton v. State*, 60 Tex. Cr. App. 412, 132 S. W. 480, 24 Am. & Eng. Ann. Cas. 86 (1910); *Francis v. State*, 7 Tex. App. 501 (1880).

United States.—*Ex parte Scharer*, 197 Fed. 67 (1912); *Dillard v. U. S.*, 141 Fed. 303, 72 C. C. A. 451 (1905).

8. *Indiana*.—*McCartney v. State*, 3 Ind. 353, 56 Am. Dec. 510 (1852).

Massachusetts.—*Com. v. Price*, 10 Gray 472, 71 Am. Dec. 668 (1858).

New Jersey.—*State v. Van Houten*, 3 N. J. L. 672, 4 Am. Dec. 407 (1810).

Texas.—*Burks v. State*, 24 Tex. App. 332, 6 S. W. 303 (1887).

United States.—*Bryan v. U. S.*, 133 Fed. 495, 66 C. C. A. 369 (1904).

inclination or disposition of the accused. But in prosecutions for certain sexual crimes, the intent of the defendant is a constituent fact to be shown by the prosecution. Where proof of such mental state is necessary, evidence of similar offenses by the accused may assist in determining the intent with which the particular act in question was done. For example, in a prosecution for an assault with *intent* to commit rape, the constituent element of *intent* may be shown by collateral acts of the accused when the same mental state was manifested.¹ So, too, upon a prosecution for taking indecent liberties with a child, evidence of similar acts by the accused may be admitted in evidence.² Likewise, proof of a collateral offense will be received on the trial of an indictment for lewdness, where the issue is whether the exposure of the defendant's person was intentional.³ Under sound administrative principles, however, such evidence is not admissible unless necessary to afford the government a reasonable opportunity for the proof of its case. If the defendant admits in open court that, if the acts charged were done, they were intentionally done, no paramount necessity exists for the reception of the evidence and the court may properly refuse to admit the testimony.⁴

§ 3227. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Intent and Intention); Social Offences.—In many offenses, other than those mentioned in the foregoing sections, the intent accompanying the doing of the alleged criminal act is an element of such importance that the prosecution is permitted to introduce proof of collateral acts by the accused. Thus, on a prosecution for a violation of a liquor law, other offenses by the accused may be received on the question of the defendant's intent upon the particular instance under investi-

§ 3226-1. *State v. Johnson*, 133 Iowa 38, 110 N. W. 170 (1907); *State v. Desmond*, 109 Iowa 72, 80 N. W. 214 (1899); *State v. Walters*, 45 Iowa 389 (1879); *Evers v. State*, 84 Neb. 708, 121 N. W. 1005, 19 Am. & Eng. Ann. Cas. 96 (1909); *Williams v. State*, 8 Humph. (Tenn.) 585 (1848). See also, *State v. Leak*, 156 N. C. 643, 72 S. E. 567 (1911).

2. *People v. Harrison*, 14 Cal. App. 545, 112 Pac. 733 (1911); *People v. Swift*, (Mich. 1913) 138 N. W. 662; *Grabowski v. State*, 128 Wis. 447, 105 N. W. 805 (1905).

3. *State v. Stice*, 88 Iowa 27, 55 N. W. 17 (1893).

4. *State v. Vance*, 119 Iowa 685, 94 N. W. 204 (1903).

gation.¹ Likewise, on a trial for the giving,² or the solicitation,³ of a bribe, the intent of the accused may be shown by similar acts committed or attempted to be committed at other times. So, too, on a prosecution for practicing medicine without a license, evidence of other acts of practice by the accused will be received.⁴ In much the same way, evidence of collateral acts will be admitted upon the trial of numerous social offenses, such as posting an obscene letter,⁵ attempting to procure an abortion,⁶ illegal prescription of cocaine,⁷ false certificate of acknowledgment,⁸ keeping a gambling room,⁹ and false registration.¹⁰

§ 3228. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State); Knowledge.—The scienter is a constituent element of a large number of criminal offenses or instances of civil liability. Evidence of such a constituent is, of course, admissible and may be properly established by use of collateral instances giving rise to an appropriate induction.¹

§ 3227-1. Alabama.—*Sweat v. State*, 153 Ala. 70, 45 So. 588 (1908).

Illinois.—*People v. Whalen*, 151 Ill. App. 16 (1909).

Iowa.—*State v. Johns*, 140 Iowa 125, 118 N. W. 295 (1908).

Massachusetts.—*Com. v. Sinclair*, 138 Mass. 493 (1885).

Michigan.—*People v. Hancock*, 166 Mich. 654, 132 N. W. 443 (1911); *People v. Giddings*, 159 Mich. 523, 124 N. W. 546, 16 Det. L. N. 1024, 18 Am. & Eng. Ann. Cas. 844 (1910).

Missouri.—*State v. Stamfer*, 159 Mo. App. 382, 141 S. W. 432 (1911).

North Dakota.—*State v. Miller*, 20 N. D. 509, 128 N. W. 1034 (1910).

Oklahoma.—*Hill v. State*, 3 Okl. Cr. App. 686, 109 Pac. 291 (1910).

Texas.—*Weatherford v. State*, 51 Tex. Cr. App. 430, 103 S. W. 632 (1907); *Pike v. State*, 40 Tex. Cr. App. 613, 51 S. W. 395 (1899).

2. Roden v. State, (Ala. App. 1912) 59 So. 751.

Attempt to bribe.—In a prosecution for attempting to bribe an officer, evidence that accused approached another in the same way in connection with the same matter is admissible to show intent. *Carden v.*

State, 62 Tex. Cr. App. 545, 138 S. W. 598 (1911).

3. Higgins v. State, 157 Ind. 57, 60 N. E. 685 (1901); *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127 (1898).

4. State v. Blumenthal, 141 Mo. App. 502, 125 S. W. 1188 (1910); *Sirgh v. State*, (Tex. Cr. App. 1912) 146 S. W. 891; *Germany v. State*, 62 Tex. Cr. App. 276, 137 S. W. 130 (1911).

5. Thomas v. State, 103 Ind. 419, 2 N. E. 808 (1885).

6. Lamb v. State, 66 Md. 285, 7 Atl. 399 (1886).

7. Stanley v. State, 9 Ga. App. 141, 70 S. E. 894 (1911); *Lee v. State*, 8 Ga. App. 413, 69 S. E. 310 (1910).

8. People v. Marrin, 205 N. Y. 275, 98 N. E. 474 (1912).

9. Razor v. State, 57 Tex. Cr. App. 10, 121 S. W. 512 (1909).

10. State v. Robinson, 236 Mo. 712, 139 S. W. 140 (1911); *Com. v. Valverdi*, 218 Pa. St. 7, 66 Atl. 877 (1907).

§ 3228-1. Alabama.—*Pugh v. State*, 4 Ala. App. 144, 58 So. 936 (1912); *Cox v. State*, 162 Ala. 66, 50 So. 398 (1909).

Arkansas.—*State v. Dulaney*, 87

§ 3229. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Knowledge*); Negligence.—In an action for an injury arising out of the alleged negligent condition of machinery or other property, it is necessary, or at least desirable from the standpoint of the plaintiff, to show the defendant's *knowledge* of the dangerous conditions. The happening of a similar accident from the same cause tends to eliminate the infirmative hypothesis that the defendant had no knowledge of the defect in question. It is, therefore, generally held that testimony of the prior occurrence is admissible to charge the defendant with knowledge or notice of the dangerous nature of the instrumentality in question.¹ The rule is well illustrated by cases of in-

Ark. 17, 112 S. W. 158, 15 Am. & Eng. Ann. Cas. 192 (1908).

California.—*People v. Robertson*, 6 Cal. App. 514, 92 Pac. 498 (1907); *People v. Whiteman*, 114 Cal. 338, 46 Pac. 99 (1896).

Delaware.—*State v. Effler*, (Gen. Sess. 1910) 78 Atl. 411.

District of Columbia.—*Ryan v. U. S.*, 26 App. D. C. 74 (1905).

Florida.—*Langford v. State*, 33 Fla. 233, 14 So. 815 (1894).

Georgia.—*Lee v. State*, 8 Ga. App. 413, 69 S. E. 310 (1910).

Illinois.—*People v. Hagenow*, 236 Ill. 514, 86 N. E. 370 (1908); *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183 (1902).

Indiana.—*Buechert v. State*, 165 Ind. 523, 76 N. E. 111 (1905).

Kentucky.—*Morse v. Com.*, 129 Ky. 294, 111 S. W. 714, 33 Ky. L. Rep. 831, 894 (1908).

Louisiana.—*State v. Behan*, 113 La. 701, 37 So. 607 (1904).

Maine.—*State v. McAllister*, 24 Me. 139 (1844).

Massachusetts.—*Com. v. Stearns*, 10 Mete. 256 (1845).

Michigan.—*People v. Minney*, 155 Mich. 534, 119 N. W. 918, 15 Det. L. N. 1094 (1909).

Nebraska.—*Cohoe v. State*, 82 Neb. 744, 118 N. W. 1088 (1908); *Clark v. State*, 79 Neb. 473, 113 N. W. 211 (1907).

New York.—*People v. Grossman*, 59 App. Div. 626, 69 N. Y. Suppl. 1141, *affirmed*, 168 N. Y. 47, 60 N. E. 1050 (1901).

North Dakota.—*State v. Merry*, 20 N. D. 337, 127 N. W. 83 (1910).

Ohio.—*Davis v. State*, 20 Ohio Cir. Ct. R. 430, 10 O. C. D. 738 (1900).

South Carolina.—*State v. Allen*, 56 S. C. 495, 35 S. E. 204 (1900).

Utah.—*Ogden Valley Trout & Resort Co. v. Lewis*, 125 Pac. 687 (1912); *State v. Gillies*, 123 Pac. 93 (1912).

Wisconsin.—*Dietz v. State*, 149 Wis. 462, 136 N. W. 166 (1912).

United States.—*Lillis v. U. S.*, 190 Fed. 530, 111 C. C. A. 362 (1911); *Lobosco v. U. S.*, 183 Fed. 742, 106 C. C. A. 476 (1911); *Williamson v. U. S.*, 207 U. S. 425, 28 S. Ct. 163, 52 L. ed. 278 (1908).

§ 3229-1. *Alabama*.—*Southern Coal & Coke Co. v. Swinney*, 149 Ala. 405, 42 So. 808 (1907); *Louisville & N. R. Co. v. Hall*, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863 (1890).

Colorado.—*Hotchkiss Mt. Mining & Reduction Co. v. Bruner*, 42 Colo. 305, 94 Pac. 331 (1908).

Illinois.—*Framke v. Hanly*, 215 Ill. 216, 74 N. E. 130 (1905).

Indiana.—*Salem Stone & Lime Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411 (1894); *Louisville, N. A. & C. Ry. Co. v. Wright*, 115 Ind. 378, 16 N. E.

juries to employees from defective machines. In such a case, to show that the employer had knowledge of the defective character of the appliance in question, it may properly be shown that other employees while working at the same machine were likewise injured.² But the rule is by no means limited to injuries received by a servant from defective machinery. When it is sought to recover from a railroad company for injuries caused by a defective appliance, to charge the defendant with knowledge of the condition of the appliance in question, it may be shown that prior accidents have arisen from the same defect.³ The same rule is applied in case of an injury from a defective elevator,⁴ a dumb

145, 17 N. E. 584, 7 Am. St. Rep. 432 (1888).

Iowa.—Cameron v. Bryan, 89 Iowa 214, 56 N. W. 434 (1878).

Kentucky.—Crigler & Crigler v. Ford, 26 Ky. L. Rep. 784, 82 S. W. 599 (1904).

Massachusetts.—Donovan v. Chase-Shawmut Co., 201 Mass. 357, 87 N. E. 580 (1909).

Michigan.—Wormsdorf v. Detroit City Ry. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453 (1889).

Minnesota.—Phelps v. Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867 (1887).

Missouri.—Winkle v. George B. Peck Dry Goods Co., 132 Mo. App. 656, 112 S. W. 1026 (1908).

New Hampshire.—Presby v. Grand Trunk Ry., 66 N. H. 615, 22 Atl. 554 (1891).

New York.—Glassman v. Surpless, 53 Misc. R. 586, 103 N. Y. Suppl. 789 (1907); Withers v. Brooklyn Real Estate Exch., 106 App. Div. 255, 94 N. Y. Suppl. 328 (1905); Stock v. Le Boutiller, 18 Misc. R. 349, 41 N. Y. Suppl. 649, 75 N. Y. St. Rep. 1035 (1896); *affirmed*, 19 Misc. R. 112, 43 N. Y. Suppl. 248 (1897).

North Carolina.—Turner v. Goldsboro Lumber Co., 119 N. C. 387, 26 S. E. 23 (1896).

Rhode Island.—McGarity v. New

York, etc., R. Co., 25 R. I. 269, 55 Atl. 718 (1903).

Texas.—Ware v. Shafer, (Civ. App. 1894) 27 S. W. 764; *affirmed*, 88 Tex. 44, 29 S. W. 756 (1895).

Wisconsin.—Brossard v. Morgan Co., 150 Wis. 1, 136 N. W. 181 (1912).

2. Framke v. Hanly, 215 Ill. 216, 74 N. E. 130 (1905); Donovan v. Chase-Shawmut Co., 201 Mass. 357, 87 N. E. 580 (1909); McCarragher v. Rogers, 44 Hun (N. Y.) 628, 8 St. Rep. 847 (1887); Turner v. Goldsboro Lumber Co., 119 N. C. 387, 26 S. E. 23 (1896).

3. Southern Coal & Coke Co. v. Swinney, 149 Ala. 405, 42 So. 808 (1907); Louisville & N. R. Co. v. Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863 (1890); Louisville, N. A. & C. Ry. Co. v. Wright, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. Rep. 432 (1888); McGarity v. New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718 (1903).

4. Crigler & Crigler v. Ford, 82 S. W. 599, 26 Ky. L. Rep. 784 (1904); Glassman v. Surpless, 53 Misc. R. (N. Y.) 586, 103 N. Y. Suppl. 789 (1907); Auld v. Manhattan L. Ins. Co., 34 App. Div. 491, 54 N. Y. Suppl. 222; *affirmed*, 165 N. Y. 610, 58 N. E. 1085 (1900).

waiter,⁵ a carrier system in a store,⁶ or a falling rock in a mine.⁷

Similar instrumentalities.—Not only is evidence admissible of similar accidents from the same machinery or appliance, but, in some cases, an accident arising from a different but similar instrumentality may be sufficient to charge a person with knowledge of the defective character of the particular thing which caused the injury in question. Thus, where the question is as to the negligence of the defendant in using a defective pulley constructed by its employees, it may be shown, as bearing upon the question of the defendant's knowledge of its defective nature, that two other pulleys previously used by it, which had been constructed by the same employees in the same manner, had burst.⁸ In much the same way, in an action for injuries caused by the collapse of a building, testimony that other similar buildings had fallen was admitted.⁹ So, too, where the issue was whether a certain maul furnished a servant was defective and whether the master had knowledge of the defect, evidence was admitted which tended to prove the condition of other mauls of the same kind furnished by the master to other employees.¹⁰ In an action against a traction company to recover damages for injuries caused by the falling of a trolley pole, evidence is admissible of the falling of similar poles in the immediate vicinity of the one in question, as it tends to show the knowledge of the company of the dangerous character of the poles in that vicinity.¹¹

Defective condition of street or highway.—Prominent among the instances where the plaintiff is permitted to prove a collateral accident to show the defendant's knowledge or notice of the defective condition of an instrumentality, is that of an action against a municipality for injuries arising from the dangerous character

5. *Vandercarr v. Universal Trust Co.*, 80 App. Div. 274, 80 N. Y. Suppl. 290 (1903).

6. *Stock v. LeBoutillier*, 18 Misc. R. (N. Y.) 349, 41 N. Y. Suppl. 649, 75 N. Y. St. Rep. 1035; *affirmed*, 19 Misc. R. 112, 43 N. Y. Suppl. 248 (1897).

7. *Hotchkiss Mt. Mining & Reduction Co. v. Bruner*, 42 Colo. 305, 94 Pac. 331 (1908). But evidence of the falling of material at another place under different conditions is not admissible. *Sugar Creek Coal*

Min. Co. v. Peterson, 177 Ill. 324, 52 N. E. 475 (1898).

8. *Wabash Screen Door Co. v. Black*, 126 Fed. 721, 61 C. C. A. 639 (1903).

9. *Waterhouse v. Schiltz Brewing Co.*, 16 S. D. 592, 94 N. W. 587 (1903).

10. *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473, 71 S. W. 540 (1903).

11. *Evansville & S. Traction Co. v. Montgomery*, (Ind. App. 1912) 98 N. E. 731.

of a street or highway. The rule is familiar that, to show the defendant's knowledge of the condition of the street or highway, testimony of prior accidents at the same place will be admitted.¹² To be received, however, the evidence of the collateral accident must be within such limits of time as to be relevant. The evidence is properly excluded where it relates to the condition of the street or highway at a time so far past that it throws no light upon the question of knowledge of the defendant at the time of the accident in question.¹³ It is obvious that a subsequent accident can afford no evidence of knowledge of a prior one.¹⁴

Fellow servant's incompetency.—It is a well-established rule of the law pertaining to the relation of master and servant that, though an injury is caused to the servant by the negligent act of a fellow servant, the master may, nevertheless in some cases, be liable for such injuries where such fellow servant is incompetent to perform his duties and the master retains him in his employ after acquiring *knowledge* of his incompetency. To prove the

12. *Illinois.*—City of Chicago v. Jarvis, 226 Ill. 614, 80 N. E. 1079 (1907); City of Bloomington v. Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 21 (1894); City of Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418 (1866).

Indiana.—City of Goshen v. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253 (1889); City of Delphi v. Lowery, 74 Ind. 520, 39 Am. Rep. 98 (1881).

Iowa.—Wilberding v. City of Dubuque, 11 Iowa 484, 82 N. W. 957 (1900); Moore v. City of Burlington, 49 Iowa 136 (1878).

Michigan.—Moore v. City of Kalamazoo, 109 Mich. 176, 66 N. W. 1089 (1896); Lombar v. Village of East Tawas, 86 Mich. 14, 48 N. W. 947 (1891); Smith v. Sherwood Tp., 62 Mich. 159, 28 N. W. 806 (1886).

Minnesota.—Burrows v. Village of Lake Crystal, 61 Minn. 357, 63 N. W. 745 (1895).

New York.—Lundbeck v. City of Brooklyn, 26 App. Div. 595, 50 N. Y. Suppl. 421 (1898); Stebbins v. Vil-

lage of Oneida, 52 Hun 613, 5 N. Y. Suppl. 483, 23 N. Y. St. Rep. 702, 1 Silv. 240 (1889).

Ohio.—Russell v. City of Toledo, 19 Ohio Cir. Ct. R. 418, 10 O. C. D. 367 (1899); Village of Ashtabula v. Bartram, 3 Ohio Cir. Ct. R. 640, 2 O. C. D. 372 (1888).

Texas.—Ware v. Schafer, (Civ. App. 1894) 27 S. W. 764; *affirmed*, 88 Tex. 44, 29 S. W. 756 (1895).

Washington.—Falldin v. City of Seattle, 57 Wash. 307, 106 Pac. 914 (1910); Smith v. City of Seattle, 33 Wash. 481, 74 Pac. 674 (1903); Piper v. City of Spokane, 22 Wash. 147, 60 Pac. 138 (1900).

13. City of Elgin v. Nofs, 96 Ill. App. 291, *rev'd* 200 Ill. 252, 65 N. E. 679 (1902); Gillerie v. City of Lockport, 122 N. Y. 403, 25 N. E. 357 (1890) (two years before).

14. Davis v. Common Council of Alexander City, 137 Ala. 206, 33 So. 863 (1903); City of Chicago v. Vesey, 105 Ill. App. 191 (1902); McGrail v. City of Kalamazoo, 94 Mich. 52, 53 N. W. 955 (1892).

scienter in such case, collateral acts of negligence on the part of such fellow servant are properly received.¹⁵

Vicious animals.—In an action to recover damages for injuries caused by a vicious domestic animal, it becomes necessary to show that the owner of the animal had knowledge of its vicious disposition. The usual method of making such proof is by giving evidence of the conduct of the animal on former occasions.¹⁶

§ 3230. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Knowledge; Negligence); Notice.—While the words “notice” and “knowledge” are not in all respects synonymous and interchangeable,¹ they are commonly used interchangeably in judicial discussions of negligence questions, where the liability of a party depends upon whether or not he was aware, either actually or constructively, of some particular fact, hence, the observations made in the preceding sections in reference to the use of evidence of other occurrences to show knowledge are equally applicable to the use of such evidence to show notice.

§ 3231. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Knowledge); Criminal Cases.—Knowledge of the existence of certain conditions is, in many instances, an essential element of a crime. For example, on a trial

15. Maine.—*Robbins v. Lewiston, etc., Ry.*, 107 Me. 42, 77 Atl. 537, 30 L. R. A. (N. S.) 109n, 24 Am. & Eng. Ann. Cas. 92 (1910).

Minnesota.—*Pfudl v. F. J. Romer Sons*, 107 Minn. 353, 120 N. W. 302 (1909).

Texas.—*Gulr, etc., Ry. Co. v. Hays*, 40 Tex. Civ. App. 162, 89 S. W. 29 (1905).

Virginia.—*Meyer's Sons v. Falk*, 99 Va. 385, 3 Va. Sup. Ct. Rep. 273, 38 S. E. 178 (1901).

Washington.—*Dosset v. St. Paul Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273 (1905); *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841 (1905).

United States.—*Pittsburgh Rys.*

Co. v. Thomas, 174 Fed. 591, 98 C. C. A. 437 (1909).

Contra, *Grebenstein v. Stone & Webber Engineering Corp.*, 205 Mass. 431, 91 N. E. 411 (1910).

16. Connecticut.—*Arnold v. Norton*, 25 Conn. 92 (1856).

New Hampshire.—*Kittredge v. Elliott*, 16 N. H. 77 (1844).

North Carolina.—*Cockerham v. Nixon*, 11 Ired. L. 269 (1850).

South Carolina.—*McCaskill v. Elliot*, 5 Strobb. 196 (1850).

Wisconsin.—*Keenan v. Hayden*, 39 Wis. 58 (1876).

England.—*Worth v. Gilling*, L. R. 2 C. P. 3 (1866).

§ 3230-1. *Levins v. W. O. Peeples Grocery Co.*, (Tenn. 1896) 38 S. W. 733; *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915 (1901).

of an indictment for receiving stolen goods, the government must show that the accused had *knowledge* of the stolen character of the goods.¹ Likewise, in a prosecution for uttering a forged instrument or counterfeit money, the defendant's *knowledge* of the nature of the instrument or money is a constituent fact to be shown by the prosecution. In these, as well as many other offenses, proof of the commission of similar offenses by the defendant is received, not for the purpose of proving the commission of the overt act in the particular case in question, but as showing the *scienter* with which the act was done. The evidence, as in cases of proving the intention of the accused,² tends to eliminate infirmative hypotheses or explanations. To illustrate: a person is indicted for uttering a check without sufficient funds for its payment. The accused may claim with considerable plausibility that, at the time he uttered the paper, he thought he had a balance in the bank sufficient to pay the check. The government must meet such claim or suffer an acquittal. To show that the defendant knew the state of his bank account, the district attorney may produce testimony of other occasions when the accused uttered a check without sufficient funds for its payment. A single collateral instance weakens his contention that the act was done without knowledge, but, if possible, the instances may be multiplied and such a number of other acts presented until the defense of lack of knowledge is eliminated beyond a reasonable doubt.³

§ 3232. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Knowledge); Embezzlement.—

To show, on an indictment for embezzlement, that the accused converted the property to his own use *knowing* the same to belong to another, evidence of similar embezzlements is competent.¹ Some relevant connection between the two offenses must, however, be

§ 3231-1. § 3237.

2. §§ 3222, *et seq.*

3. *People v. Bercovitz*, 163 Cal. 636, 126 Pac. 479 (1912).

§ 3232-1. *Alabama*.—*Lang v. State*, 97 Ala. 41, 12 So. 183 (1893); *Stanley v. State*, 88 Ala. 154, 7 So. 273 (1889).

California.—*People v. Robertson*, 6 Cal. App. 514, 92 Pac. 408 (1907);

People v. Neyce, 86 Cal. 393, 24 Pac. 1091 (1890); *People v. Gray*, 66 Cal. 271, 5 Pac. 240 (1884).

Kentucky.—*Morse v. Com.*, 129 Ky. 294, 33 Ky. L. Rep. 831, 111 S. W. 714 (1908).

Nebraska.—*Cohoe v. State*, 82 Neb. 744, 118 N. W. 1088 (1908).

New York.—*People v. De Graff*, 6 N. Y. St. Rep. 412 (1887).

shown to authorize the proof of one on a prosecution for another. If not so connected, it should not be received in evidence.²

§ 3233. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Knowledge*); False Pretenses.

On a prosecution for obtaining property by false pretenses, it is incumbent upon the prosecution to show that the accused had knowledge of the falsity of the pretenses by which it is claimed he procured the property in question. To show this constituent fact of knowledge, evidence of the defendant's obtaining other property by similar pretenses is admissible,¹ if the other acts are so closely related in point of time or otherwise as to be within the limits of relevancy.² The evidence is highly prejudicial to the accused and it should not be received unless reasonably necessary to establish a constituent fact of the government's case. Thus, where the knowledge of its falsity is necessarily inferred from the nature of the pretense, sound administration justifies the refusal of the presiding judge to admit the evidence.³

2. *Morse v. Com.*, 129 Ky. 294, 33 Ky. L. Rep. 831, 111 S. W. 714 (1908); *State v. Crosswhite*, 130 Mo. 358, 32 S. W. 991, 51 Am. St. Rep. 571 (1895); *State v. Newman*, 73 N. J. L. 202, 62 Atl. 1008 (1906).

§ 3233-1. *California*.—*People v. Emmons*, 13 Cal. App. 487, 110 Pac. 151 (1910); *People v. Whalen*, 154 Cal. 472, 98 Pac. 194 (1908).

Colorado.—*Clarke v. People*, 53 Colo. 214, 125 Pac. 113 (1912).

Georgia.—*Saffold v. State* (App. 1912) 75 S. E. 338.

Illinois.—*People v. Donaldson*, 255 Ill. 19, 99 N. E. 62 (1912); *People v. Weil*, 243 Ill. 208, 90 N. E. 731, 134 Am. St. Rep. 357n (1910); *Juretic v. People*, 223 Ill. 484, 79 N. E. 181 (1906); *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183 (1902); *Whiteman v. People*, 83 Ill. App. 369 (1899).

Kansas.—*State v. Briggs*, 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 278, 10 Am. & Eng. Ann. Cas. 904 (1906).

Massachusetts.—*Com. v. Coe*, 115 Mass. 481 (1874).

Nebraska.—*State v. Sparks*, 79 Neb. 504, 113 N. W. 154 (1907).

Ohio.—*Coblentz v. State*, 84 Ohio St. 235, 95 N. E. 768 (1911).

Oregon.—*State v. Germain*, 54 Oreg. 395, 103 Pac. 521 (1909).

Texas.—*Trimble v. State* (Civ. App. 1912), 145 S. W. 929.

United States.—*Griggs v. U. S.*, 158 Fed. 572, 85 C. C. A. 596 (1908).

England.—*Reg. v. Francis*, 12 Cox Cr. C. 112 (1871).

2. *Clarke v. People*, 53 Colo. 214, 125 Pac. 113 (1912); *State v. Sparks*, 79 Neb. 504, 113 N. W. 154 (1907).

Subsequent false pretenses are not generally admissible to show the defendant's knowledge of the false character of the pretenses involved in the indictment. *Coblentz v. State*, 84 Ohio St. 235, 95 N. E. 768 (1911); *State v. Letourneau*, 24 R. I. 3, 51 Atl. 1048, 96 Am. St. Rep. 696 (1902).

3. *Jackson v. People*, 18 Ill. App. 508 (1886).

§ 3234. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Knowledge*); Forged Instruments.—In a prosecution for forgery or uttering forged paper, the guilty knowledge of the illegal nature of the paper can generally be proved, not by direct evidence, but only by acts and conduct of the accused indicating such knowledge.¹ To prove such guilty knowledge, it is therefore, proper to show other forgeries of the accused,² or that he had other forged instruments in his possession³ at about the time of the commission of the offense charged in the indictment.

Counterfeit Bills.—In a prosecution for passing a counterfeit bill or note, evidence of the possession⁴ or the utterance⁵ by the

§ 3234-1. *Com. v. Russell*, 156 Mass. 196, 30 N. E. 763 (1892).

2. *California.*—*People v. McGlade*, 139 Cal. 66, 72 Pac. 600 (1902).

Florida.—*Langford v. State*, 33 Fla. 233, 14 So. 815 (1894).

Illinois.—*Steele v. People of State of Illinois*, 45 Ill. 152 (1867).

Kansas.—*State v. Cooper*, 83 Kan. 385, 111 Pac. 428 (1910).

Massachusetts.—*Com. v. Miller*, 3 Cush. 243 (1849).

Michigan.—*Carver v. People*, 39 Mich. 786 (1878).

Montana.—*State v. Mitton*, 37 Mont. 366, 96 Pac. 926, 127 Am. St. Rep. 732 (1908).

Nebraska.—*Davis v. State*, 58 Neb. 465, 78 N. W. 930 (1899).

New York.—*People v. Dolan*, 186 N. Y. 4, 78 N. E. 569, 116 Am. St. Rep. 521, 9 Am. & Eng. Ann. Cas. 453 (1906); *People v. Weaver*, 177 N. Y. 434, 68 N. E. 1094 (1904).

South Carolina.—*State v. Ray*, 75 S. E. 174 (1912).

Tennessee.—*Foute v. State*, 83 Tenn. (15 Lea) 712 (1885).

Texas.—*Hinson v. State*, 53 Tex. Cr. App. 143, 109 S. W. 174 (1908); *McGlasson v. State*, 37 Tex. Cr. App. 620, 40 S. W. 503, 66 Am. St. Rep. 842 (1897).

United States.—*Ex parte Glaser*, 176 Fed. 702, 100 C. C. A. 254

(1910); *Withaup v. U. S.*, 127 Fed. 530, 62 C. C. A. 328 (1903).

3. *Kansas.*—*State v. Calhoun*, 75 Kan. 259, 88 Pac. 1079 (1907).

Kentucky.—*Barnes v. Com.*, 101 Ky. 556, 19 Ky. L. Rep. 803, 41 S. W. 772 (1897).

Massachusetts.—*Com. v. Russell*, 156 Mass. 196, 30 N. E. 763 (1892); *Com. v. Coe*, 115 Mass. 481, 501 (1874).

Missouri.—*State v. Stark*, 202 Mo. 210, 100 S. W. 642 (1907).

Virginia.—*Hendrick v. Com.*, 5 Leigh 707 (1834).

United States.—*Ex parte Schorer*, 197 Fed. 67 (1912).

4. *Com. v. White*, 145 Mass. 392, 14 N. E. 611 (1887); *Com. v. Hall*, 4 Allen (Mass.) 305 (1862); *Com. v. Price*, 10 Gray 472, 71 Am. Dec. 668 (1858); *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767 (1831); *Hendrick v. Com.*, 5 Leigh (Va.) 707 (1834); *Reg v. Forster*, Dearsley Cr. C. 456, 3 C. L. R. 681, 24 L. J. M. C. 134, 1 Jur. (N. S.) 407, 3 W. R. 411, 6 Cox Cr. C. 521 (1855).

5. *Alabama.*—*Tharp v. State*, 15 Ala. 749 (1849).

Delaware.—*State v. Tindal*, 5 Har. 488 (1853).

Indiana.—*McCartney v. State*, 3 Ind. 353, 56 Am. Dec. 510 (1852).

accused of similar bills or notes at about the same time is admissible to show his knowledge of the nature of the instrument passed by him on the principal occasion. But such evidence will not be received where the notes are so different in appearance that the knowledge of the counterfeit character of one would not afford a reasonable ground to believe that the other was of the same nature⁶ unless there is some connection between the acts of passing them. However, the fact that the counterfeit bill on the collateral occasion purported to be upon a bank other than the one upon which the bill was drawn on the principal occasion does not affect the admissibility of the evidence.⁷ The collateral occasion may be prior or subsequent⁸ to the principal, if within the limits of relevancy.⁹

Coin.—On a prosecution for uttering a counterfeit coin, evidence of other offenses will be received for the purpose of proving the defendant's knowledge of the nature of the coin.¹⁰ The proof,

Kentucky.—*Mount v. Com.*, 62 Ky. (1 Duv.) 90 (1863).

Maine.—*State v. McAllister*, 24 Me. 139 (1844).

Massachusetts.—*Com. v. Stearns*, 10 Metc. 256 (1845); *Com. v. Bigelow*, 8 Metc. 235 (1844).

Missouri.—*State v. Mix*, 15 Mo. 153 (1851).

New Jersey.—*State v. Robinson*, 16 N. J. L. 507 (1838).

Ohio.—*Reed v. State*, 15 Ohio 217 (1846).

South Carolina.—*State v. Williams*, 2 Rich. L. 418, 45 Am. Dec. 741 (1846).

Virginia.—*Martin v. Com.*, 2 Leigh 745 (1830).

United States.—*U. S. v. Doeblor*, Baldwin 519, 25 Fed. Cas. No. 14,977 (1832).

6. *U. S. v. Roudenbush*, Baldw. (U. S.) 514, 27 Fed. Cas. No. 16,198 (1832).

7. "The fact that a person had passed one counterfeit note on the state bank of Indiana about the time of his passing one such note on the state bank of Ohio might tend, but in a very slight degree, to prove

that the person knew the Ohio note to be counterfeit, but if a person should pass several counterfeit notes on the state bank of Indiana about the time he should pass, or be in possession of, counterfeit notes on the Ohio or any other bank, everyone would say, according to the usual rules of judging of human conduct and intentions, that it conducted strongly to show that the party knew all his counterfeit paper to be such, and that he was making a business of passing such paper." *McCartney v. State*, 3 Ind. 353, 355, 56 Am. Dec. 510 (1852), per Perkins, J.

8. *Com. v. Price*, 10 Gray (Mass.) 472, 476 (1858); *Hendrick v. Com.*, 5 Leigh (Va.) 707 (1834).

9. "How long before or after—one minute or ten, one hour or twenty-four, a day, a week, or more or less—must be determined by the circumstances of each case." *Hendrick v. Com.*, 5 Leigh (Va.) 707, 714 (1834), per Daniel, J.

10. *Alabama.*—*Tharp v. State*, 15 Ala. 749 (1849).

Massachusetts.—*Com. v. Stearns*, 10 Metc. 256 (1845); *Com. v. Perci-*

however, that the coins passed at such other times were actually counterfeit should be positive and direct.¹¹

Administrative Details.—The trial judge will determine, as a matter of administration, in what cases other utterings of forged instruments shall be allowed to go to the jury as tending to establish the fact of the *scienter*.¹² The administrative function is properly exercised by requiring strict proof of the forged nature of the collateral papers before admitting them in evidence.¹³

§ 3235. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Knowledge*); *Illegal Sale of Liquor.*—In a prosecution for selling intoxicating liquor to a minor *knowing* him to be under age, this constituent fact of knowledge—the *scienter*—may be shown by evidence of other similar sales by the accused or with his consent to the same person at about the same time.¹ But where there are no circumstances indicating that the accused had knowledge of the minor's age at the time of the former sale, the presiding judge, acting within his administrative powers, may exclude the evidence.² In such a case the danger to the accused arising from the possible prejudice of the jury overcomes the slight probative value, if any, which the evidence might have in establishing the defendant's *scienter*.

§ 3236. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Knowledge*); *Larceny.*—Knowledge, in some cases, is an essential element of the offense of larceny. Where this psychological fact is to be established, evidence of other connected larcenies, so near in time and similar in circum-

val, 1 Thatcher Cr. Cas. 293 (1833).

Michigan.—People v. Clarkson, 56 Mich. 164, 22 N. W. 258 (1885).

New Jersey.—State v. Van Houten, 3 N. J. L. 672, 4 Am. Dec. 407 (1810).

North Carolina.—State v. Twitty, 9 N. C. 248 (1822).

Tennessee.—Peck v. State, 2 Humph. 78 (1840).

England.—R. v. Forster, Dears. Cr. C. 456, 3 C. L. R. 681, 24 L. J. M. C. 134, 1 Jur. (N. S.) 407, 3 W. R. 411, 6 Cox Cr. C. 521 (1855).

11. Peck v. State, 2 Humph. (Tenn.) 78 (1840).

12. People v. Frank, 28 Cal. 507 (1865).

13. People v. Whiteman, 114 Cal. 338, 46 Pac. 99 (1896); People v. Baird, 105 Cal. 126, 38 Pac. 633 (1894); Pelton v. State, 60 Tex. Cr. App. 412, 132 S. W. 480, 24 Am. & Eng. Ann. Cas. 86 (1910).

§ 3235-1. Gray v. State, 44 Tex. Cr. App. 470, 72 S. W. 169 (1903); Vincent v. State, (Tex. Cr. App. 1900) 55 S. W. 819.

2. Dittfurth v. State, 46 Tex. Cr. App. 424, 80 S. W. 628 (1904).

stances as to be probative of the existence of this mental state may be shown for that purpose.¹ Thus, it may be shown that other stolen goods were found with the property in question in possession of the defendant.² Evidence of what took place on the collateral occasion is not received as tending to show that the defendant did a particular act on the principal occasion.³ This is the inference of conduct from a particular moral stimulus — previous conduct, habit, or the like — which it is the object of the *res inter alios* rule, viewed either as one of procedure or as a principle of administration, to prevent. The simple fact that a person accused of larceny committed another larceny at another time would be unprobative and immaterial, if offered for the purpose of showing that the person who acted on the collateral occasion actually committed the larceny charged in the indictment. Such evidence might be further objectionable as tending to raise collateral issues, and to prejudice the defendant in the eyes of the jury, or by surprising him. An ignorant and perhaps prejudiced tribunal will not be permitted to find the defendant guilty of one crime upon uncertain evidence that he has committed another of the same kind. However, as above stated, evidence of such collateral offenses will, of necessity, not be rejected in all cases.

§ 3237. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Knowledge); Receiving Stolen Goods.— On a prosecution for receiving stolen goods knowing them to have been stolen, the element of knowledge may be proved by evidence of the similar receipt of stolen goods upon other occa-

§ 3236-1. *Territory v. West*, 14 N. M. 549, 99 Pac. 343 (1909); *Weyman v. People*, 4 Hun (N. Y.) 511 (1875). "The rule is recognized as well established, that in cases like the present, where guilty knowledge is an ingredient of the offense charged, the same may be proved as other facts are proved, by circumstantial evidence, and that other acts of a like character, although involving substantive crimes, may be given in evidence to prove the *scienter*. The principal limitation of the rule is, that the criminal act which is sought to be given in evidence, must be

necessarily connected with that which is the subject of the prosecution, either from some connection of time and place, or as furnishing a clue to the motive on the part of the accused." *Coleman v. People*, 58 N. Y. 555, 560 (1874), per Allen, J.

2. *Martin v. State*, 10 Ga. App. 795, 74 S. E. 304 (1912); *Territory v. Caldwell*, 14 N. M. 535, 98 Pac. 167 (1908).

3. *Snapp v. Com.*, 82 Ky. 173, 6 Ky. L. Rep. 34 (1884); *People v. Lapidus*, 167 Mich. 53, 132 N. W. 470 (1911); *Gardner v. State*, 55 Tex. Cr. App. 400, 117 S. W. 140 (1909).

sions.¹ Accordingly, it may be shown that other stolen goods were found in defendant's possession at the same time that the goods charged in the pending indictment to have been feloniously received were discovered to be there.² It is not material that there are certain differences between the present occasion and the collateral one introduced as evidence of knowledge; e. g., that other persons were acting with accused on the collateral occasion,³ or that on such occasion the purchase was made from one of the defend-

§ 3237-1. *Alabama*.—*Piano v. State*, 161 Ala. 88, 49 So. 803 (1909); *Gassenheimer v. State*, 52 Ala. 313 (1875).

California.—*People v. Zimmerman*, 11 Cal. App. 115, 104 Pac. 590 (1909).

District of Columbia.—*Gassenheimer v. U. S.*, 26 App. D. C. 432 (1906).

Illinois.—*People v. Baskin*, 254 Ill. 509, 98 N. E. 957 (1912); *Lipsev v. People*, 227 Ill. 364, 81 N. E. 348 (1907).

Indiana.—*McIntire v. State*, 10 Ind. 26 (1857).

Indian Territory.—*Jeffries v. U. S.*, 7 Ind. Terr. 47, 103 S. W. 761 (1907).

Maryland.—*Luery v. State*, 116 Md. 284, 81 Atl. 681 (1911).

Nebraska.—*Becker v. State*, 91 Neb. 352, 136 N. W. 17 (1912); *Goldsberry v. State*, 66 Neb. 312, 92 N. W. 906 (1902).

New Jersey.—*State v. Popick*, 83 N. J. L. 318, 84 Atl. 1061 (1912).

New York.—*People v. Doty*, 175 N. Y. 164, 67 N. E. 303 (1903); *People v. Grossman*, 168 N. Y. 47, 60 N. E. 1050 (1901); *People v. McClure*, 148 N. Y. 95, 42 N. E. 523 (1895); *Coleman v. People*, 58 N. Y. 555 (1874); *Copperman v. People*, 56 N. Y. 591 (1874).

Ohio.—*Premack v. State*, 30 Ohio Cir. Ct. R. 828 (1908).

Pennsylvania.—*Com. v. Charles*, 21 Pittsb. Leg. J. (O. S.) 11, 4 Pittsb. Leg. J. (N. S.) 11 (1873).

South Carolina.—*State v. Winter*, 83 S. C. 251, 65 S. E. 243 (1909); *State v. Rountree*, 80 S. C. 387, 61 S. E. 1072, 22 L. R. A. (N. S.) 833n. (1908).

Texas.—*Harwell v. State*, 22 Tex. App. 251, 2 S. W. 606 (1886).

2. *Arkansas*.—*Woodward v. State*, 84 Ark. 119, 104 S. W. 1109 (1907).

Indiana.—*Buechert v. State*, 165 Ind. 523, 76 N. E. 111, 6 Am. & Eng. Ann. Cas. 914 (1905).

Kentucky.—*Com. v. Grief*, 27 S. W. 814, 16 Ky. L. Rep. 198 (1894); *Devoto v. Com.*, 3 Mete. 417 (1861).

Ohio.—*Shriedley v. State*, 23 Ohio St. 130 (1872).

Rhode Island.—*State v. Habib*, 18 R. I. 558, 30 Atl. 462 (1894).

South Carolina.—*State v. Crawford*, 39 S. C. 343, 17 S. E. 799 (1893).

Texas.—*Hanks v. State*, 55 Tex. Cr. App. 45, 117 S. W. 150 (1909); *Morgan v. State*, 31 Tex. Cr. App. 1, 18 S. W. 647 (1892).

United States.—*Sapir v. U. S.*, 174 Fed. 219, 98 C. C. A. 227 (1909).

In England, by common law, neither upon an indictment for stealing nor receiving can evidence be given that the prisoner had at the time, or previously, other stolen goods in his possession. *Reg. v. Oddy, T. & M.* 593, 2 Den. C. C. 264, 20 L. J. M. C. 198, 15 Jur. 517, 5 Cox Cr. C. 210 (1851).

3. *Goldsberry v. State*, 66 Neb. 312, 92 N. W. 906 (1902).

ants by his co-defendants.⁴ Nor is it incumbent upon the prosecution to show the defendant's knowledge that the goods received on the collateral occasion were stolen.⁵ Nor can it successfully be alleged, as a ground for resisting the admission of the evidence of other transactions, that the prosecution has proved the doing of the event or act upon the principal occasion by the use of direct evidence.⁶ The answer to such a contention is that the proof of the other occurrences is directed to another point — the psychological constituent of knowledge. Had this also been itself established by direct evidence, the circumstantial proof of the scienter by showing other occasions indicative of guilty knowledge might properly have been rejected. Should the proof of such knowledge involve placing before the jury the details of criminal offenses other than that with which the prisoner stands charged, and he thereby shall be exposed to the danger that the jury may conclude that he has committed the principal offense because he has committed others, or is a general bad character, or has acquired a habit or the like, that is merely the prisoner's bad fortune. For it, he has probably no one to blame but himself. The evidence is not admitted for that object but for the necessary purpose of enabling the government to establish the *res gestae* of the crime, including the psychological fact of knowledge, in its nature not usually provable by direct evidence. The evidence is competent for that purpose and will not be excluded simply because it gives rise to other natural inferences, or that facts of distinct offenses are detailed to the jury.⁷ Should it happen that the right of the government to prove the component element or constituent fact of knowledge on the part of the actor, on the principal occasion, by circumstantial evidence of what he did at another time, can be fully protected by the presiding judge by requiring the use of other circumstantial evidence which does not entail the same danger to the defendant, the adoption of such an alternative course might be excellent judicial administration.

4. *State v. Rountree*, 80 S. C. 387, 61 S. E. 1072, 22 L. R. A. (N. S.) 833n. (1908).

5. *State v. Winter*, 83 S. C. 251, 65 S. E. 243 (1909).

That the property was actually stolen must, however, be shown to render the receipt thereof by the ac-

cused competent to prove his guilty knowledge in the receipt of other stolen goods. *State v. Moxley*, 41 Mont. 402, 110 Pac. 83 (1910).

6. *Goldsberry v. State*, 66 Neb. 312, 92 N. W. 906 (1902).

7. *Goldsberry v. State*, 66 Neb. 312, 92 N. W. 906 (1902).

§ 3238. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Knowledge*); Other Felonies.—

It may in general be said, irrespective of any particular class of criminal offense, that, upon a trial for felony, the commission of other felonies which have a tendency to establish the *scienter*, existence of knowledge, may be given in evidence for that purpose.¹ In other words, although the effect of using an illuminating collateral occurrence for the purpose of showing guilty knowledge on his part, be to establish the proposition that he has committed a distinct and separate crime, evidence of what happened on a collateral occasion is nevertheless receivable.² Thus, in a prosecution of a bank president³ or other official for receiving deposits with knowledge of the bank's insolvency, false reports of the financial condition of the bank made by such officer prior to the offense with which he is charged are relevant upon the issue of his knowledge of the bank's condition. Likewise, where a bank officer is charged with making a false report of the financial condition of the bank, prior false reports may be received to show his guilty knowledge.⁴ The evidence tends to show that he was not mistaken when he made the report in question.

§ 3239. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State*); Malice.—The existence of malice in connection with a particular transaction may be shown by its manifestation on other probative occasions.¹ In other words,

§ 3238-1. *Reg. v. Weeks, L. & C.* 18, 30 L. J. M. C. 141, 7 Jur. (N. S.) 472, 4 L. T. 373, 9 W. R. 553, 8 Cox Cr. C. 455 (1861).

2. *Alabama.*—*Mason v. State*, 42 Ala. 532 (1868).

Illinois.—*People v. Hagenow*, 236 Ill. 514, 86 N. E. 370 (1908).

Nebraska.—*Goldsberry v. State*, 66 Neb. 312, 92 N. W. 906 (1902).

New York.—*Coleman v. People*, 58 N. Y. 555 (1874).

Pennsylvania.—*Striker v. McMichael*, 1 Phila. 89, 7 Leg. Int. 154 (1850).

South Dakota.—*State v. Stevens*, 16 S. D. 309, 92 N. W. 420 (1902); *State v. Phelps*, 5 S. D. 480, 59 N. W. 471 (1894).

3. *Parrish v. Com.*, 136 Ky. 77, 123 S. W. 339 (1909).

4. *Anderson v. Com.* (Ky. 1909), 117 S. W. 364; *State v. Jackson*, 21 S. D. 494, 113 N. W. 880, 16 Am. & Eng. Ann. Cas. 87 (1907).

§ 3239-1. *Alabama.*—*Ellis v. State*, 120 Ala. 333, 25 So. 1 (1898); *Lunsford v. Dietrich*, 93 Ala. 565, 9 So. 308, 30 Am. St. Rep. 79 (1890).

California.—*People v. Chaves*, 122 Cal. 134, 54 Pac. 596 (1898).

Florida.—*Eldridge v. State*, 27 Fla. 162, 9 So. 448 (1891).

Georgia.—*Smallwood v. State*, 9 Ga. App. 300, 70 S. E. 1124 (1911); *Alsbrook v. State*, 126 Ga. 100, 54 S. E. 805 (1906).

similar acts done at other times, not too remote to be probative, may be introduced in evidence for the purpose of showing that a given act was done maliciously.² To be evidentiary in such a connection the collateral occasion must be so connected with the principal transaction by proximity of time and similarity or dissimilarity of conditions as to render it probable that the same mental state was operative on both occasions. As in other connections, the similarity in antecedents and consequents operates by way of showing the existence and force in operation of the mental state which is alleged to have been present as the cause or part of the cause of the observed result. Dissimilarity of condition, on the other hand, acts *corroboratively*, reinforcing the direct probative effect of similarity by the indirect method of infirmative or alternative hypotheses or explanations to the contention that the cause pointed out by the relevancy of similarity was in fact the operative one. Features in either transaction presenting neither features of similarity nor dissimilarity in connection with a particular mental state, may be disregarded. For example, the merits of a quarrel on a collateral occasion, introduced in order to show malice, are immaterial.³

§ 3240. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State); Minor Mental State; Claim.—

The mental states of intent, knowledge and motive, though they

Indiana.—Lanter v. McEwen, 8 Blackf. 495 (1847).

Massachusetts.—Com. v. Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270 (1892).

New Hampshire.—State v. Palmer, 65 N. H. 216, 20 Atl. 6 (1889).

South Carolina.—State v. Durant, 87 S. C. 532, 70 S. E. 306 (1911).

Tennessee.—Burnett v. State, 14 Lea 439 (1884).

Wisconsin.—Grace v. McArthur, 76 Wis. 641, 45 N. W. 518 (1890).

England.—Rex v. Voke, R. & R. (1823).

2. *Alabama*.—Crawford v. State, 86 Ala. 16, 5 So. 651 (1888).

Florida.—West v. State, 42 Fla. 244, 28 So. 430 (1900).

Illinois.—Henry v. People, 198 Ill. 162, 65 N. E. 120 (1902).

Indiana.—Sanderson v. State, 169 Ind. 301, 82 N. E. 525 (1907).

Iowa.—State v. Soper, 118 Iowa 1, 91 N. W. 774 (1902).

Louisiana.—State v. Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392 (1890).

Mississippi.—Hale v. State, 72 Miss. 140, 16 So. 387 (1894).

Missouri.—State v. Calloway, 154 Mo. 91, 55 S. W. 444 (1899).

Ohio.—State v. Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109 (1896).

South Carolina.—State v. Weldon, 39 S. C. 318, 17 S. E. 688, 24 L. R. A. 126 (1892).

Texas.—Hamilton v. State, 41 Tex. Cr. App 644, 56 S. W. 926 (1900).

3. Garrett v. State, 76 Ala. 18 (1884).

are most frequently encountered in the administration of jurisprudence, by no means constitute the only ones which may require judicial consideration. Other states of mind, though of minor importance, may be the subject of inquiry. If so, they may be proved in the same manner, by evidence of their manifestations upon other occasions. Of this nature is the *claim* under which property, real or personal is being held.¹ Thus, acts of ownership may be proved for the purpose of showing the nature of the actor's claim of title under a conveyance, execution of which is disputed.² Unless there is some definite connection between the two occasions, what a man claims as to his rights in one piece of land is not, however, relevant on the question as to what he claims them to be in another piece.³

§ 3241. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State*); Minor Mental States Other than Claim.—Good faith¹ or its absence,² may be proved in this way. Emotions or mental states such as purpose,³ recognition of liability,⁴ the operation of undue influence,⁵ and the like, normally

§ 3240-1. *Wood v. Brewer & Brewer*, 73 Ala. 259 (1882); *Smith v. Shackelford*, 9 Dana (Ky.) 452 (1840); *Hunt v. Haven*, 56 N. H. 87 (1875); *Little v. Downing*, 37 N. H. 355 (1858) *Irvin v. Patchin*, 164 Pa. St. 51, 30 Atl. 436, 35 W. N. C. 341 (1894).

2. *Rankin v. Busby*, (Tex. Civ. App. 1894) 25 S. W. 678.

3. *Smith v. New York, etc., R. Co.*, 163 Mass. 569, 41 N. E. 110 (1895).

§ 3241-1. *Rice v. Bancroft*, 11 Pick. (Mass.) 469 (1831); *Hunt, T. & Co. v. Reynolds*, 9 R. I. 303 (1869); *Walker v. Town of Westfield*, 39 Vt. 246 (1867); *Lackarie v. Franklin*. 12 Peters (U. S.) 151, 9 L. ed. 1035 (1838).

2. *Rex v. Winkworth*, 4 Car. & P. 441 (1830).

3. *Iowa*.—*State v. McCahill*, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599 (1887).

Massachusetts.—*Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452 (1888).

Missouri.—*State v. Williams*, 136 Mo. 293, 38 S. W. 75 (1896).

New York.—*Brouwer v. Hill*, 1 Sandf. (N. Y.) 629 (1848).

United States.—See *U. S. v. The Paryntha Davis*, 27 Fed. Cas. No. 16,003, 1 Cliff. 532 (1860).

The question being whether A., during the American Civil War, placed a horse with B. under a fictitious sale for the purpose of keeping it from being impressed by the Confederate government, evidence of a similar transaction regarding a cow at the same time between the same parties, was properly admitted. *Lutz v. Yount*, 61 N. C. 367 (1867).

4. *Davenport Gaslight & Coke Co. v. City of Davenport*, 13 Iowa 229 (1862); *Moody v. Tenney*, 3 Allen (Mass.) 327 (1862).

5. *Somes v. Skinner*, 16 Mass. 348 (1819).

Evidence of undue influence exercised over a testator both before and after the execution of his will is ad-

require this kind of proof. In like manner, consent,⁶ ratification,⁷ waiver,⁸ and other constituent or probative psychological facts may be proved in the same way.

§ 3242. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State*); Motive.—While motive is not so much, in most cases, a constituent as a probative¹ fact,—it usually being immaterial with what motive a crime was committed where it is established by the use of direct evidence,—it may be conveniently observed, in this connection, that the motive with which an act was done may be established by evidence of similar transactions at about the same time, by which the practical operation and influence of the motive was manifested.² In other words,

missible on an issue as to undue influence at the time it was made. *Forney v. Ferrell*, 4 W. Va. 729 (1871).

6. *Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140 (1890); *Gibson v. Hatchett & Bros.*, 24 Ala. 201 (1854).

7. *Alabama*.—*Lytle v. Bank of Dothan*, 121 Ala. 215, 26 So. 6 (1898).

Indiana.—*Buckingham v. Hanna*, 20 Ind. 110 (1863); *Hitchens v. Ricketts*, 17 Ind. 625 (1861).

Louisiana.—*Finlay v. Kirkland*, 9 Mart. (O. S.) 463 (1821).

Massachusetts. — *Spaulding v. Forbes, etc., Co.*, 171 Mass. 271, 50 N. E. 543, 68 Am. St. Rep. 424 (1898); *Munroe v. Holmes*, 5 Allen 201 (1862).

Missouri.—*Morse v. Diebold*, 2 Mo. App. 163 (1876).

New York.—*People v. McLaughlin*, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005, 11 N. Y. Cr. Rep. 97, 73 N. Y. St. Rep. 496, *reversed*, 150 N. Y. 365, 44 N. E. 1017 (1896).

Agency or forgery.—While it is not admissible to prove, as an independent fact, the previous existence and negotiation of other forged paper like that in suit, to bind him whose name is forged, yet if it is

further shown that any such paper was brought to his knowledge, and he treated it as a valid paper, the fact will have a tendency, not merely to show that that particular paper was authorized, but to strengthen any evidence of authority from him to make use of his name in executing such paper thereafter. *Stroh v. Hinchman*, 37 Mich. 490 (1877).

8. *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13 (1897); *Andre v. Hardin*, 32 Mich. 324 (1875); *Missouri, etc., R. Co. of Texas v. Mayfield*, 29 Tex. Civ. App. 477, 68 S. W. 807 (1902).

§ 3242-1. § 51.

2. *Alabama*. — *Gassenheimer v. State*, 52 Ala. 313 (1875).

Arizona.—*Qualey v. Territory*, 8 Ariz. 45, 68 Pac. 546 (1902).

California.—*People v. Burns*, 16 Cal. App. 416, 118 Pac. 454 (1911); *People v. Argentos*, 156 Cal. 720, 106 Pac. 65 (1910); *People v. Walters*, 98 Cal. 138, 32 Pac. 864 (1893).

Colorado.—*Warford v. People*, 43 Colo. 107, 96 Pac. 556 (1908).

District of Columbia.—*Ryan v. U. S.*, 26 App. D. C. 74 (1905).

Georgia.—*Smallwood v. State*, 9 Ga. App. 300, 70 S. E. 1124 (1911); *Jones v. State*, 63 Ga. 395 (1879).

Indiana.—*Eacock v. State*, 169 Ind. 488, 82 N. E. 1039 (1907); *Sanderson*

the existence of a particular motive and its influence upon the conduct of a given person may be established by evidence of other occasions on which it may appear to have been operative.³ Thus, the efforts of an accused person to borrow money,⁴ and the lack of success attending such efforts, or the fact that the accused had been confined in jail just prior to the commission of a crime,⁵ may be given in evidence as tending to establish a pressing need for money. These other transactions must, however, in order to be admissible, be so nearly related in time and otherwise so connected

v. State, 169 Ind. 301, 82 N. E. 525 (1907); *Cross v. State*, 138 Ind. 254, 37 N. E. 790 (1894).

Iowa.—*State v. O'Connell*, 144 Iowa 559, 123 N. W. 201 (1909); *State v. Ward*, 91 N. W. 898 (1902).

Kansas.—*State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322 (1894).

Kentucky.—*Welch v. Com.*, 108 S. W. 863, 33 Ky. L. Rep. 51 (1908); *Clark v. Com.*, 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029 (1901).

Louisiana.—*State v. McKowen*, 126 La. 1075, 53 So. 353 (1910).

Massachusetts.—*Com. v. Choate*, 105 Mass. 451 (1870).

Missouri.—*State v. Hyde*, 234 Mo. 200, 136 S. W. 316, 25 Am. & Eng. Ann. Cas. 191 (1911); *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55 (1906).

Nebraska.—*Smith v. State*, 17 Neb. 358, 22 N. W. 780 (1885).

New Mexico.—*Territory v. McGinnis*, 10 N. M. 269, 61 Pac. 208 (1900).

New York.—*People v. Morse*, 196 N. Y. 306, 89 N. E. 816 (1909); *People v. Harris*, 136 N. Y. 423, 33 N. E. 65 (1893).

North Dakota.—*State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518 (1896).

Ohio.—*State v. Dickerson*, 77 Ohio St. 34, 82 N. E. 969, 13 L. R. A. (N. S.) 341, 11 Am. & Eng. Ann. Cas. 1181, 122 Am. St. Rep. 479 (1907); *Brown v. State*, 26 Ohio St. 176 (1875).

Oklahoma.—*Smith v. State*, 3 Okla. Cr. App. 629, 108 Pac. 418 (1910); *Beberstein v. Territory*, 8 Okla. 467, 58 Pac. 641 (1899).

Oregon.—*State v. Hembree*, 54 Ore. 463, 103 Pac. 1008 (1909); *State v. Germain*, 54 Ore. 395, 103 Pac. 521 (1909); *State v. Finch*, 54 Ore. 482, 103 Pac. 505 (1909).

Pennsylvania.—*McConkey v. Com.*, 101 Pa. St. 416 (1882).

South Carolina.—*State v. Duncan*, 88 S. C. 217, 70 S. E. 402 (1911); *State v. Durant*, 87 S. C. 532, 70 S. E. 306 (1911).

South Dakota.—*State v. Phelps*, 5 S. D. 480, 59 N. W. 471 (1894).

Texas.—*Vines v. State* (Cr. App. 1912), 148 S. W. 727; *Adams v. State*, 62 Tex. Cr. App. 426, 138 S. W. 117 (1911); *Lawshe v. State*, 57 Tex. Cr. App. 32, 121 S. W. 865 (1909).

Virginia.—*O'Boyle v. Com.*, 100 Va. 785, 40 S. E. 121 (1902).

United States.—*Thomas v. U. S.*, 156 Fed. 897, 84 C. C. A. 477, 178 L. R. A. (N. S.) 720n. (1907); *Van Gesner v. U. S.*, 153 Fed. 46, 82 C. C. A. 180 (1907).

England.—*Reg. v. Cooper*, 3 Cox Cr. C. 547 (1849).

3. *Com. v. Birriolo*, 197 Pa. St. 371, 47 Atl. 355 (1900).

4. *Stevenson v. Stewart*, 11 Pa. St. 307 (1849).

5. *People v. McCarthy*, 14 Cal. App. 148, 111 Pac. 274 (1910).

as to be probative for the purpose for which they are offered.⁶ To authorize the reception of evidence of a collateral crime as furnishing a motive to the perpetration of the offense with which the accused is charged, the motive must grow out of the former act; it is not sufficient that both crimes proceeded from the same motive.⁷ The lines of demarcation between intent, intention, and motive are often shadowy. Thus, motive may be spoken of in judicial parlance where intent would have answered the same purpose, and then so even better. For example, where the plaintiffs alleged that the defendant sent them a communication representing that a certain individual was reliable and solvent, thereby fraudulently inducing plaintiffs to extend credit to him, the fact that the person carrying the communication was also instructed to make the same representations to another firm, was held admissible as tending, it was said, to show the defendant's motive.⁸

Other circumstantial evidence may be used to show motive. The entire circumstances out of which, as is claimed, the motive arises, may be placed before the jury.⁹ Thus, where the motive suggested was that of revenge, the fact that deceased had caused criminal¹⁰ or disbarment¹¹ proceedings to be instituted against the defendant is competent. It is no ground for excluding this circumstantial evidence of motive that it shows that the accused has committed another distinct crime;—either similar or dissimilar, in its nature. Thus, it may be claimed that the motive for the offense on trial was the concealment of an offense previously

6. *Alabama*.—Garrett v. State, 76 Ala. 18 (1884).

Kentucky.—Martin v. Com., 93 Ky. 189, 19 S. W. 580, 14 Ky. L. Rep. 95 (1892); O'Brien v. Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534 (1889).

New Hampshire.—State v. Palmer, 65 N. H. 216, 20 Atl. 6 (1889); State v. Knapp, 45 N. H. 148 (1863).

New York.—People v. Van Tassel, 26 N. Y. App. Div. 445, 50 N. Y. Suppl. 53, 13 N. Y. Cr. Rep. 160; *affirmed*, 156 N. Y. 561, 51 N. E. 274 (1898); Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551 (1855); Van Kirk v. Wilds, 11 Barb. 520 (1851).

North Dakota.—State v. Hakon, 21 N. D. 133, 129 N. W. 234 (1910).

Ohio.—State v. Dickerson, 77 Ohio St. 34, 82 N. E. 969, 13 L. R. A. (N. S.) 341, 122 Am. St. Rep. 479, 11 Am. & Eng. Ann. Cas. 1181 (1907).

Pennsylvania.—Com. v. Birriolo, 197 Pa. St. 371, 47 Atl. 355 (1900).

Texas.—Kunde v. State, 22 Tex. App. 65, 3 S. W. 325 (1886).

7. People v. Glass, 158 Cal. 650, 112 Pac. 281 (1910).

8. Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551 (1855).

9. State v. Palmer, 65 N. H. 216, 20 Atl. 6 (1888); Kunde v. State, 22 Tex. App. 65, 3 S. W. 325 (1886).

10. Martin v. Com., 93 Ky. 189, 19 S. W. 580, 14 Ky. L. Rep. 95 (1892).

11. State v. Finch, 54 Ore. 482, 103 Pac. 505 (1909).

committed,¹² or to prevent conviction of the crime of having committed such other offense.¹³ For example, on an indictment for killing a policeman, it may be shown that the latter was trying to arrest the accused for another felony.¹⁴ So too, on a prosecution for house-breaking, it may be shown that cancelled checks used by the defendant as a means of embezzlement were in the burglarized building.¹⁵ Naturally, the evidence offered must be probative to the end for which it is tendered.¹⁶ Should the two crimes be thus connected;—that the effort to conceal the first furnished the motive for the commission of the second, mere remoteness in point of time will not, for obvious reasons, operate to exclude evidence of the original transaction.¹⁷

Details of Collateral Offense.— While the prosecution may show the motive underlying the commission of the offense with which the accused is charged though the proof involves the commission of another crime, if the motive can clearly be shown without exhibiting all the details of the collateral offense, sound administrative principles justify the presiding judge in refusing to admit such details.¹⁸

§ 3243. (Administrative Requirements; Relevancy of Similarity; Proof of Mental State); Unity of Design.— Evidence as to what was done on other occasions may be used with especial probative force either to show that particular conduct took place

12. *Morse v. Com.*, 129 Ky. 294, 111 S. W. 714, 33 Ky. L. Rep. 831, 894 (1908); *Pontius v. People*, 21 Hun (N. Y.) 328; *affirmed*, 82 N. Y. 339 (1880); *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518 (1896); *McConkey v. Com.*, 101 Pa. St. 416 (1882).

13. *Cover v. Com.*, (Pa. 1887) 8 Atl. 196, 5 Sad. 79; *State v. Durant*, 87 S. C. 532, 70 S. E. 306 (1911); *Vines v. State*, (Tex. Cr. 1912) 148 S. W. 727.

14. *People v. Wilson*, 117 Cal. 688, 49 Pac. 1054 (1897); *People v. Pool*, 27 Cal. 572 (1865); *People v. Morse*, 196 N. Y. 306, 89 N. E. 816 (1909).

15. *Com. v. Everson*, 123 Ky. 330, 96 S. W. 460, 29 Ky. L. Rep. 760, 124 Am. St. Rep. 365 (1906).

16. *Kentucky.*— *Baker v. Com.*, 106 Ky. 212, 50 S. W. 54, 20 Ky. L. Rep. 1778 (1899).

Mississippi.— *Cotton v. State*, 17 So. 372 (1895).

New York.— *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193 (1901).

North Carolina.— *State v. Alston*, 94 N. C. 930 (1886).

North Dakota.— *State v. Hakon*, 21 N. D. 133, 129 N. W. 234 (1910).

Texas.— *Barkmann v. State* (Cr. App. 1899), 52 S. W. 69.

17. *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518 (1896).

18. *Com. v. Andrews*, 234 Pa. 597, 83 Atl. 412 (1912); *Menefee v. State*, (Tex. Cr. App. 1912) 149 S. W. 138.

on another occasion, to identify the person by whom the act was done, or to establish the mental state under which he did it, when the several occasions have such a relation, in their similar or dissimilar features, as to show that they all were, or might properly be regarded as being, manifestations of a single purpose. Where a series of similar or dissimilar acts are seen to bear such relation to each other as to evidence *unity of design*;—e. g., where prior acts are only explainable or most readily understood as having been done for the purpose of making subsequent ones more easy of accomplishment either by directly facilitating them or through the removal of obstacles, and where these subsequent acts in turn facilitate the attainment of a definite end which had evidently been in view from the beginning, the mind recognizes, with a zest so great as often to mislead it, the presence of a peculiarly strong probative force in the inference that the person or persons to whom this object has been worth the previous effort will scarcely fail, if furnished with a suitable opportunity, to take the subsequent steps necessary to its attainment. The force of this probative relevancy is gained by the use of dissimilarity; ¹ i. e., by the elimination of informative hypotheses or explanations to which the contention that A. wilfully and intentionally did a given act would otherwise be open. While A. may have done on each of the collateral occasions what he did innocently by way of accident or ignorance, it will seldom happen that the same explanation will apply to two; still less that it will be applicable to more.² On the other hand,

§ 3243-1. The several acts, criminal or civil, may be similar in character; as where one has systematically violated the terms of a statutory license in conducting his business.

Alabama.—Chambers v. State, 26 Ala. 59 (1855).

Maryland.—Archer v. State, 45 Md. 33 (1876).

New Hampshire.—State v. Welch, 64 N. H. 525, 15 Atl. 146 (1888).

Pennsylvania.—Com. v. McDermott, 37 Pa. Super. Ct. 1 (1908).

Texas.—Skipwith v. State (Cr. App. 1902), 68 S. W. 278.

Virginia.—Whitlock v. Com., 89 Va. 337, 15 S. E. 893 (1892).

Washington.—State v. Downer, 68 Wash. 672, 123 Pac. 1073 (1912).

But this general similarity is neither necessary to nor conflicting with the relevancy of similarity involved in the present rule.

2. The theory of accident, lack of intention, or any innocent motive or purpose may be disproved in this way.

Alabama.—Gassenheimer v. State, 52 Ala. 313 (1875).

Arkansas.—Ford v. State, 34 Ark. 649 (1879).

California.—People v. Sternberg, 111 Cal. 3, 43 Pac. 198 (1896).

Florida.—Wallace v. State, 41 Fla. 547, 26 So. 713 (1899).

where A. is identified, the fact that he had long been possessed of a purpose to do the act in question and has been so strongly influenced by it as to exert himself on other occasions for its accomplishment, not only effectually segregates him from other possible actors, but tends strongly to show, in connection with the proof of a *corpus delecti*, that A., in point of fact, did the act for which he has already done so much.

Several persons may unite in the effort to accomplish a given result; — each doing on a separate occasion some act assumed to be calculated to advance the end in view relying upon the co-operation of his associates to supply the other elements which may be relied upon for the attainment of a successful result. This instance of unity of design may properly be regarded as the relevancy of a *common purpose*. On the other hand, a single individual may resolve upon the attainment of a definite object, innocent or criminal, supposed to be profitable or meritorious. Various acts, on a number of occasions, may be done by such a person, in the effort to reach the object in view and adapted for that end; — either by procuring means for its attainment, securing an opportunity for the use of these means, removing obstacles which may threaten the success of the enterprise; or, in case of a criminal offense, by eliminating circumstances likely to assist in the detection and punishment of the principal act to which these successive steps are subservient. These and similar occurrences may be said to be fairly typical of the influence of a *continuous purpose*.

Indiana.—Card v. State, 109 Ind. 415, 9 N. E. 591 (1886).

Iowa.—State v. Lee, 91 Iowa 499, 60 N. W. 119 (1894).

Maryland.—Archer v. State, 45 Md. 33 (1876).

Massachusetts.—Com. v. Ferry, 146 Mass. 203, 15 N. E. 484 (1888).

Michigan.—People v. Summers, 115 Mich. 537, 73 N. W. 818 (1897).

Missouri.—State v. Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135 (1888).

Nebraska.—Guthrie v. State, 16 Neb. 667, 21 N. W. 455 (1884).

New Hampshire.—State v. Welch, 64 N. H. 525, 15 Atl. 146 (1888).

New York.—People v. Zucker, 20 App. Div. 363, 46 N. Y. Suppl. 766, 14 N. Y. Cr. Rep. 464; *affirmed* 154 N. Y. 770, 49 N. E. 1102 (1897).

North Dakota.—State v. Fallon, 2 N. D. 510, 52 N. W. 318 (1892).

Ohio.—Lindsey v. State, 38 Ohio St. 507 (1882).

Pennsylvania.—Com. v. Hutchinson, 19 Pa. Co. Ct. 360 (1897).

Tennessee.—Rafferty v. State, 91 Tenn. 655, 16 S. W. 728 (1891).

Texas.—Peterson v. State (Cr. App. 1902), 70 S. W. 978.

England.—Rex v. Ellis, 6 B. & C. 145, 9 D. & R. 174, 5 L. J. M. C. (O. S.) 1, 13 E. C. L. 76 (1826).

§ 3244. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Unity of Design*); Common Purpose.—The existence of a *common purpose* may be innocent or otherwise; i. e., it may be for the attainment of ends and by the employment of means which the substantive law regards as permissible; or, on the other hand, may, to use Lord Denman's epigram, be for the attainment of unlawful ends or for the attainment of lawful ends by unlawful means. In the latter event, it is commonly designated a conspiracy. Either in its innocent aspect or in that of unlawful combination the existence of a common purpose is usually established by the correlation and mutual dependency of the acts done on distinct occasions. The fact of a conspiracy,¹ or the existence of a common purpose among several persons, may be established by proof of the acts of such persons on other occasions, though the actors may have been separated by long distances, and though the acts in question cover an extended length of time. In other words, where a series of acts are the manifestations of a common design² or constitute a systematic plan.

§ 3244.1. *Alabama*.—Loeb & Bros. v. Flash Bros., 65 Ala. 526 (1880).

Arkansas.—Cook v. State, 80 Ark. 495, 97 S. W. 683 (1906).

Connecticut.—Knotwell v. Blanchard, 41 Conn. 614 (1874); Luckey v. Roberts, 25 Conn. 486 (1857).

Delaware.—State v. Effler, 78 Atl. 411 (1910).

Idaho.—State v. Hammond, 18 Idaho 428, 110 Pac. 169 (1910).

Illinois.—Orr v. People, 63 Ill. App. 305 (1895).

Massachusetts.—Com. v. Eastman, 1 Cush. 189, 48 Am. Dec. 596 (1848).

Michigan.—People v. Summers, 115 Mich. 537, 73 N. W. 818 (1898).

Minnesota.—State v. Ames, 90 Minn. 183, 96 N. W. 330 (1903).

New York.—People v. Coombs, 36 App. Div. 284, 55 N. Y. Suppl. 276, 13 N. Y. Cr. Rep. 525; *affirmed*, 158 N. Y. 532, 53 N. E. 527 (1899); People v. Bleeker, 2 Wheeler Cr. Cas. 256 (1823); Allison v. Matthieu, 3 Johns. 235 (1808).

Ohio.—Davis v. State, 20 Ohio Cir. Ct. R. 430, 10 Ohio C. D. 738 (1900).

Oregon.—State v. Smith, 55 Oreg. 408, 106 Pac. 797 (1910).

Pennsylvania.—Neff v. Landis, 110 Pa. St. 204, 1 Atl. 177 (1885).

South Carolina.—State v. Davis, 88 S. C. 204, 70 S. E. 417 (1911).

Washington.—Stack v. Nolte, 29 Wash. 188, 69 Pac. 753 (1902).

United States.—Jack v. Mutual Res. Fund L. Assn., 113 Fed. 49, 51 C. C. A. 36 (1902); Bottomley v. U. S., 1 Story 135, 3 Fed. Cas. No. 1,688 (1840).

England.—R. v. Roberts, 1 Camp. 399 (1808).

2. *California*.—People v. Cobler, 108 Cal. 538, 41 Pac. 401 (1895).

Georgia.—Chapman v. State, 112 Ga. 56, 37 S. E. 102 (1900).

Kansas.—State v. Folwell, 14 Kan. 105 (1874).

Massachusetts.—Com. v. Robinson, 146 Mass. 571, 16 N. E. 452 (1888); Com. v. Blood, 141 Mass. 571, 6 N. E. 769 (1886).

Minnesota.—State v. Ames, 90 Minn. 183, 96 N. W. 330 (1903).

Nebraska.—Barber v. Martin, 67 Neb. 445, 93 N. W. 722 (1903).

of operations,³ evidence of what happened on other occasions embraced in the series will be admissible to show who did the particular act at the culmination of the series, or was otherwise connected with it, and the motive with which it was done. Frequently, the existence of a common purpose can only be established by such proof and a comparison of the different acts and observing the presence of a unity of design to which the several acts are

New York.—People v. Peckens, 153 N. Y. 576, 47 N. E. 883 (1897).

Pennsylvania.—Goersen v. Com., 106 Pa. St. 477, 51 Am. Rep. 534 (1884).

South Dakota.—State v. Halpin, 16 S. D. 170, 91 N. W. 605 (1902).

Texas.—White v. State, 11 Tex. 769 (1854).

Vermont.—State v. Eastwood, 73 Vt. 205, 50 Atl. 1077 (1901).

United States.—Jones v. U. S., 179 Fed. 584, 103 C. C. A. 142 (1910); Butler v. Watkins, 13 Wall. 456, 20 L. ed. 629 (1871).

England.—Makin v. Atty.-Gen., A. C. 57, 17 Cox Cr. C. 704, 58 J. P. 148, 63 L. J. P. C. 41, 69 L. T. Rep. (N. S.) 778, 6 Reports 373 (1894).

On a trial for murder of one of defendant's daughters, where there is evidence to support the theory of the prosecution that her killing, and the killing of defendant's wife and another daughter, were each a part of a scheme to accomplish a certain purpose, all evidence tending to connect defendant with the murder of his wife and other daughter is admissible. Hawes v. State, 88 Ala. 37, 7 So. 302 (1889).

Where the crime charged is one of a system of criminal acts occurring so near together in point of time and so nearly similar in means as to lead to the inference that they are all mutually dependent and committed in pursuance of the same deliberative criminal purpose, evidence of such other acts is admissible, even though those acts amount to another criminal offense, not for the purpose of

proving that defendant committed the crime charged against him, but to show his purpose, plan, intent, or knowledge, or to show that the acts charged against him were not the result of accident, mistake, or inadvertence. Wallace v. State, 41 Fla. 547, 26 So. 713 (1899).

But where evidence of a similar crime is not so connected with the crime charged as to show a common scheme or plan so that proof of such other crime does not tend to prove the murder charged, the evidence is inadmissible. People v. Molineaux, 168 N. Y. 264, 10 N. Y. Ann. Cas. 256, 61 N. E. 286, 62 L. R. A. 193 (1901).

3. *Alabama.*—Hawes v. State, 88 Ala. 37, 7 So. 302 (1889).

Arkansas.—Cook v. State, 80 Ark. 495, 97 S. W. 683 (1906).

California.—People v. Van Ewan, 111 Cal. 144, 43 Pac. 520 (1896).

Idaho.—State v. Hammock, 18 Idaho 428, 110 Pac. 169 (1910).

Indiana.—Card v. State, 109 Ind. 415, 9 N. E. 591 (1886).

Iowa.—State v. Soper, 118 Iowa 1, 91 N. W. 774 (1902).

Massachusetts.—Fowle v. Child, 164 Mass. 210, 41 N. E. 291, 49 Am. St. Rep. 451 (1895).

Oregon.—State v. Smith, 55 Ore. 408, 106 Pac. 797 (1910).

Texas.—Efrid v. State, 44 Tex. Cr. App. 447, 71 S. W. 957 (1903).

United States.—New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997 (1885).

intelligently adapted.⁴ Practically it is in this way that the conspiracy is most frequently established, in the absence of admissions or confessions.

It is not material that certain of these intermediate acts, i. e., those done between the inception of the conspiracy and its accomplishment or abandonment, should be separate criminal offenses. The evidence of such a transaction is equally admissible, if such acts can reasonably be held to have been done in pursuance of the common object.⁵

A common purpose is not sufficient, standing alone, to secure admissibility for the evidence of what happened on other occasions. The several acts may well have been done for the same purpose or in pursuance of a single agreement; the evidence nevertheless is not admissible unless the *common purpose* runs *through* the several acts rather than *up* to them. In other words, the individual transactions must be connected, correlated and systematized in such a way that each act, though, perhaps, in a sense, complete in itself, is yet a necessary element in a plan to reach an ulterior object which has been in view from the start, simple unity of purpose not being sufficient. A mere conspiracy to do a number of disconnected acts of a similar nature,⁶ e. g., to rob all the houses of a given neighborhood and the carrying out of such an arrangement, would not be sufficient to authorize the court in receiving evidence of one robbery as proof of the commission of another. Those associated in the common plan may each be liable, under the rules of substantive law governing the relations of conspirators, for the doing of any acts which may have been done during and in pursuance of the conspiracy.⁷ But such a situation does not disclose an instance of the working of the rule under consideration. Were, however, the agreement one to rob a bank and a suc-

4. Proof of conspiracy is not essential to the admissibility of the evidence itself. *Cox Shoe Mfg. Co. v. Adams*, 105 Iowa 402, 75 N. W. 316 (1898). Reasonable proof of a conspiracy may, however, be demanded before the agency of one alleged conspirator may be properly held to affect those claimed to be his associates.

5. *State v. Adams*, 20 Kan. 311 (1878); *State v. Greenwode*, 72 Mo.

298 (1880); *Hall v. State*, 3 Lea (Tenn.) 552 (1879).

6. *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116 (1903); *Topolewski v. State*, 130 Wis. 244, 109 N. W. 1037, 7 L. R. A. (N. S.) 756 n, 10 Am. & Eng. Ann. Cas. 627, 118 Am. St. Rep. 1019 (1906).

7. *Towne v. People*, 89 Ill. App. 258 (1899); *State v. May*, 142 Mo. 135, 43 S. W. 637 (1897); *Barber v. State*, (Tex. Cr. App. 1902) 70 S. W. 210.

cession of robberies took place for the purpose of procuring the necessary funds, appropriate tools, essential information, or the like, for doing so, an instance of unity of design would be presented.

Similar Devices, etc.—The existence of a common purpose, and even of a continuous one, may be shown by the use on other occasions, of a similarity in the details of procedure adopted. This rule of admissibility may be so far extended as to cover inferences drawn from the use on other occasions of a device or form of trickery,⁸ or deception similar to that alleged to have been employed in the case at bar.⁹

§ 3245. (*Administrative Requirements; Relevancy of Similarity; Proof of Mental State; Unity of Design*); Continuous Purpose.—Wherever a series of acts has been done on other occasions, all of which have been adapted to the attainment of a particular purpose to which the act under investigation alone remains necessary, the doing of these former acts is highly probative to the effect that the actor on these occasions did the act in question and that he did it for the purpose of reaching the end which the former acts were calculated to secure. The case presented is this;—A proposes to himself a definite object. To attain it, three successive interrelated steps are necessary; X, Y and Z. Until Z is finally done, the objective point will not be reached.

8. California.—People v. Arnold, 17 Cal. App. 68, 118 Pac. 729 (1911); People v. Harben, 5 Cal. App. 29, 91 Pac. 398 (1907).

Florida.—Charles v. State, 58 Fla. 17, 50 So. 419 (1909).

Iowa.—State v. Dobbins, 152 Iowa 632, 132 N. W. 805 (1911); State v. O'Connell, 144 Iowa 559, 123 N. W. 201 (1903).

Michigan.—Beard v. Hill, 131 Mich. 246, 9 Det. L. N. 297, 90 N. W. 1065 (1902).

Minnesota.—Hinkley v. Freick, 112 Minn. 239, 127 N. W. 940 (1910).

Montana.—State v. Hall, 45 Mont. 498, 125 Pac. 639 (1912).

Pennsylvania.—Com. v. Pugliese, 44 Pa. Super. Ct. 361 (1910); Com.

v. Griffin, 42 Pa. Super. Ct. 597 (1910).

Texas.—Melton v. State, 63 Tex. Cr. App. 262, 140 S. W. 230 (1911).

Washington.—State v. Craddick, 61 Wash. 425, 112 Pac. 491 (1911).

United States.—Williamson v. U. S., 207 U. S. 425, 28 S. Ct. 162, 52 L. ed. 278 (1908).

9. Benham v. Cary, 11 Wend. (N. Y.) 83 (1833); **Smith v. Schewd**, 9 Fed. 483, *appeal dismissed* 106 U. S. 188, 1 Sup. Ct. 221, 27 L. ed. 156 (1881).

To impeach a conveyance as fraudulent, it may be shown that in other transactions, about the same time, the grantee helped the grantor to baffle creditors. **Adams v. Kenney**, 59 N. H. 133 (1879).

Step Z, however, cannot be taken until Y is taken, nor can Y be undertaken until X is perfectly achieved. On the other hand, the taking of step X is helpful to that of step Y, is well calculated to that end and to no other. The taking of step Y, thus facilitated makes the doing of Z more practicable and is eminently well fitted to that end and to no other. The doing of Z is beneficial to A by enabling him to attain the end thus held steadily in view from the beginning. Unless Z is done, the work of doing X and Y is wasted. The question being, Did A do act Z, is evidence admissible that, on another occasion, he did step X and, on a still later one, act Y? The answer of the courts is affirmative. In such an issue, it may be shown that A took steps X and Y,¹ even though these constitute independent transactions or even crimes; provided the continuous purpose in doing them can be satisfactorily established, or even serve as a tenable theory of the case. For example, as the supreme judicial court of Massachusetts says:² "Precedent acts which render the commission of the crime charged more easy, more safe, more certain, more effective to produce the ultimate result which formed the general motive and inducement, if done with that intention and purpose, have such a connection with the crime charged as to be admissible, though they are also of themselves criminal."³ That one who has followed the leadings of a continuous purpose to a given objective over a long course of systematic conduct will not swerve from doing the final act which will give him the result for which so much effort has been undertaken seems a highly rational conclusion.

An offense subsequent to the one in question may likewise be proved where it is shown that the acts are steps in the design of the accused to attain the desired end.⁴ To use the above illustration on

§ 3245-1. *Hawes v. State*, 88 Ala. 37, 7 So. 302 (1889); *State v. Deliso*, 75 N. J. L. 808, 69 Atl. 218 (1908); *People v. Toledo*, 150 App. Div. (N. Y.) 403, 135 N. Y. Supp. 49 (1912); *Faucett v. Nichols*, 64 N. Y. 377 (1876).

2. *Com. v. Robinson*, 146 Mass. 571, 578, 16 N. E. 452 (1888), per C. Allen, J.

3. *Accord. Com. v. Jackson*, 132 Mass. 16 (1882); *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81 (1877); *Jordan v. Osgood*, 109 Mass. 457, 12

Am. Rep. 731 (1872); *Com. v. Choate*, 105 Mass. 451 (1870); *People v. Sharp*, 107 N. Y. 427, 466, 14 N. E. 319 (1887); *Mayer v. People*, 80 N. Y. 364 (1880); *Swan v. Com.*, 104 Pa. St. 218 (1883); *Goersen v. Com.*, 99 Pa. St. 388 (1882); *Shaffner v. Com.*, 72 Pa. St. 60, 13 Am. Rep. 649 (1872).

4. *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435 (1912); *Gibson v. State*, (Ga. App. 1912) 74 S. E. 905. But see, *State v. Smith*, 55 Oreg. 408, 106 Pac. 797 (1910).

a prosecution for the doing of act X, it may be shown that the defendant subsequently did acts Y and Z, though such proof involves the proving of other criminal offenses.

§ 3246. (*Administrative Requirements*); *Relevancy of Dissimilarity*.—The probative use of other occasions of the conduct of a given individual presenting dissimilar features to those exhibited on the occasion under investigation may be said to proceed, as it were, by means of what may be called moral or psychological induction. The inference that A. did a particular act is not, as a rule, directly created by evidence that, on another occasion when the alleged stimulus was present, he acted in a different manner; or that, on another occasion when a different stimulus was present, he acted in the same manner as upon the particular occasion in question. No additional probative force is, in most cases, directly added to the proof that A. did the particular act in question by the operation of any relevancy of dissimilarity. The probative force of this particular method of using evidence of what was done upon other occasions by a particular individual is usually applied at another stage, i. e., at that of corroboration of an affirmative case already established by other evidence. Here, as in other cases of corroboration,¹ the method of creating belief is not through adding to the probative forces of the affirmative case but by removing cogency from the negative one. It is true that the actor, e. g., the prosecutor in a criminal case, may not feel sufficiently sure of his ability to create a *prima facie* case in the first instance without the aid of this removal of infirmative considerations; and he may, therefore, at the stage of evidence in chief, submit to the court the evidence which, under more favorable circumstances, he might reserve for the stage of corroboration. However this may be, the function of this species of evidence is apparently that of corroboration by the elimination of infirmative hypotheses or explanations for the purpose of aiding an affirmative case already fully or partly established. So considered, the relevancy of dissimilarity is a forensic necessity in many cases, especially those of a criminal nature, where a given mental state is a constituent or probative fact. Such mental states are not subject to direct observation through the sense-perception of other persons; and are, consequently, in the absence of ad-

mission, provable only by physical manifestations, exclamations, conduct and the like. In any particular case the *res gestae* may be equivocal as to the mental state of the person in question; certainly, not clear beyond a reasonable doubt. The obvious and frequently the sole administrative expedient is to broaden the field of inquiry beyond the *res gestae* of the particular case by introducing in evidence proof of what happened upon other occasions so related to the facts under investigation that by the elimination, or as it were, the cancellation of infirmative hypotheses or explanations the steady line or channel of a single sufficient operative cause may be shown to run through the entire series of connected transactions and stand revealed as the real mental state of the person in question throughout them all.

To take a familiar illustration, A. is indicted for passing counterfeit money knowing it to be such. It is satisfactorily shown that on a given occasion he gave to a witness the counterfeit bill in question, receiving therefor certain articles purchased by him and the balance in money. The physical features of the transaction are satisfactorily established; A. is fully identified or, perhaps, was arrested upon the spot and his connection with the *res gestae* is beyond all question. The sole forensic difficulty in the path of the prosecution is to show A's *knowledge* of the counterfeit nature of the bank note. He has admitted nothing, but, on the contrary, claims that he found the bill in the street just before the tradesman's shop was reached and that, supposing the bill to be good and needing the articles in question, he had purchased them as narrated. He may even be able to produce certain of his friends to testify that they saw him find the bill as he claims to have done. There may be nothing in the *res gestae* of the case itself which will control these infirmative explanations. A. may have been incautious or even silly in assuming the genuine character of the bill, but there is a wide difference between folly and guilt and it might be difficult or even unreasonable to secure a verdict of guilty under a *res gestae* such as this. It may be incidentally observed that the prosecution can gain little by the mere proof of similar instances, i. e., those to which the same infirmative hypotheses or explanations may be made to apply. Thus should the government show that bills similar to those passed upon occasion X were successfully negotiated by A. on two separate occasions Y and Z immediately preceding occasion X to other tradesmen in return

for necessary supplies of which he stood in need, the prosecution might be successfully met with the same evidence by A. of his finding, except that that fortunate event would probably involve three bills instead of one. The government's sole resort is to some similar occasion of passing bank bills like those involved in the indictment to which the explanation of the same finding would not be applicable. Were A., for example, shown to have passed a counterfeit bill shortly before occasion X, Y and Z, which he said had been given to him by an unknown stranger as an act of generosity, the infirmative hypothesis of ignorance or honest mistake would be greatly weakened. The mind of the tribunal would now be required to assent to the occurrence of two very startling and unusual events, in close succession, both extremely favorable to the accused as the alternative to the hypothesis of guilty knowledge. As this infirmative hypothesis of innocence — which, like all other hypotheses, must adequately explain all the facts — decreases in probative force, it will be observed that the government's contention that the defendant *knew* of the counterfeit nature of the money which he was passing, is steadily increasing in cogency. Should the prosecution be able to take another step by showing the passing by defendant shortly prior to the other transactions of a substantially similar bill which the person to whom it was tendered at once denounced as counterfeit notwithstanding the indignant assertion of the present prisoner that he had earned it as wages, the probative strength of the government's contention might amount almost to a moral certainty.

§ 3247. (*Administrative Requirements; Relevancy of Dissimilarity*); *Psychological Induction*.— Closely analogous in operation and effect to the method of *natural induction*,¹ by which the operation of a particular cause is established as efficient in producing given results upon physical phenomena by the use of other occasions similar or dissimilar in their antecedents, is the employment of what may be called *psychological induction*; — by which the presence and operation, both in kind and degree of intensity, of a particular mental state on a given occasion may be established by showing other times at which it was present, so adjusted to the principal occurrence as to prove a similar operative force in both or to eliminate counter infirmative suggestions, or by both methods

in combination. In few connections is the use of conduct upon other occasions by way of the relevancy of dissimilarity of greater practical importance than where the object is to establish the existence on the occasion under investigation of a particular mental or psychological state on the part of the person whose acts are under investigation. The substantive law is extremely apt, especially in criminal cases, to make the existence of a particular mental state a component or subordinate proposition in the issue. It may, for example, provide that one who passes a counterfeit bill *knowing* it to be forged shall be liable; that he who *wilfully* does a certain act shall be liable for its consequences; that one who *maliciously* kills another shall be deemed guilty of murder and the like. In other words, from the standpoint of *existences*, a definite mental state must be a constituent fact in the *res gestae*. In yet other words, it may be said that a particular state of consciousness is part of the definition of a given liability. However the matter may be regarded, proof of the psychological state is essential and, this particular *factum probandum*, not being subject to direct observation by others, can usually be proved only in a circumstantial manner;² including the use of what happened on other occasions with a view to eliminating the infirmative hypotheses or explanations in derogation of the government's contention as to the possible presence of other and more innocent psychological states upon the occasion in question.

To state the rule in a slightly different form, in case of a forensic necessity for proving the existence of a given mental state on a particular occasion, administrative indulgence may take the form³ of permitting proof of other transactions in which the mental

2. The early law abandoned the problem as unsolvable by evidence. The Devil alone knew the heart of man. Unless the accused could be forced, by torture or otherwise, to confess, the only resource was to appeal to the wisdom of Heaven as invoked by ordeal, battle and the administration of the oath. The modern law of evidence resolutely undertakes the necessary task but its administration recognizes the attendant difficulties and at once assumes that as the usual direct evidence is unattainable the secondary, circum-

stantial evidence must be employed to carry into effect the best evidence rule, viewed as a canon of concession.

Such evidence is said to be **primary** and admissible though there is other strong evidence to the same effect. *Com. v. White*, 145 Mass. 392, 14 N. E. 611 (1887).

3. Birmingham R., etc., Co. v. Franscomb, 124 Ala. 621, 27 So. 508 (1899); *Millspaugh v. Potter*, 62 App. Div. (N. Y.) 521, 71 N. Y. Suppl. 134 (1910); *Patterson v. Smith*, 73 Vt. 360, 50 Atl. 1106 (1901).

state was exhibited; provided such a connection shall appear to exist between the two transactions, the collateral and the present, as to render it probable that the same mental state was present on both occasions. The occurrence must, however, relate to the acts of the person in question and not to those of third persons.⁴

Order of Time.— In using the evidence of what happened on other occasions with a view to strengthening or corroborating an affirmative contention by the elimination of infirmative hypotheses, the order of succession between the various occurrences is immaterial. In other words, so long as the probative quality persists, the order of time between the primary and the collateral transactions is not deemed of importance. In these cases, the psychological, constituent or probative facts may be proved by evidence of what occurred on the occasion prior⁵ or subsequent⁶ to the main transaction submitted to investigation.

§ 3248. **Inferences other than Conduct.**— It is to be observed that the inference which is excluded by the principle under consideration, except in the event of an adequate forensic necessity and some special ground of relevancy other than mere similarity, is simply that a person did a particular act on one occasion because he did a similar one at another. In other words, that which is excluded is inference of conduct based upon moral uniformity in response to particular stimuli. Where the events which occurred on another occasion are probative to some other effect than that a given act was in fact done, the principle has no application. There are, however, a large number of inferences which may be drawn in any given case from what was done by a given individual on other occasions to which the present rule or principle has no application. In these other connections, the relation of the other occurrences may be in part constituent as to the right or liability asserted in the action or proceeding; i. e., the fact may be part of the *res gestae*. On the other hand, the relevancy of conduct on another occasion may be *probative* as to the existence of some other fact than conduct upon the occasion involved in the inquiry.

4. *Globe Ins. Co. v. Hazlett*, 9 Leg. Int. 54, 1 Phila. (Pa.) 347 (1852).

6. *Johnson v. Johnson*, 22 Colo. 20, 43 Pac. 130, 55 Am. St. Rep. 112 (1895).

5. *Zacharie v. Franklin*, 12 Pet. (U. S.) 151, 9 L. ed. 1035 (1838).

§ 3249. (*Inferences Other Than Conduct*); **Constituent Facts.**— The *res gestae* of one transaction may properly, and even at times necessarily, involve proof of acts of conduct which might well form the *res gestae* of another. Nothing in the principle under investigation forbids such a use of the acts done on another occasion, provided their evidentiary employment as part of the *res gestae* of the pending action or proceeding is reasonable; *a fortiori*, if it is necessary. Under the general administrative principle or canon¹ which requires the presiding judge to protect a party from prejudice caused by the misleading of the jury, the court, where a proponent could satisfactorily prove his case in some way other than one so dangerous to an opponent as proving a number of highly incriminating and mutually corroborative collateral transactions in the process of establishing the *res gestae* of the case on trial, would undoubtedly be justified in requiring the proponent to prove his case in the less harmful way. But no rule of procedure requires that the judge should do so and it is a well established principle that the fact, that the jury may misuse for purpose X evidence which is perfectly competent for purpose Y, furnishes no ground for rejecting evidence absolutely essential to the case of the proponent in connection with purpose X. Evidence of another transaction may be necessary in order to enable a party to prove his case — to detail the *res gestae* — the constituent facts upon which he is relying. A party is not prevented from proving a constituent fact — one of the *res gestae* of his case — merely because it is a transaction which, in some degree is segregated from the other transactions involved in the *res gestae*.² In a like manner, the facts of other transactions may be incorporated into a case by reference to them in the *res gestae* of the pending case; as where former dealings are referred to in the contract which is the basis of the action before the court.³ Such facts, so incorporated, are practically part of the *res gestae* of the case on trial, and may usually be proved as a matter of course.

§ 3249-1. § 386.

2. *Alexander v. State*, 56 Ga. 478 (1876); *Indianapolis St. R. Co. v. Dawson*, 31 Ind. App. 605, 68 N. E. 909 (1903); *Barber v. Martin*, 67 Neb. 445, 93 N. W. 722 (1903);

Meislahn v. Irving Nat. Bank, 172 N. Y. 631, 65 N. E. 1119 (1902).

3. *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853 (1895); *Buchnam v. Chaplin*, 1 Allen (Mass.) 70 (1861); *Gardner v. Crenshaw*, 122 Mo. 79, 27 S. W. 612 (1894).

§ 3250. (*Inferences Other Than Conduct; Constituent Facts*); Civil Cases.—The right of a litigant to prove the *res gestae* of his case is a fundamental one and will be protected by the court¹ in any civil case, although making such proof may involve the establishment of the facts of other transactions.

§ 3251. (*Inferences Other Than Conduct; Constituent Facts; Civil Cases*); Negligence.—Where negligence is to be established by proof of certain *res gestae*, it may happen that a necessary method of showing the latter may involve proving facts which might properly constitute the *res gestae* of another transaction or even of a separate act of negligence. It may, in many cases, be an essential element in establishing negligence to show the extent of the defendant's knowledge, i. e., what he knew when he did a given act or omitted to do one. Frequently the nature and extent of this knowledge will depend upon what happened on other occasions, more or less similar in their nature. In other words, the element of *notice* to a defendant as to the existence of specific conditions presents itself for establishment in this way with special frequency. For example, in jurisdictions where a railroad company is liable to the owners of property along its location injured by fires set by sparks communicated from its locomotive engines only when affirmative evidence of negligence is shown on the part of the company, the circumstances attending the setting of other fires by means of such engines at or about the same time may be received for the purpose of showing that, in view of the dangers to property from this source which the company knew to exist, its conduct on a particular occasion was negligent.¹ In this way,

§ 3250-1. § 358.

§ 3251-1. *Illinois*.—*Illinois Cent. R. Co. v. Frazier*, 47 Ill. 505 (1868); *Illinois Cent. Co. v. Mills*, 42 Ill. 407 (1866).

Indiana.—*Ind. & Cin. R. Co. v. Paramore*, 31 Ind. 143 (1869).

Iowa.—*Jackson v. Chicago, etc., R. Co.*, 31 Iowa 176, 7 Am. Rep. 120 (1870).

Kansas.—*L. L. & T. R. Co. v. Cook*, 18 Kan. 261 (1877).

Minnesota.—*Woodson v. Mil. & St. P. R. Co.*, 21 Minn. 60 (1874).

New Jersey.—*Morris & Essex R.*

Co. v. State, 36 N. J. L. 553 (1873).

New York.—*Westfall v. Erie Ry. Co.*, 5 Hun 75 (1875); *Webb v. R., W. & O. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389 (1872).

Pennsylvania.—*Phila. & Reading R. Co. v. Hendrickson*, 80 Pa. St. 182, 21 Am. Rep. 97 (1875); *Phila. & Reading R. Co. v. Yerger*, 73 Pa. St. 121 (1873).

Texas.—*Missouri Pac. Ry. Co. v. Donaldson*, 73 Tex. 124, 11 S. W. 163 (1889); *Ft. Worth, etc., Ry. Co. v. Ratliffe*, 2 White & Willson Civ. Cas., Ct. App. § 681 (1885).

a wide range of other occurrences will be received in evidence for the purpose of showing that the railroad, in the face of known dangers from fire, permitted the accumulation of combustible material on the right of way,² or failed to provide suitable protection to property along the line of its road.³ In much the same way, evidence of what happened on other occasions is admissible to show the negligence of a railroad company in permitting the operation of locomotives of faulty construction⁴ or which were not, at the time when the fire was set, in a state of complete repair.⁵ For the

Wisconsin.—McHugh v. Chicago, etc., R. Co., 41 Wis. 79 (1876).

England.—H. & C. R. Co. v. Brand, L. R. 4 H. L. 171 (1869); Dimmock v. N. S. R. Co., 4 F. & F. 1058 (1866); Vaughan v. Taff Vale R. Co., 5 H. & N. 679 (1860); Piggott v. East Cos. R. Co., 3 C. B. (M. G. & S.) 229 (1846); Aldridge v. Gt. West. R. Co., 3 Man. & Y. 515, 42 E. C. L. 272. (1841).

2. *California*.—Flynn v. S. C. & S. J. R. Co., 40 Cal. 14, 6 Am. Rep. 595 (1870).

Illinois.—First Nat. Bank, etc., v. Lake Erie & W. R. Co., 174 Ill. 36, 41, 50 N. E. 1023 (1898); Ill. C. R. Co. v. Mills, 42 Ill. 407 (1866); Bass v. C., B. & Q. R. Co., 28 Ill. 9, 81 Am. Dec. 254 (1862).

Indiana.—Wabash R. Co. v. Miller, 158 Ind. 174, 61 N. E. 1005 (1901); Pittsburg, etc., R. Co. v. Indiana Horse-shoe Co., 154 Ind. 322, 56 N. E. 766 (1900).

New Jersey.—Salmon v. D., L. & W. R. Co., 9 Vroom 5, 20 Am. Rep. 356 (1875).

New York.—Webb v. Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389 (1872).

Pennsylvania.—Pennsylvania R. Co. v. Hope, 80 Pa. St. 373, 21 Am. Rep. 100 (1876).

Texas.—Texas, etc., Ry. Co. v. Rutherford, 28 Tex. Civ. App. 590, 68 S. W. 825 (1902); International, etc., R. Co. v. Newman (Civ. App. 1897), 40 S. W. 854.

Washington.—Abrams v. Seattle, etc., R. Co., 27 Wash. 507, 68 Pac. 78 (1902).

West Virginia.—Snyder v. Pittsburgh, etc., R. Co., 11 W. Va. 14 (1877).

Wisconsin.—Kellogg v. Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69 (1870).

United States.—Gulf, etc., Ry. Co. v. Johnson, 54 Fed. 474, 4 C. C. A. 447, 10 U. S. App. 629 (1893); Northern Pac. R. Co. v. Lewis, 51 Fed. 658, 2 C. C. A. 446, 7 U. S. App. 254, reversed, 162 U. S. 366, 16 Sup. Ct. 831, 40 L. Ed. 1002 (1892).

3. *Texas*, etc., R. Co. v. Woolridge, (Tex. Civ. App. 1901) 63 S. W. 905; Cleaveland v. G. T. R. Co., 42 Vt. 449 (1869).

4. *Lake Erie*, etc., R. Co. v. Gould, 18 Ind. App. 275, 47 N. E. 941 (1897); Jamieson v. New York & R. B. R. Co., 11 App. Div. 50, 42 N. Y. Suppl. 915, affirmed 162 N. Y. 630, 57 N. E. 1113 (1896); Sheldon v. Hudson River R. Co., 14 N. Y. 218, 67 Am. Dec. 155 (1856).

5. *Baltimore*, etc., R. Co. v. Tripp, 175 Ill. 251, 51 N. E. 833 (1898); Louisville & N. R. Co. v. Samuels' Ex'rs, 22 Ky. L. Rep. 401, 57 S. W. 467 (1900); Jamieson v. New York & R. B. R. Co., 11 App. Div. 50, 42 N. Y. Suppl. 915, affirmed, 162 N. Y. 630, 57 N. E. 1113 (1900); Thomas v. New York, etc., R. Co., 182 Pa. St. 538, 41 W. N. C. 144, 38 Atl. 413 (1897).

same purpose the carelessness of the employees of the company, at other times, in operating its trains may be proved.⁶ All this, and much similar evidence, may properly constitute part of the *res gestae* of a particular transaction alleged to be negligent; its special bearing being as to the *knowledge* which the defendant company had at the time when it undertook to act. The similar setting of fires has, in a marked degree, a tendency to show that the defendant had knowledge of what it was doing, and the defective condition of its locomotives, the carelessness of its employees and the other facts upon the knowledge of which negligence on the part of the defendant is predicated. The defendant may safely be assumed to know what is going on along its line.⁷ This being so, the order of time in which knowledge was acquired may be, in many cases, a matter of indifference. The other occasions may be subsequent⁸ to the fire in suit; provided they are not too remote to be probative in view of the purpose for which the evidence is offered.

§ 3252. (*Inferences Other Than Conduct; Constituent Facts*); Criminal Cases.—The rule of administration which permits a proponent to prove the *res gestae* of his case although it should involve proof of other transactions of a similar nature applies even in criminal cases. The prosecution is not debarred from the orderly and necessary proof of its case against the prisoner by the fact that to do so involves proving that the accused committed another offense at another time.¹ Thus, where it is incumbent

6. Indiana.—Lake Erie, etc., R. Co. v. Gould, 18 Ind. App. 275, 47 N. E. 941 (1897).

Kentucky.—Kentucky Cent. R. Co. v. Barrow, 89 Ky. 638, 5 Ky. L. Rep. 518, 6 Ky. L. Rep. 240, 20 S. W. 165 (1890).

Nevada.—Longabaugh v. Virginia City, etc., R. Co., 9 Nev. 271 (1874).

New York.—Bedell v. L. I. R. Co., 44 N. Y. 367, 4 Am. Rep. 688 (1871); Field v. N. Y. C. R. Co., 32 N. Y. 339 (1865); Hinds v. Barton, 25 N. Y. 544 (1862).

Canada.—Robinson v. New Brunswick R. Co., 23 New Bruns. 323 (1883).

7. Annapolis, etc., R. Co. v. Gantt, 39 Md. 115 (1873); **Pennsylvania R. Co. v. Stranahan,** 79 Pa. St. 405 (1875).

On the other hand, the evidence of other settings of fire has been rejected when offered for this purpose. **Jacksonville, etc., R. Co. v. Peninsular, etc., Co.,** 27 Fla. 1, 9 So. 661, 17 L. R. A. 33, 65 (1891).

8. Baltimore, etc., R. Co. v. Tripp, 175 Ill. 251, 51 N. E. 833 (1898).

§ 3252-1. Alabama.—Kirkwood v. State, 3 Ala. App. 15, 57 So. 504 (1912).

Arkansas.—Renfroe v. State, 84 Ark. 16, 104 S. W. 542 (1907).

upon the prosecution to show defendant's absence from the jurisdiction in order to avoid the statute of limitations, the confinement of the accused in a prison of another jurisdiction for another offense may be shown.² Where the defendant is indicted as a second offender, evidence of the prior conviction cannot be avoided; but, unless the two offenses are so connected that the proof of the former tends to prove some element of the latter, the former cannot be considered in determining the guilt of the accused as to the latter.³

§ 3253. (*Inferences Other Than Conduct*); Contradiction.—

Evidence of similar occurrences may be received regardless of the principle in question when not offered as probative on the issue of conduct but as a purely deliberative fact relevant for some independent purpose. For example, the evidence may be used to contradict the evidence of a witness.¹ Thus, where a railroad com-

California.—*People v. Wilson*, 14 Cal. App. 515, 112 Pac. 579 (1911); *People v. Mack*, 14 Cal. App. 12, 110 Pac. 967 (1910); *People v. Glass*, 158 Cal. 650, 112 Pac. 281 (1910); *People v. Courtright*, 10 Cal. App. 522, 102 Pac. 542 (1909).

Colorado.—*Jaynes v. People*, 44 Colo. 535, 99 Pac. 325, 16 Am. & Eng. Ann. Cas. 787 (1909).

Georgia.—*Hall v. State*, 7 Ga. App. 115, 66 S. E. 390 (1909); *Eaker v. State*, 4 Ga. App. 649, 62 S. E. 99 (1908); *Ray v. State*, 4 Ga. App. 67, 60 S. E. 816 (1908).

Illinois.—*Nagel v. People*, 229 Ill. 598, 82 N. E. 315 (1907).

Kansas.—*State v. Brown*, 85 Kan. 418, 116 Pac. 508 (1911); *State v. Nordmark*, 84 Kan. 628, 114 Pac. 1068 (1911); *State v. Hansford*, 81 Kan. 300, 106 Pac. 738 (1909).

Louisiana.—*State v. Anderson*, 120 La. 331, 45 So. 267 (1907).

Michigan.—*People v. Neely*, 171 Mich. 249, 137 N. W. 150 (1912).

Missouri.—*State v. Bell*, 212 Mo. 111, 111 S. W. 24 (1908); *State v. Landrum*, 127 Mo. App. 653, 106 S. W. 1111 (1908); *State v. Cavin*, 199 Mo. 154, 97 S. W. 573 (1906).

Montana.—*State v. Sylvester*, 40 Mont. 79, 105 Pac. 86 (1909).

New York.—*People v. Furlong*, 140 App. Div. 179, 125 N. Y. Suppl. 164; *affirmed*, 201 N. Y. 511, 94 N. E. 1096 (1911).

Oklahoma.—*Hampton v. State*, 7 Okl. Cr. App. 291, 123 Pac. 571 (1912); *Williams v. State*, 4 Okla. Cr. App. 523, 114 Pac. 1114 (1910); *Hunter v. State*, 3 Okla. Cr. App. 533, 107 Pac. 444 (1910); *Vickers v. U. S.*, 1 Okla. Cr. App. 452, 98 Pac. 467 (1908).

Pennsylvania.—*Com. v. Benedick*, 39 Pa. Super. Ct. 477 (1909).

Texas.—*Bird v. State* (Tex. Cr. App. 1912), 148 S. W. 738; *Roman v. State* (Tex. Cr. App. 1912), 142 S. W. 912.

Washington.—*State v. Thuna*, 59 Wash. 689, 109 Pac. 331 (1910).

2. *State v. Moran*, 131 Iowa 645, 109 N. W. 187 (1906).

3. *People v. Callahan*, 136 N. Y. Suppl. 407 (1912); *Davis v. State*, 134 Wis. 632, 115 N. W. 150 (1908).

§ 3253-1. *People v. Doody*, 172 N. Y. 165, 64 N. E. 807 (1902); *Com. v. House*, 36 Pa. Super. Ct. 363 (1908); *State v. Kenny*, 77 S. C. 236, 57 S. E. 859 (1907).

pany, on an action by a passenger for an alleged fall at its depot, had given evidence that it had carried a large number of persons therefrom without accident, testimony of a witness that she had met with a similar accident at the same place when attempting to board one of defendant's cars at a time prior to the accident to the plaintiff, was admissible as proper rebuttal.²

§ 3254. (*Inferences Other Than Conduct*); Corroboration.—

In much the same way, the evidence of what occurred on a similar occasion may be properly received to *corroborate* a witness.¹ Evidence of another criminal offense committed by the accused has, however, been rejected, although offered for this purpose.² This would seem to carry the rule of exclusion to an unnecessary length, although very possibly justified in a particular case on the ground that its admission was calculated to prejudice the accused to an extent disproportionate to the gain to the cause of justice. In this connection, it is important to bear in mind a fact fundamental in the very nature of corroboration. As is elsewhere seen,³ the peculiar probative force of corroboration is reached by the elimination of infirmative hypotheses or explanations attaching to the contention to which it applies. Where, for example, an additional witness is produced testifying merely to the same fact stated by others and presenting the same elements of bias or other infirmative consideration which his associates are subject to, e. g., where an additional witness testifies that he was with the prisoner, in connection with a crowd of others, under the circumstances which, if believed, tend to establish an alibi, an instance of cumulative evidence is presented, not one of corroboration. In the

2. Illinois Cent. R. Co. v. Treat, 179 Ill. 576, 54 N. E. 290 (1899).

§ 3254-1. *Arkansas*.—Cook v. State, 80 Ark. 495, 97 S. W. 683 (1906).

Iowa.—State v. Leek, 152 Iowa 12, 130 N. W. 1062 (1911).

Minnesota.—State v. Ames, 90 Minn. 183, 96 N. W. 330 (1903).

Missouri.—State v. Henderson, 243 Mo. 503, 147 S. W. 480 (1912).

Nebraska.—State v. Routzahn, 81 Neb. 133, 115 N. W. 759, 129 Am. St. Rep. 675 (1908).

New York.—People v. Rogers, 192

N. Y. 331, 85 N. E. 135, 15 Am. & Eng. Ann. Cas. 177 (1908).

Oregon.—State v. Robinson, 32 Oreg. 43, 48 Pac. 357 (1897).

Texas.—Lott v. State (Cr. App. 1912), 146 S. W. 544; Hamilton v. State, 36 Tex. Cr. App. 372, 37 S. W. 431 (1896).

Washington.—State v. Conlin, 45 Wash. 478, 88 Pac. 932 (1907).

Wisconsin.—Lanphere v. State, 114 Wis. 193, 89 N. W. 128 (1902).

2. People v. Schweitzer, 23 Mich. 301 (1871).

3. § 1768.

same way, the statements of a witness on one occasion cannot be corroborated by proof of his statements or acts at another;—so long as the same infirmative consideration shall apply to each. In like manner, in most cases, the other transaction in order to be probative by way of corroboration should be based on the credit of another witness than the one sought to be corroborated, or to circumstances gaining credit from some source other than such a witness. As was said by a court in Texas: "It could not be corroboration of the prosecutrix for her to testify to one rape and then corroborate this fact by testifying to another rape."⁴

Where the offense is a continuous one, evidence of former acts is admissible in corroboration of the witness to the particular act charged.⁵ This, however, is under the ordinary rules of administration and has no particular reference to the rule or principle under consideration.

§ 3255. (*Inferences Other Than Conduct*); Explanation.—

In much the same way, evidence of a different transaction may be given in order to afford a reasonable *explanation* of the *res gestae* or probative facts under consideration in the pending case.¹ For example, it may be shown in this way who is the principal in a given transaction.²

§ 3256. (*Inferences Other Than Conduct*); Identification of Doer of Act; Essential Conditions for Conduct.—Prominent among the inferences which may properly be drawn from the conduct of the given individual on other occasions are those which arise in connection with what may be called necessary conditions of action upon the occasion in question and which serve to connect a given individual with the *res gestae* of that transaction, *identifying him* as the actor of

4. *Smith v. State*, (Tex. Cr. App. 1903) 73 S. W. 401, 402, per Brooks, J.

5. *California*.—*People v. Bidleman*, 104 Cal. 608, 38 Pac. 502 (1894).

Florida.—*Toll v. State*, 40 Fla. 169, 23 So. 942 (1898).

Indiana.—*Townsend v. State*, 147 Ind. 624, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294 (1897).

New York.—*People v. McLaughlin*, 2 App. Div. 419, 37 N. Y. Suppl.

1005, 11 N. Y. Cr. Rep. 97, 73 N. Y. St. Rep. 496, *reversed*, 150 N. Y. 365, 44 N. E. 1017 (1896).

England.—*Reg. v. Rearden*, 4 F. & F. 26 (1864).

§ 3255-1. *Bigcraft v. People*, 30 Colo. 298, 70 Pac. 417 (1902); *Mitchell v. People*, 24 Colo. 532, 52 Pac. 671 (1898).

2. *Woodward v. Buchanan*, 39 L. J. Q. B. 71, L. R. 5 Q. B. 285, 22 L. T. 123 (1872).

these *res gestae*. It is evidently an important part of the contention of any litigant who is seeking to enforce a right to liability against a given individual, to establish the identity, actual or legal, of his opponent with the person by whom the *res gestae* on which he is relying were done. It is useless, for example, for the plaintiff in a civil action to claim damages against A. for breach of contract unless he is also prepared to connect A., in some suitable manner, with a person who has made the contract with him. In a criminal case, it is equally essential that the prisoner at bar should be satisfactorily identified by the prosecution with the doer of the *res gestae* which it may have proved. Even where, in either a civil or criminal case, direct evidence of the *res gestae* is presented, the question of identity is still important and may become, under exceptional circumstances, extremely difficult of solution. But the issue of identity seldom assumes in such cases the critical importance which it frequently develops when the evidence is circumstantial and the actor has sought, with the highest ingenuity and skill of which he is capable, to conceal his identity which has now become so important a portion of the hypothesis of the party seeking to enforce a right against or impose a liability upon him. Under these circumstances, much light is often thrown upon the identity of the offender by the circumstances attending the doing of such of the *res gestae* as are not disputed. These essential conditions of action may assist effectually in identifying the doer of a particular act; and, in connection with the proof of a *corpus delicti*, are often highly probative to the effect that the individual designated actually did it. While the distinction is, perhaps, a fine one, it may fairly be said — for example, in a criminal case — that, although the fact that A. did a particular act on a given occasion cannot be shown by evidence that he did a similar one at another, it may nevertheless fairly be shown that A. alone *could* have done the act in question because acts done by him on other occasions show that he alone of all known persons fulfills the conditions which the act in question shows must have been met by the doer of it.¹ The explanation of this apparent anomaly appears to be that the incriminating evidence in such a case does not

§ 3256-1. Nichols v. Baker, 75 Me. (1900); State v. Ames, 90 Minn. 183, 334 (1883); Koplan v. Boston Gas-light Co., 177 Mass. 15, 58 N. E. 183 (1900); State v. Ames, 90 Minn. 183, 334 (1883); Koplan v. Boston Gas-light Co., 177 Mass. 15, 58 N. E. 183 (1900); Brown v. Schock, 77 Pa. St. 471 (1875).

operate by way of the relevancy of similarity,² which is the subject matter of the present rule — but by that of dissimilarity³ which tends to corroborate affirmative evidence by eliminating possible infirmative explanations. In other words, A. is not shown to have done a particular act by the similarity of his conduct on other occasions, but, the doing of the act being otherwise established, A's connection with it is shown by the elimination of other possible actors through the process of establishing some dissimilarity or incongruity between the mental or physical characteristics or other conditions which attend the conduct of such other persons and the essential conditions presented by the conduct in question. It is a truism that the actor on a given occasion must necessarily have been shown to have complied with all the limiting conditions and qualifying circumstances attending the doing of the act in question. Such of these as may be shown to have been complied with by a particular individual, tend, in proportion to their number and unusual nature, to segregate that particular person from all others and thereby identify him as the doer of the act. The possession of these identifying characteristics by a given individual may be shown by what happened on other occasions about the same time which, as it were, tie a particular man to the offense in question. It is not material should the effect of thus identifying the defendant result in showing that he has committed another criminal offense.⁴ The use of all such evidence is, administra-

2. § 3216.

3. § 3246.

4. *Alabama*.—*Abrams v. State*, 155 Ala. 105, 46 So. 464 (1908); *Curtis v. State*, 78 Ala. 12 (1884).

Arkansas.—*Reed v. State*, 54 Ark. 621, 16 S. W. 819 (1891).

California.—*People v. Harben*, 5 Cal. App. 29, 91 Pac. 398 (1907); *People v. McGilver*, 67 Cal. 55, 7 Pac. 49 (1885).

Illinois.—*People v. Jennings*, 252 Ill. 534, 96 N. E. 1077 (1911); *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474 (1868).

Indiana.—*Dotterer v. State*, 172 Ind. 357, 88 N. E. 689, 30 L. R. A. (N. S.) 846n. (1909); *Frazier v. State*, 135 Ind. 38, 34 N. E. 817 (1893).

Iowa.—*State v. Harris*, 153 Iowa 592, 133 N. W. 1078 (1912).

Kentucky.—*Morse v. Com.*, 129 Ky. 294, 33 Ky. L. Rep. 831, 111 S. W. 714 (1908); *Tye v. Com.*, 3 Ky. L. Rep. (abstract) 59 (1881).

Minnesota.—*State v. Barrett*, 40 Minn. 65, 41 N. W. 459 (1889).

Missouri.—*State v. Hyde*, 234 Mo. 200, 136 S. W. 316, 25 Am. & Eng. Ann. Cas. 191 (1911); *State v. Balch*, 136 Mo. 103, 37 S. W. 808 (1896).

Montana.—*State v. Hill*, 46 Mont. 24, 126 Pac. 41 (1912).

New York.—*People v. Schooley*, 149 N. Y. 99, 43 N. E. 536 (1896).

Ohio.—*Coble v. State*, 31 Ohio St. 100 (1876).

Pennsylvania.—*Goersen v. Com.*, 99 Pa. St. 388 (1881).

tively speaking, limited to the necessity⁵ shown to exist for receiving it. Accordingly, where other evidence amply identifies the defendant, the presiding judge may well decline to raise a collateral issue and expose the accused to the injurious inferences which arise from showing, even for another purpose, that he committed a further substantive and distinct crime.

Among such essential conditions of conduct are those of motive, means and opportunity. The actor must, in most cases, have had a motive for doing that which he has done. He must, in all cases, have had the means by which it was done, and the opportunity for using these means for achieving the result attained. Any other conditions of time, space and causation which the *res gestae* or probative facts show must be met by the actual doer of the act and proof of them, even as shown on other occasions, is often a necessary method of circumstantial proof. Thus, for example, should the act in question have required a certain degree of strength, height of body, or length of arm, the dissimilarity of persons not possessing these bodily qualities will effectively exclude from consideration all persons who do not possess them. So of mental characteristics. Should a particular act require special skill, e. g., where the body of a murdered person was dismembered with a knowledge and skill habitual only to experienced surgeons, this fact may be proved and possession of the requisite skill by the accused established even if such proof requires evidence of what happened on other occasions.⁶

§ 3257. (*Inferences Other Than Conduct; Identification of Doer of Act; Essential Conditions for Conduct*); Capability.

—In like manner, where A. is said to have done a certain act, it must, in the absence of direct evidence, be shown that he was physically and mentally capable of doing it. When the doing of an act is shown by the uncontroverted testimony of the observers,

Rhode Island.—*State v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766 (1893).

Tennessee.—*Links v. State*, 13 Lea 701 (1884).

Texas.—*Wyatt v. State*, 55 Tex. Cr. App. 73, 114 S. W. 812 (1908); *Kelley v. State*, 18 Tex. App. 262 (1885).

Washington.—*State v. Leroy*, 61 Wash. 405, 112 Pac. 635 (1911).

United States.—*U. S. v. Boyd*, 45 Fed. 851, *reversed*, 142 U. S. 450, 12 Sup. Ct. 292, 35 L. ed. 1077 (1890).

England.—*Rex v. Clewes*, 4 C. & P. 221, 19 E. C. L. 485 (1830).

5. § 3213.

6. *Dabney v. State*, 82 Miss. 252, 33 So. 973 (1903).

or the actor has admitted or confessed the doing of it, no question can well arise as to the matter of capability. Doing a thing demonstrates capacity for doing it. But when circumstantial evidence is of necessity employed, either for the purpose of making out a *prima facie* case or corroborating one already established by the party seeking to prove the doing of an act, the necessity frequently arises that the proponent should establish the fact that the alleged actor was possessed of the particular powers the possession of which is implied by the doing of the act. The necessity will obviously come into existence and increase in forensic importance in proportion as the qualification called for is beyond those possessed by the ordinary human being; in other words, in the ratio that the class of possible actors is limited by some peculiarity of the act itself or of the manner in which it was done. The most adequate opportunity for doing a particular act would have been useless to A., one accused of doing the act, unless he were capable of availing himself of it; and, on the other hand, the most complete capability would be equally useless without the opportunity of exercising it. The co-existence of both, however, tends greatly to eliminate the number of possible actors by the dissimilarity of conditions which they present to those which the actors must have presented. This matter of capability may be established by A's conduct on other occasions. Previous acts showing capacity for doing a certain act are admissible when the effect is to prove that the person doing them could have done the act in question.¹ This is much the same as saying, that, in general, whenever the *possibility* of an act is in question, it may be shown that, on a previous occasion, a similar act was done by the alleged actor.² This is especially necessary where A's capacity for doing the act is denied. If capability in any particular is contested by the alleged doer, it can usually be established only by showing instances, other than the disputed one, on which the alleged actor has shown himself qualified in this particular to act.

§ 3258. (*Inferences Other Than Conduct; Identification of Doer of Act; Essential Conditions for Conduct*); Knowledge.

— Among the essential conditions of conduct which may be established by inferences to be drawn from what happened on other

§ 3257-1. Louisville, etc., R. Co. v. Bates, 8 Ky. L. Rep. 617 (1887).

2. Blalock v. Randall, 76 Ill. 224 (1875).

occasions is that of *knowledge*.¹ The doer of any particular act must have possessed all the knowledge essential to enable him to do it. The *res gestae* of any particular action may reveal a knowledge so specific as effectively to limit the class of possible actors to a very small number of people. Possession of special knowledge may at any time constitute a means of identification. So in case of criminal conduct. Stolen property, for example, may be taken without previous search from a hiding place known to but few persons. It may have been immediately carried to a remote spot the whereabouts of which was a secret carefully confined to a still more restricted number of persons. The actor indicated by these circumstances is a person who is a member of both classes which may have but one common member. Occurrences on other occasions are entirely competent to show the knowledge which the alleged actor possessed on these points, and such evidence has no connection with the rule or principle now under consideration.

Knowledge connected with the obtaining of the means by which a certain act was done may be significant in proportion to the limited number of persons who may fairly be supposed to share such knowledge. Here again, evidence of what happened upon other occasions is not excluded by the present rule. For example if the means by which a murder was committed was a rifle bullet commonly used throughout the community, the possession of such a weapon and ability to use it might almost be assumed. Where, however, as in Donellan's case,² the government claimed that the accused distilled laurel water from laurel leaves and administered the poison to the deceased, it was obviously essential that capability on the part of the prisoner to distill the poison should be shown; that he knew how to distill, that he possessed the apparatus, the skill to use it, etc.

§ 3259. (*Inferences Other Than Conduct; Identification of Doer of Act; Essential Conditions for Conduct*); Opportunity.

— In order that an alleged actor should have been capable of doing a specific act which requires his bodily presence at the *locus* of its being done, it is necessary, where the evidence is circumstantial, to establish that he was present at the time at that place. This

§ 3258-1. *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183 (1902). 2. *Rex v. Donellan*, (Norwich Spring Assizes, 1781) Burr. Civ. Ev. p. 117, 217.

may be shown by his actions on a previous occasion.¹ His other acts at about the same time as the act in question and near the scene of that act tend to show the presence of the accused at the place indicated at such a time as to afford him a suitable opportunity for doing the act which he is said to have committed. Thus, on an indictment for placing obstructions upon railroad tracks, it may be shown that the accused persons were in the vicinity where the offense was committed by evidence that they placed other obstructions on the rails at about the same time.² So, too, on the trial of a homicide case, where the accused claims that he was not in the vicinity of the place where the crime was committed at the time of its commission, the government may show his presence shortly before the homicide near the scene of the crime, though when seen by some of the witnesses he was committing another offense.³

§ 3260. (*Inferences Other Than Conduct; Identification of Doer of Act; Essential Conditions for Conduct*); Skill.—To establish capability in an alleged actor for doing an act displaying peculiar skill or mechanical dexterity, it is necessary to show that the actor at the time possessed these qualities. This may be done by proving that on a prior occasion he displayed them.¹ Thus, on an indictment for setting incendiary fires by means of a box of peculiar construction containing inflammable material, the government was permitted to prove that a similar box which was found a month previously under circumstances tending to show that it was in use at the time for incendiary purposes, was made by the defendant at his work-shop; and the jury were specially instructed, concerning this box, that the evidence that the defendant made it was not to be used to show that he made the box with which the fire in question was set, but only that he possessed the requisite

§ 3259-1. Missouri.—*State v. Spray*, 174 Mo. 569, 74 S. W. 846 (1903).

New York.—*People v. Hill*, 198 N. Y. 64, 91 N. E. 272 (1910).

Ohio.—*Coble v. State*, 31 Ohio St. 100 (1876).

Pennsylvania.—*Com. v. House*, 36 Pa. Super. Ct. 363 (1908).

Rhode Island.—*State v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766 (1893).

Texas.—*Lynne v. State*, 53 Tex. Cr. App. 375, 111 S. W. 729 (1908).

2. *State v. Wentworth*, 37 N. H. 196 (1858).

3. *People v. Jennings*, 252 Ill. 534, 96 N. E. 1077 (1911).

§ 3260-1. *Paducah First Nat. Bank v. Wisdom's Ex'rs*, 111 Ky. 135, 63 S. W. 461, 23 Ky. L. Rep. 530 (1901); *Com. v. Choate*, 105 Mass. 451 (1870).

skill, material, tools and opportunity to have made it, and that this was the sole use of such evidence, unless they should "find in the one such marks as show one hand must have made both."² These instructions were sustained, the supreme judicial court of Massachusetts saying: "The objection to all this evidence respecting the box No. 2, and the allusions to other offences contained in the letter, is urged upon the ground of a well established principle, that evidence which merely tends to prove that the defendant has committed some other similar offence, or which tends to prove facts that are merely collateral, is inadmissible. The principle is, that all the evidence admitted must be pertinent to the point in issue. But if it be pertinent to the point, and tends to prove the crime alleged, it is not to be rejected, though it also tends to prove the commission of other crimes, or to establish collateral facts." In the same way, should it happen that the conduct involved in the inquiry showed lack of technical skill or manual dexterity on the part of the actor it may be shown, by what happened upon other occasions, that the accused was similarly unskilled in the same particulars.³ It cannot, however, be shown that a person did a particular act merely because he had the skill to do it. Thus, on a question of forgery, it has been held inadmissible to show that the alleged defendant possessed the skill necessary to write the forged document.⁴

Skill at earlier period.— The possession of a certain degree of skill at one time is not, however, significant of its existence at an earlier period. In other words, the fact that a man can do a thing skillfully at a given time does not show that he could have done it with the same skill two years earlier.⁵

§ 3261. (*Inferences Other Than Conduct*); Possibility; Animals.— Where the question is whether it was possible for an animal to do a particular act, for example, whether it can attain a certain speed,¹ it may be shown that upon another occasion it actually did so. So too, it may be shown that certain consequences upon animal life of certain occurrences are possible by evidence

2. *Com. v. Choate*, 105 Mass. 451, 457 (1870), per Chapman, C. J.

3. *Clark v. Com.*, 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029 (1901).

4. *Costello v. Crowell*, 139 Mass. 588, 2 N. E. 698 (1885).

5. *Leighton v. Sargent*, 31 N. H. 119, 64 Am. Dec. 323 (1855).

§ 3261-1. *Whitney v. Leominster*, 136 Mass. 25 (1883).

that the results actually happened on other occasions. Thus the capacity of a steam whistle² or structure³ to frighten a horse may be shown by proof of other occasions when a horse was frightened thereby.

§ 3262. (*Inferences Other Than Conduct*); Probative Facts.

— Certain facts such as those of continuance in a mental feeling or change in the same can best be established by collateral occurrences showing the mental condition at different times. In like manner that certain action is habitual, accurate, or the like, calls, almost of necessity, for proof of appropriate action on other occasions. With regard to these, the collateral transaction may properly be regarded a probative fact.

§ 3263. (*Inferences Other Than Conduct; Probative Facts*); Accuracy, Habitual Conduct, etc.— Habit is best proved by specific instances of conduct. Obviously, if the habit of a person for accuracy in a certain line of work, for example, were in issue, proof that, on numerous occasions, he had done such work with absolute accuracy would be relevant and admissible. This use of specific collateral facts, which are in the nature of repeated acts, to prove a habit of an individual has the support of authority as well as reason.¹ The habit proved may be a negative one, that is, a habitual omission to do something, for example, that an engineer and fireman on a railway locomotive had a habit of failing to give any warning at a certain railway crossing may be shown by evidence of their repeated failure to do so during a considerable period.²

§ 3264. (*Inferences Other Than Conduct; Probative Facts*); Change.— Change, in and of itself, implies comparison. The comparison necessitates a standard or a former state of things with which to make the comparison or, in other words, an essentially collateral fact must be shown. Where it becomes necessary to

2. Crocker v. McGregor, 76 Me. 282, 49 Am. Rep. 611 (1884).

3. House v. Metcalf, 27 Conn. 631 (1858); Elgin v. Thompson, 98 Ill. App. 358 (1901); Darling v. Westmoreland, 52 N. H. 401, 13 Am. Rep. 55 (1872).

§ 3263-1. Ferner v. State, 151 Ind. 247, 51 N. E. 360 (1898); State v. Shaw, 58 N. H. 73 (1878); Davis v. Lyon, 91 N. C. 444 (1884).

2. State v. Manchester & Lawrence R. R., 52 N. H. 528 (1873).

prove a change in condition, conduct, degree of care and the like, evidence of similar occurrences may be relevant and admissible. Thus, in an action for the breach of a contract for the manufacture of a certain article after a model, evidence may be introduced to show that the article manufactured does not produce the same results as the model.¹

§ 3264-1. *Tilton v. Miller*, 66 Pa. St. 388, 5 Am. Rep. 373 (1870).

CHAPTER XLVIII.

MORAL UNIFORMITY; CHARACTER.

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§ 3265. Inference of Conduct from Character.— Character is to be distinguished from reputation with which it is sometimes confused, even in judicial opinions. Reputation, or the opinion concerning a person which is entertained by those who are so situated as to be able to form an opinion with more or less intelligence, may extend to a variety of subjects. For example, it may be a reputation for musical ability, physical strength, wealth and the like. However, reputation is more commonly considered as having reference to the disposition or character of a person. Thus it is said

of a person that he bears a good reputation, meaning that the person in question has a reputation for being a person of good character. For the purposes of the present chapter, character may be defined generally as that combination of traits which goes to make up the moral nature of an individual and serves to distinguish him from all others. This definition is doubtless imperfect. It can hardly be said to be broad enough to cover what is often spoken of as the character of an animal. It would perhaps save confusion if the word disposition were used consistently in reference to animals. It will be noticed that in the law of evidence the inquiry will commonly extend only to a trait or group of traits rather than to the sum total of traits. Reputation may furnish important evidence for ascertaining character but character may often differ widely from the reputation concerning it.

That the character of a person is a strong determining factor in regulating his conduct will not be questioned. The net result, as it were, of heredity and environment in its effect upon the individual is expressed in his character, to use the term in its broadest sense, without the limitation which is given to it in our present discussion. That portion of such net result which has to do with what is called the moral side of a person, or that which distinguishes the human species from all other creatures upon the earth and is an outgrowth largely of man's dealings with man, will obviously influence a person in his actions which affect his fellows. Thus to reasonable minds it seems clear that a person of dishonest character and without regard for the property rights of others would be more likely in a particular instance to appropriate to his own use property belonging to another than would a person of honest character, habitually holding sacred the rights of others in respect to the possession of property. Hence it would seem that on the question whether or not an individual was guilty of a specific charge of larceny evidence of the character of the accused for honesty or the contrary would be of very material service in arriving at a just decision. It is certain that, in the everyday affairs of our lives and in the forming of our private opinions and judgments, we habitually resort to inferences drawn from character in passing upon questions of past conduct and the probabilities of future conduct of individuals. It is equally clear, however, that in many situations no inference can be drawn from a person's character which has any probative weight with the logical

mind, for example, the character of a party to an alleged agreement would ordinarily have no bearing on the question whether or not he had entered into the agreement. It remains to be seen how judicial administration, influenced by precedent and considerations of policy or expediency, regards such inferences.

§ 3266. (*Inference of Conduct From Character*); Inference not a Probative One.—As is stated elsewhere¹ the entire lack of any probative force to an inference drawn from character most commonly appears in civil cases, especially in those involving no moral quality. Thus, the character of a party in an action for goods sold and delivered, for services rendered, for money loaned or for the conversion of goods can ordinarily throw no light on the question of the respective rights of the parties. This idea has been rather strikingly expressed judicially as follows: “The general character is not in issue; the business of the court is to try the case and not the man; and a very bad man may have a very righteous cause.”² Moreover, the inference in cases where it has some probative value does not possess sufficient proving power to entitle it to a place in the general class of probative inferences. It is on the contrary of that slight degree of probative force designated as deliberative.³ That a person’s character is good or bad simply renders his doing a particular act more or less probable. It has not the belief-compelling power, in reference to the proof of the matter in question, of a probative fact, properly so-called. To illustrate, the fact that a person accused of a crime is shown to have been miles away from the scene of the crime at the time of its commission raises a strictly probative inference, of a convincing character, that he did not commit the crime, while, in another case, the fact that the accused is a person of excellent character is productive of an inference which is not ordinarily convincing in that respect but only serves to raise a doubt and make the guilt of the accused improbable.

§ 3267. (*Inference of Conduct From Character*); Rule an Assignment of Irrelevancy.—The reason very frequently assigned for the exclusion of evidence as to character, offered for the pur-

§ 3266-1. §§ 3273-3275.

3. § 3278.

2. *Thompson v. Church*, 1 Root (Conn.) 312 (1791).

pose of showing the probability or otherwise that a specific act was or was not done, is that the evidence is irrelevant. This as has been indicated in the preceding section is often a true reason in the case of civil actions, but it is not the sole reason assignable even in such actions. There is in addition an important reason of administrative policy which has its principal foundation in the fact that to admit such evidence would "make trials intolerably long and tedious and greatly increase the expense and delay of litigation."¹ In criminal cases, irrelevancy can seldom be properly assigned as a reason for exclusion, as the issue usually involves a moral quality and hence knowledge of the character of the accused clearly aids in determining his guilt or innocence of the crime charged. Administrative policy may, however, be a proper ground for exclusion in such cases. This may be based on a desire to prevent surprise to the accused or prejudice against him, together with a desire to keep within the actual issue. These matters will be more fully considered later.²

§ 3268. **Necessity.**—Character whenever evidentiary at all is primary evidence and no necessity need be shown to warrant its introduction. However, as actual character is difficult if not impossible to show in evidence,¹ the law has resorted to the use of reputation to prove character. Reputation is a species of hearsay evidence, admitted under an exception to the hearsay rule. It is in connection with the use of reputation that necessity must appear as is the case with all classes of hearsay. The necessity for resorting to reputation lies partly in the difficulty in obtaining other proof and partly because of legal precedent which excludes the knowledge and opinion of individuals concerning the person whose character is under consideration and evidence of his conduct, and this often when such evidence might be of great value.

§ 3269. (*Necessity*); **Criminal Cases.**—The observations in the preceding section go only to the effect of necessity on the admissibility of evidence of character to prove conduct. There is

§ 3267-1. *Wright v. McKee*, 37 Vt. 161, 164 (1864), per Aldis, J.

2. §§ 3274, *et seq.*

§ 3268-1. "We do not think that the statute requires proof of the true character of the person, for that would in most cases be impossible.

The best we can do is to judge the character of our neighbors by the estimation in which they are held in the community." *Ex parte Vandiveer*, 4 Cal. App. 650, 654, 88 Pac. 993 (1907), per Chipman, P. J.

another meaning of necessity which must be distinguished, that is, the need that either party resort to evidence of character because of the scarcity or entire absence of direct evidence of the facts alleged by such party. This need is frequently found in criminal cases. For example, in a homicide case in which the accused pleads self-defense and there are no eye-witnesses to the encounter, he might be utterly without evidence that the deceased was the aggressor, aside from his own statement, unless proof of the deceased's character for quarrelsomeness and turbulence were allowed. Such a necessity, however urgent, cannot be regarded as a factor in determining the admissibility of evidence of character to prove conduct.

§ 3270. Relevancy.—The relevancy of character to prove conduct has a variety of sources. Among the more important of these, tending to prove good conduct, may be mentioned the force of habit, religious sanction and self respect. That a person of good character has a decided tendency to conduct himself consistently therewith merely from force of habit cannot be doubted, but probably self respect and religious sanction, either acting singly or together, may be regarded as more powerful influences. On the other hand, force of habit may have an equally strong tendency to result in wrong conduct and a person devoid of self respect and without regard for religious sanction readily departs from standards of right conduct. Where a person is shown to be of good character, good habits, self respect and the like are inferred, and the inference is to the contrary when a bad character is proved. Herein lies the relevancy of character as furnishing a basis for an inference as to conduct. It is apparent that in civil cases no moral quality is commonly involved and hence proof of the character of a party can throw no light on his conduct or, in other words, character is ordinarily not relevant to prove conduct in civil actions.

§ 3271. (*Relevancy*); Criminal Cases.—In most criminal cases, the character of the accused is clearly relevant on the question whether or not he committed the crime of which he is charged. A case can scarcely be conceived in which this would not be true, where the offense alleged involves a moral quality. The habitual regard or disregard for right doing as evidenced by a person's character cannot fail to have its effect upon his conduct whenever he is confronted with the necessity for acting in one direction or

the other. This fact, well known to all thinking persons, gives to character its probative force or relevancy by way of raising an inference as to conduct. As has been judicially said: "The principle upon which good character may be proved is, that it affords a presumption against the commission of crime. This presumption arises from the improbability as a general rule, as proved by common observation and experience, that a person who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur, but they are exceptions; the general rule is otherwise."¹ Where the crime charged involves really no moral quality as in case of petty misdemeanors such, for example, as the violation of a game law or a city ordinance, the probative force of the inference drawn from character may be slight and upon principle it may seem that the case might well be governed by the rule applied in civil actions and evidence of character excluded. However, the modern rule seems clear to the effect that no distinction is made with reference to the nature of the crime charged.² The relevancy of character to prove conduct in a criminal action being established and its competency not being open to question, it follows that the evidence is always admissible except where it is excluded because of administrative policy.³

§ 3272. (*Relevancy; Criminal Cases*); Psychological States.

— The operation of the mind of a party often becomes material in legal proceedings, especially in those of a criminal nature. Naturally, evidence which throws any considerable light on the mental operations is not usually abundant. Character is sometimes of evidentiary value in this respect and it has been employed to show motive and intent in prosecutions for crimes involving an inquiry into these psychic elements.¹ For example, in homicide cases, where the fact that the accused killed the deceased is admitted, the good character of the accused has been shown as tending to prove absence of any criminal motive or intent. The same use has been made of character evidence in a prosecution for having possession of counterfeit money with intent to utter it.

§ 3271-1. *Cancemi v. People*, 16 N. Y. 501, 506 (1858), per Strong, J.

2. See, §§ 3275-3279.

3. §§ 3275-3279.

§ 3272-1. § 3309.

The relevancy of character in such cases rests upon the well-known uniformity of an individual's conduct already discussed in the sections immediately preceding. That a person of good and law-abiding character will not have evil and unlawful intents and motives is a conclusion which logically follows from this general principle of uniformity.²

§ 3273. Rule Stated; Civil Cases.—It may be laid down as the modern general rule that, in civil actions, evidence of the character of a *party* is not admissible for the purpose of raising an inference as to his conduct. In other words, that a party did or did not do an act may not be established in civil actions,¹ by show-

2. "The guilt of the defendant here, depends mainly, as to what was his intention in going by the house of the deceased, which must be gathered from all the facts proved on the trial. The defendant's general character as a *peaceable man*, was admissible in evidence. . . . Did the defendant go by the house of deceased, for the purpose of provoking a fight, that he might take his life? If he did, then he is guilty of murder. If he did not go by the house of deceased with any intention, or if he did, and had abandoned such intention before the difficulty ensued, then the jury might find the homicide to be manslaughter only, or justifiable homicide; and in our judgment, it was competent of the jury to take into consideration, the previous good character of the defendant as a peaceable man, in determining either of those questions, and ought not to have been restricted to the fact, as to whether the *homicide* had been committed by the defendant. A citizen of irreproachable character is found on a public highway, standing over the body of a dead man, with a bloody weapon in his hand, and declares that the deceased attempted to rob him, and he took his life. In such a case, there could be no doubt as to the fact, that the *homicide* was committed by the defendant, and yet,

his general good character as a *peaceable man*, would be very important on his trial, in order to show the grade of the homicide, when charged with the offence of murder." *Davis v. State*, 10 Ga. 101, 105 (1851), per Warner, J.

"When a man is arrested with counterfeit money in his possession, . . . he may relieve the charge thus placed upon him by proof of former character, showing that he would not be likely to be engaged in that class of business, or that he obtained the money in due course of business, supposing it to be genuine." *United States v. Kenneally*, 26 Fed. Cas. No. 15,522, 5 Biss. 122 (1870), per Blodgett, J.

§ 3273-1. Alabama.—*Lord v. Mobill*, 113 Ala. 360, 21 So. 366 (1896); *South, etc., R. Co. v. Chappell*, 61 Ala. 527 (1878).

Arkansas.—*Powers v. Armstrong*, 62 Ark. 267, 35 S. W. 228 (1896).

California.—*Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909 (1895).

Connecticut.—*Humphrey v. Humphrey*, 7 Conn. 116 (1828). See also *Roberts v. Ellsworth*, 11 Conn. 290 (1836); *Woodruff v. Whittlesey*, Kirby 60 (1786).

Georgia.—*Atlanta, etc., R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763 (1894).

ing that his character is such as to predispose him to one course or

Illinois.—Kozlowski v. Chicago, 113 Ill. App. 513 (1904); Ellwood Ex'r, etc., v. Walter, Adm'r, etc., 103 Ill. App. 219 (1902).

Indiana.—Volker v. S., 97 N. E. 422 (1912); Church et al. v. Drummond, 7 Ind. 17 (1855). See also Continental Ins. Co. v. Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194 (1886); Gebhart v. Burkett, 57 Ind. 378, 26 Am. Rep. 61 (1877); Harrison v. Russel et al., Wils. 391 (1873).

Iowa.—Porter v. Whitlock, 142 Iowa 66, 120 N. W. 649 (1909).

Kansas.—Southern Kansas R. Co. v. Robbins, 43 Kan. 145, 23 Pac. 113 (1890). See also Atchison, etc., R. Co. v. Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780 (1888).

Kentucky.—R. Co. v. Riddle, 72 S. W. 22, 24 Ky. L. Rep. 1687 (1903); Revill v. Pettit, 3 Metc. 312 (1841).

Maine.—Dunham v. Rackliff, 71 Me. 345 (1880); Soule v. Bruce, 67 Me. 584 (1877); Thayer v. Boyle, 30 Me. 475 (1849). See also Potter v. Webb, 6 Me. 14 (1829).

Maryland.—Brooke v. Berry, 2 Gill 83 (1844). See also Martin v. Good, 14 Md. 398, 74 Am. Dec. 545 (1859).

Massachusetts.—Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am. St. Rep. 559 (1907); Lamagdelaine v. Tremblay, 162 Mass. 339, 39 N. E. 38 (1894); McCarty v. Leary, 118 Mass. 509 (1875); McDonald v. Savoy, 110 Mass. 49 (1872); Atwood v. Dearborn, 1 Allen 483, 79 Am. Dec. 755 (1861).

Michigan.—Adams v. Elseffer, 132 Mich. 100, 92 N. W. 772 (1902); Wolf v. Troxell, 94 Mich. 573, 54 N. W. 383 (1893); Klein v. Bayer, 81 Mich. 233, 45 N. W. 991 (1890).

Mississippi.—Leinkauf v. Brinker, 62 Miss. 255, 52 Am. Rep. 183 (1884).

Missouri.—Bank v. Richmond, 235 Mo. 532, 139 S. W. 352 (1911); Hatch

v. Bayless, 164 Mo. App. 216, 146 G. W. 839 (1911); Black v. Epstein, 221 Mo. 286, 120 S. W. 754 (1909); Dudley v. McCluer, 65 Mo. 241, 27 Am. Rep. 273 (1877); Gutzwiller v. Lackman, 23 Mo. 168 (1856).

New Hampshire.—Dame v. Kenney, 25 N. H. 318 (1852). See also, Boardman v. Woodman, 47 N. H. 120 (1866).

New York.—Taylor v. Heft, 135 N. Y. Suppl. 450, 452 (1912); Meyer v. Suburban Home Co., 25 Misc. R. 686, 55 N. Y. Suppl. 566 (1899); Jacobs v. Duke, 1 E. D. Smith 271 (1851); Houghtaling v. Kilderhouse, 1 N. Y. 530, 5 How. Prac. 80 (1848); Gough v. St. John, 16 Wend. 646 (1837).

North Carolina.—Butler v. South Carolina, etc., R. Co., 130 N. C. 15, 40 S. E. 770 (1902); Marcom v. Adams, 122 N. C. 222, 29 S. E. 333 (1898); Emery v. Raleigh, etc., R. Co., 102 N. C. 209, 9 S. E. 139, 11 Am. St. Rep. 727 (1889); McRae v. Lilly, 23 N. C. 118 (1840); Jeffries v. Harris, 10 N. C. 105 (1824).

Pennsylvania.—Baltimore, etc., R. Co. v. Colvin, 118 Pa. St. 230, 12 Atl. 237 (1888); American F. Ins. Co. v. Hazen, 110 Pa. St. 530, 1 Atl. 605 (1885); Battles v. Laudenslager, 84 Pa. St. 446 (1877); Porter v. Seiler, 23 Pa. St. 424, 62 Am. Dec. 341 (1854).

Rhode Island.—Hampson v. Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732 (1885).

South Carolina.—McKenzie v. Allen, 3 Strobb. 546 (1849).

Texas.—Electric Co. v. Jones (Civ. App. 1910), 129 S. W. 863; McHay v. Peterson, 52 Tex. Civ. App. 195, 113 S. W. 981 (1908); Hurst v. Benson (Civ. App. 1902), 71 S. W. 417; Stone v. Day, 69 Tex. 13, 5 S. W. 642, 5 Am. St. Rep. 17 (1887); Redus v. Burnett, 59 Tex. 576 (1883).

Vermont.—Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 151 (1859).

the other. This rule is subject to certain exceptions mostly of a somewhat doubtful and unsettled nature.²

§ 3274. (Rule Stated; Civil Cases); Exclusion Absolute. —

As has already been indicated, the exclusion of evidence of the character of a party as a basis for an inference as to his conduct is practically absolute in civil cases. A good fundamental reason for this rule is found in the fact that a party's character is ordinarily of no probative value in such actions.¹ It is obvious that in the majority of strictly civil actions such as those on an account,² for work and labor performed,³ for board furnished⁴ and the like, the fact that a party may be of good or bad character can throw little light on the respective rights of the litigants. There is, however, another reason, and it is one of administrative policy. It doubtless has its source in a variety of considerations, but that which assumes greatest importance is the necessity that the issues be confined in order that the trial may not be of undue length.⁵

See also, *Wright v. McKee*, 37 Vt. 161 (1864).

United States.—*Quinalty v. Temple*, 176 Fed. 67, 99 C. C. A. 375, 27 L. R. A. (N. S.) 1114 (1910); *Thompson v. Bowie*, 4 Wall. 463, 18 L. ed. 423 (1866); *Ketland v. Bissett*, 1 Wash. 144, 14 Fed. Cas. No. 7,742, 1 Wash. C. C. 144 (1804).

2. § 3281.

§ 3274-1. See, *Thompson v. Church*, 1 Root (Conn.) 312 (1791); *McQuisten v. Street Ry. Co.*, 150 Mich. 332, 113 N. W. 1118 (1907); *Taylor v. Heft*, 150 App. Div. (N. Y.) 509, 135 N. Y. Suppl. 450 (1912); *Etting v. Bank*, 11 Wheat. (U. S.) 59, 73, 6 L. ed. 419 (1826); *Attorney-General v. Radloff*, 10 Exch. 97 (1854).

"A man of good character is unlikely to be guilty of a crime involving moral turpitude, and reputation is the index of character. This rule has little or no application to penal acts which have no moral quality, but are mere *mala prohibita*. That one is of good reputation as an honest, peaceable citizen has little tendency to show that he has not violated a statute or ordinance for-

bidding him to catch trout out of season, or to drive certain vehicles faster than a walk, or requiring him to keep the sidewalk abutting on his premises free from snow and ice." *Com. v. Nagle*, 157 Mass. 554, 32 N. E. 861 (1893), per Knowlton, J.

2. *Mattingly v. Shortall*, 120 Ky. 52, 85 S. W. 215, 27 Ky. L. Rep. 426, 8 Am. & Eng. Ann. Cas. 1134 (1905); *Alkire Grocer Co. v. Tagart*, 78 Mo. App. 166 (1899).

3. *Munroe v. Godkin*, 111 Mich. 183, 69 N. W. 244 (1896).

4. *Taylor v. Heft*, 150 App. Div. (N. Y.) 509, 135 N. Y. Suppl. 450 (1912).

5. See, *Smets v. Plunket*, 1 Strobh. (S. C.) 372 (1847); *Wright v. McKee*, 37 Vt. 161 (1864).

[Were the rule otherwise] "general character would become the principal evidence in most cases; and he who could throng the court with witnesses to establish his reputation in general, would shelter himself from the wrongs he had perpetrated." *Stow v. Converse*, 3 Conn. 325, 345, 8 Am. Dec. 189 (1820), per Hosmer, Ch. J.

These two reasons suffice to exclude the evidence in all cases of a purely civil nature. In civil cases of a quasi-criminal nature the reason for exclusion is not so clear in principle and the courts do not speak with so certain a tone with reference thereto. This class of cases is considered elsewhere.⁶ Where the person whose character is sought to be shown is not a party to the action the evidence is admissible whenever relevant.⁷ The reason for this practice lies in the fact that administrative policy does not demand that the evidence be excluded. The person whose character is in question is not interested in the outcome of the case and, as a result, no danger need be feared that the issues will be greatly departed from or that the trial will be unduly prolonged.

It should be observed that only as furnishing a basis for an inference of conduct is evidence of character excluded. Where character is relevant for any other purpose, it is admissible in all cases. For example, the character of the female for chastity has been received in actions for breach of promise of marriage.⁸ Likewise, proof of a person's character may be relevant and admissible for the purpose of mitigating damages. Thus, where the plaintiff seeks damages because of an injury to his reputation, the defendant may show that the plaintiff's character and reputation at the time of the alleged injury was such that he suffered slight damage or no damage at all.⁹

§ 3275. (Rule Stated); Criminal Cases.—In criminal cases, it is a well established general rule that the prosecution may not introduce evidence of the character of the accused for the purpose of raising an inference that the latter is guilty of the crime for which he is being tried.¹ The relevancy of the evidence in such

6. §§ 3280, *et seq.*

7. *Alabama*.—Blackman v. State, 36 Ala. 295 (1860).

Massachusetts.—Com. v. Gray, 129 Mass. 474, 37 Am. Rep. 378 (1880); Clement v. Kimball, 98 Mass. 535 (1868).

Michigan.—Marble v. Marble, 36 Mich. 386 (1877).

Virginia.—Foll v. Overseers, 3 Munf. (Va.) 495 (1811).

England.—Pendrell v. Pendrell, 2 Strange 925 (1732).

8. *Illinois*.—Burnett v. Simpkins, 24 Ill. 264 (1860).

Indiana.—Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. 745 (1893).

Massachusetts.—McCarty v. Coffin, 157 Mass. 478, 32 N. E. 649 (1892).

Pennsylvania.—Von Storch v. Griffin, 77 Pa. St. 504 (1875).

Canada.—McGregor v. McArthur, 5 U. C. C. P. 493 (1856).

Compare Colburn v. Marble, 196 Mass. 376, 82 N. E. 28 (1907).

9. See cases cited in § 3308.

§ 3275-1. *Alabama*.—Harrison v. State, 37 Ala. 154 (1861).

cases is beyond question. That a person of bad character will be more likely to do a bad deed than one of good character is self-evident. No argument is needed to convince the average mind of the truth of this fact. The reason for the rule of exclusion must therefore be sought elsewhere. The rule is one of administrative policy.² The source of it may be found in the principle of the

Arkansas.—Ware v. State, 91 Ark. 555, 121 S. W. 927 (1909).

California.—People v. Fair, 43 Cal. 137 (1872).

Delaware.—State v. Lodge, 9 Houst. 542, 33 Atl. 312 (1892).

Florida.—Mann v. State, 22 Fla. 600 (1886).

Georgia.—Pound v. State, 43 Ga. 88 (1871).

Iowa.—State v. Rainsbarger, 71 Iowa 746, 31 N. W. 865 (1887); State v. Kabrich, 39 Iowa 277 (1874).

Kansas.—State v. Beaty, 62 Kan. 266, 62 Pac. 658 (1900); State v. Thurtell, 29 Kan. 148 (1883).

Kentucky.—Petty v. Com., 15 S. W. 1059, 12 Ky. L. Rep. 919 (1891); Young v. Com., 6 Bush 312 (1869).

Massachusetts.—Com. v. Hardy, 2 Mass. 303 (1807).

Missouri.—State v. Nelson, 98 Mo. 414, 11 S. W. 997 (1889); State v. Creson, 38 Mo. 372 (1866).

New Hampshire.—State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69 (1876).

New York.—Adams v. People, 9 Hun 89 (1876); People v. Bodine, 1 Edm. Sel. Cas. 36 (1845); People v. White, 14 Wend. 111 (1835).

North Carolina.—State v. Hare, 74 N. C. 591 (1876); State v. Merrill, 13 N. C. 269 (1829).

Ohio.—Hamilton v. State, 34 Ohio St. 82 (1877).

Oklahoma.—Porter v. State (Okl. Cr. App. 1912), 126 Pac. 699.

Rhode Island.—State v. Hull, 18 R. I. 207, 26 Atl. 191, 20 L. R. A. 609 (1893); State v. Ellwood, 17 R. I. 763, 24 Atl. 782 (1892).

Texas.—Dimry v. State, 41 Tex.

Cr. App. 272, 53 S. W. 853 (1899); Felsenthal v. State, 30 Tex. App. 675, 18 S. W. 644 (1892); Coffee v. State, 1 Tex. App. 548 (1877).

Washington.—State v. Craddick, 61 Wash. 425, 112 Pac. 491 (1911).

West Virginia.—State v. Grove, 61 W. Va. 697, 57 S. E. 296 (1907).

United States.—U. S. v. Keneally, 26 Fed. Cas. No. 15,522, 5 Biss. 122 (1870); U. S. v. Jourdine, 26 Fed. Cas. No. 15,499, 4 Cranch C. C. 338 (1833); U. S. v. Warner, 28 Fed. Cas. No. 16,642, 4 Cranch C. C. 342 (1833); U. S. v. Carrigo, 25 Fed. Cas. No. 14,735, 1 Cranch C. C. 49 (1802).

England.—Reg. v. Rowton, 10 Cox Cr. C. 25, 11 Jur. (N. S.) 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865).

Canada.—King v. William Long, 11 Que. K. B. 328, 5 Can. Cr. Cas. 493 (1902).

Evidence that the defendant mentioned to the officer that arrested him that he had formerly been convicted of a crime was inadmissible before the defendant had given evidence of good character. People v. Springer, 137 App. Div. (N. Y.) 304, 122 N. Y. Suppl. 194 (1910).

The crown may not inquire on cross-examination of the defendant in regard to a former conviction for a crime, where the defence has offered no character evidence. Rex v. Atlas, 16 Can. Cr. Cas. 35 (1910).

2. "It [proof of character] is evidence strictly relevant to the issue, but such evidence is not admissible upon the part of the prosecution

law of English speaking people, which obtains in criminal actions, that the accused is presumed to be innocent until he is proven guilty.³ It would clearly be difficult to maintain this presumption of innocence in the minds of the jurors if testimony were given of a long list of crimes alleged to have been committed by the accused. A prejudice against him would naturally be aroused in the minds of the jurors if such a practice were followed. It might often happen that they would conclude that they might as well find the accused guilty, as the punishment would not be out of place as a penalty for past crimes, even though they should be wrong in finding him guilty of the crime for which he was being tried.⁴ Further, a contrary policy would place the accused at an unfair disadvantage in respect to surprises as he could not possibly come to court with sufficient witnesses to rebut all possible evidence, true or false, concerning his character. Evidence offered by either party of the character of any person, other than the accused, who is or was involved in the crime, as, for example, the deceased in a case of homicide,⁵ or the alleged assaulted party in

. . . because if the prosecution were allowed to go into such evidence we should have the whole life of the prisoner ripped up, and as has been witnessed in the proceedings of jurisdictions where such evidence is admissible upon a charge preferred, you might begin by showing that when a boy at school he [the accused] had robbed an orchard and so read the rest of his conduct and the whole of his life; and the result would be that a man on trial would be overwhelmed by prejudice instead of being convicted on affirmative evidence, which the law of the country requires. The prosecution is prevented from giving such evidence for reasons rather of policy and humanity than because proof that the prisoner was a bad character is not relevant to the issue." *Reg. v. Rowton*, 10 Cox Cr. C. 25, 38, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436 (1865), Per Willes, J.

3. See, *People v. Fitzgerald*, 156 N. Y. 253, 260, 50 N. E. 846 (1898).

4. "It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all English speaking peoples, that you cannot blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the court and the jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all should it not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care." *State v. Lapage*, 57 N. H. 245, 289, 24 Am. Rep. 69 (1876), per Cushing, C. J.

5. *Alabama*.—*Kennedy v. State*,

a case of assault,⁶ is ordinarily excluded. The reason is simply that the evidence is irrelevant, no proving power being discernible in such evidence in the majority of cases. However, whenever it is relevant, it is admissible.⁷ The fact that the accused offers proof of his own good character will not make such evidence admissible.⁸

§ 3276. (Rule Stated; Criminal Cases); Exceptions to Rule.

— Strictly speaking, there are no exceptions to the rule excluding evidence by the prosecution of the character of the accused for the purpose of proving conduct. If such evidence is ever properly admitted, it is because of the action of the accused amounting to a waiver of the protection afforded by the rule. This matter is treated in the following section. However, what might appear like an exception should be noticed. When the accused takes the stand as a witness, he occupies a double position. As a defendant in a criminal action, he has the right to object to all evidence, concerning his character offered for the purpose of proving conduct, unless this privilege has been abridged and curtailed because of the rights of the prosecution, arising from the fact that he has chosen to be a witness. May the accused after being sworn as a witness still take shelter behind his privilege as the accused and successfully object to any evidence concerning his character? It is universally held that he cannot, but that he may be impeached like any other witness in accordance with the rule prevailing in the particular jurisdiction.¹ The impeachment of the defendant

140 Ala. 1, 37 So. 90 (1903); *Ben v. State*, 37 Ala. 103 (1861).

California.—*People v. Anderson*, 39 Cal. 703 (1870).

Georgia.—*Worley v. State*, 75 S. E. 240 (1912); *Pound v. State*, 43 Ga. 88 (1871).

Kansas.—*State v. Potter*, 13 Kan. 414 (1874).

Kentucky.—*Parker v. Com.*, 96 Ky. 212, 28 S. W. 500, 16 Ky. L. Rep. 449 (1894).

Louisiana.—*State v. McCarthy*, 43 La. Ann. 541, 9 So. 493 (1891).

Texas.—*Keith v. State*, 50 Tex. Cr. App. 63, 94 S. W. 1044 (1906); *Melton v. State*, (Cr. App. 1904), *overruling Martin v. State*, 44 Tex. Cr. App. 279, 70 S. W. 793 (1902); *Ev-*

erett v. State, 30 Tex. App. 682, 18 S. W. 674 (1892). See also *Moore v. State*, 46 Tex. Cr. App. 54, 79 S. W. 565 (1904).

Utah.—*State v. Vacos*, 120 Pac. 497 (1911).

Virginia.—*Dock v. Com.*, 21 Gratt. 909 (1872).

Washington.—*State v. Eddon*, 8 Wash. 292, 36 Pac. 139 (1894).

6. *Woods v. State*, 90 Miss. 245, 43 So. 433 (1907).

7. §§ 3276, 3309.

8. *State v. Eddon* 8 Wash. 292, 36 Pac. 139 (1894).

§ 3276-1. *Cox v. State*, 162 Ala. 66, 59 So. 398 (1909); *Halloway v. People*, 181 Ill. 544, 54 N. E. 1030 (1899); *Fletcher v. State*, 49 Ind. 124,

as a witness must not be confused with proving his general character to be bad for the purpose of raising an inference that he committed the crime charged. The evidence concerning character, offered for the purpose of impeachment, must be considered only as affecting his credibility as a witness.² Showing general bad character is not allowable for the purpose of impeachment.³

There is no rule of administrative policy which excludes evidence of the character of a third person involved in the crime. As has already been stated such evidence is ordinarily excluded because it has no relevancy.⁴ Whenever it is relevant, it is admissible.⁵ Proof of character is often relevant in prosecutions for certain sexual offenses such as rape, indecent assault and the like. In such cases, the defendant may introduce evidence of the bad character for chastity of the prosecutrix for the purpose of showing consent.⁶ The people may rebut this evidence by introducing evidence of the good character of the prosecutrix for chastity.⁷ The character of the deceased in a case of homicide

19 Am. Rep. 673 (1879); *State v. Spurling*, 118 N. C. 1250, 24 S. E. 533 (1896).

2. *State v. Cloninger*, 149 N. C. 567, 63 S. E. 154 (1908); *State v. Traylor*, 121 N. C. 674, 28 S. E. 493 (1897).

3. *Calhoon v. Com.*, 23 Ky. L. Rep. 1188, 64 S. W. 965 (1901); *People v. Hinksman*, 192 N. Y. 421, 85 N. E. 676 (1908).

4. § 3275.

5. § 3309.

6. *Arkansas*.—*Jackson v. State*, 91 Ark. 71, 122 S. W. 101 (1909).

Florida.—*Rice v. State*, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245 (1895).

Georgia.—*Camp v. State*, 3 Ga. 417 (1847).

Illinois.—*People v. Gray*, 251 Ill. 431, 96 N. E. 268 (1911).

Massachusetts.—*Com. v. Kendall*, 113 Mass. 210, 18 Am. Rep. 469 (1873).

New Jersey.—*O'Brien v. State*, 47 N. J. L. 279 (1885).

New York.—*Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309 (1874);

Conkey v. People, 1 Abb. Dec. 418, 5 Park. Cr. Rep. 31 (1859).

North Carolina.—*State v. Murray*, 63 N. C. 31 (1868); *State v. Jefferson*, 28 N. C. 305 (1846).

Vermont.—*State v. Reed*, 39 Vt. 417, 94 Am. Dec. 337 (1867).

Statutory rape.—In a prosecution for statutory rape, the absence of her consent not being an element of the offense, proof of the unchastity of the prosecutrix is inadmissible. *State v. Rivers*, 82 Conn. 454, 74 Atl. 757 (1909); *State v. Hammock*, 18 Idaho 424, 110 Pac. 169 (1910); *People v. Gray*, 251 Ill. 431, 96 N. E. 268 (1911); *Richardson v. State*, 100 Miss. 514, 56 So. 454 (1911).

7. *O'Brien v. State*, 47 N. J. L. 279 (1885); *Conkey v. People*, 1 Abb. Dec. (N. Y.) 418, 5 Park. Cr. Rep. (N. Y.) 31 (1859).

In a prosecution for carnal intercourse with a female under the age of eighteen years and not previously unchaste, where the defendant has adduced evidence of a specific act of lewdness on the part of the prosecu-

may also in some instances be relevant. Where the plea is self-defense, the defendant may show the violent and turbulent character of the deceased for the purpose of inducing the jury to believe that the latter was the attacking party.⁸ After the defendant has done this, the prosecution may rebut by showing that the deceased was a quiet, peaceable and law-abiding citizen.⁹ The rule is the same in cases of assault.¹⁰ In a criminal action for slander imputing unchastity to a woman where the defendant pleads justification, he may show that the reputation of the woman for chastity is bad.¹¹

trix, the people may show her previous good character for chastity to discredit such evidence. *Leedom v. State*, 81 Neb. 585, 116 N. W. 496 (1908).

8. *Williams v. State*, 74 Ala. 18 (1883); *De Arman v. State*, 71 Ala. 351 (1882); *State v. Tallmadge*, 107 Mo. 543, 17 S. W. 990 (1891); *Basye v. State*, 45 Nebr. 261, 63 N. W. 811 (1895); *Thomas v. People*, 67 N. Y. 218 (1876).

In Texas the Penal Code provides that evidence of the character of the deceased as a violent or dangerous person is admissible where there is proof of threats made by him. *Bingham v. State*, 6 Tex. App. 169 (1879).

On a trial for murder, where the uncontradicted evidence shows that the difficulty, which resulted in the homicide, was caused by the defendant, and that he could have withdrawn with safety, if at any time he was in danger, evidence of the violent character of the deceased is inadmissible. *Teague v. State*, 120 Ala. 309, 25 So. 209 (1898).

"On all doubtful questions as to who was the aggressor, the violent or blood-thirsty character of the deceased, if such be his character, enters into the account. More prompt and decisive measures of defense are justified, when the assailant is of known violent and blood-thirsty nature." *De Arman v. State*, 71 Ala. 351, 361 (1882), per Stone, J.

9. *Alabama*.—*Twitty v. State*, 168 Ala. 59, 53 So. 308 (1910); *Hussey v. State*, 87 Ala. 121, 6 So. 420 (1888).

Arkansas.—*Bryant v. State*, 95 Ark. 239, 129 S. W. 295 (1910); *Weaver v. State*, 83 Ark. 119, 102 S. W. 713 (1907).

California.—*People v. Howard*, 112 Cal. 135, 44 Pac. 464 (1896).

Georgia.—*Crawley v. State*, 137 Ga. 777, 74 S. E. 537 (1912); *Pound v. State*, 43 Ga. 88 (1871).

Kansas.—*State v. Truskett*, 85 Kan. 804, 118 Pac. 1047 (1911).

Michigan.—*People v. Meert*, 157 Mich. 93, 121 N. W. 318 (1909).

Missouri.—*State v. Feeley*, 194 Mo. 300, 92 S. W. 663, 3 L. R. A. (N. S.) 351n., 112 Am. St. Rep. 511 (1906).

New York.—*Thomas v. People*, 67 N. Y. 218 (1876).

Texas.—*Edwards v. State*, 61 Tex. Cr. App. 307, 135 S. W. 540 (1911); *Menefee v. State*, 50 Tex. Cr. App. 249, 97 S. W. 486 (1906); *Pettis v. State*, 47 Tex. Cr. App. 66, 81 S. W. 312 (1904).

Utah.—*State v. Vacos*, 120 Pac. 497 (1911).

10. *Stevens v. State*, 84 Neb. 759, 122 N. W. 58, 19 Am. & Eng. Ann. Cas. 121 (1909).

11. *Ballew v. State*, 48 Tex. Cr. App. 46, 85 S. W. 1063 (1905); *Collins v. State*, 39 Tex. Cr. App. 30, 44 S. W. 846 (1898).

§ 3277. (*Rule Stated; Criminal Cases*); **Exclusion Conditional.**—The defendant in a criminal action may in all cases give evidence of his good character.¹ Character being always relevant

Mitigation of penalty.—Proof that a libelled party bore a bad reputation in regard to the trait of character involved in the alleged libel is not admissible in a criminal case for the purpose of mitigating the penalty. *McArthur v. State*, 41 Tex. Cr. App. 635, 57 S. W. 847 (1900).

§ 3277-1. *Alabama.*—*Kilgore v. State*, 74 Ala. 1 (1883).

Arkansas.—*Ware v. State*, 91 Ark. 555, 121 S. W. 927 (1909).

California.—*People v. Baldocchi*, 10 Cal. App. 42, 101 Pac. 28 (1909).

Delaware.—*State v. Stewart*, 6 Pennw. 435, 67 Atl. 786 (1907); *State v. Collins*, 5 Pennw. 263, 62 Atl. 224 (1903).

District of Columbia.—*United States v. Bowen*, 3 MacArthur 64 (1877).

Florida.—*Bacon v. State*, 22 Fla. 46 (1886).

Illinois.—*Mark v. Merz*, 53 Ill. App. 458 (1893).

Indiana.—*Wagner v. State*, 197 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79 (1886).

Iowa.—*State v. Donovan*, 61 Iowa 278, 16 N. W. 130 (1883); *State v. Lindley*, 51 Iowa 343, 1 N. W. 484, 33 Am. Rep. 139 (1879).

Kansas.—*State v. Pipes*, 65 Kan. 543, 70 Pac. 363 (1902).

Kentucky.—*White v. Com.*, 80 Ky. 480, 4 Ky. L. Rep. 373 (1882).

Louisiana.—*State v. Garic*, 35 La. Ann. 970 (1883).

Massachusetts.—*Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711 (1850).

Michigan.—*People v. Albers*, 137 Mich. 678, 100 N. W. 908 (1904).

Minnesota.—*State v. Beebe*, 17 Minn. 241, (Gil. 218) (1871).

Mississippi.—*Lewis v. State*, 93 Miss. 697, 47 So. 467 (1908).

Missouri.—*State v. King*, 78 Mo. 555 (1883).

Nebraska.—*Biester v. State*, 65 Neb. 276, 91 N. W. 416 (1902).

New Jersey.—*State v. Wells*, 1 N. J. L. 424, 1 Am. Dec. 211 (1790).

New Mexico.—*Territory v. Pierce*, 16 N. M. 10, 113 Pac. 591 (1911).

New York.—*People v. Hinkman*, 192 N. Y. 421, 85 N. E. 676 (1908); *Stover v. People*, 56 N. Y. 315 (1874).

North Carolina.—*State v. Holly*, 155 N. C. 485, 71 S. E. 450 (1911).

Oklahoma.—*Friel v. State*, 6 Okl. Cr. App. 532, 119 Pac. 1124 (1912); *Dickinson v. State*, 3 Okl. Cr. App. 151, 104 Pac. 923 (1909).

Pennsylvania.—*Com. v. Miller*, 31 Pa. Super. Ct. 309 (1906); *Abernethey v. Com.*, 101 Pa. St. 322 (1882).

Texas.—*Matthews v. State*, 32 Tex. 117 (1869).

West Virginia.—*State v. Moyer*, 58 W. Va. 146, 52 S. E. 30, 6 Am. & Eng. Ann. Cas. 344 (1905).

United States.—*Searway v. United States*, 184 Fed. 716, 107 C. C. A. 635 (1910); *United States v. Wilson*, 176 Fed. 806 (1910); *Edgington v. U. S.*, 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467 (1896).

Canada.—*King v. William Long*, 11 Que. K. B. 328, 5 Can. Cr. Cas. 493 (1902).

The accused may introduce evidence of his good character even though he does not testify himself. *State v. Greene*, 152 N. C. 835, 68 S. E. 16 (1910); *State v. Hice*, 117 N. C. 782, 23 S. E. 357 (1895).

Where the people's attorney admits that the character of the defendant is good, it is not error to reject evidence of the good character of the latter. *Beard v. State*, 44 Tex. Cr. App. 402, 71 S. W. 960 (1903).

in a criminal case, it follows that it is admissible whenever it is not excluded by some reason of administrative policy. In regard to the good character of the accused, no reason exists for exclusion on the ground of policy, the situation being quite different from that which is confronted when bad character is sought to be shown. When the accused has introduced evidence of his good character, the protection thrown around him by the rule excluding evidence of bad character is necessarily withdrawn and the state may thereupon give such evidence of his bad character as may be obtainable.² Otherwise the accused would enjoy an unfair advantage, dangerous to the interests of society, as he would be in a position to introduce evidence of good character, whether true or false, without fear of contradiction. A wide opportunity for imposition on the court would thus be given. The evidence of good character which will open the door for the introduction of evidence of bad character by the prosecution may be brought out by the accused on the cross-examination of the witnesses for the prosecution.³ The evidence by the state in rebuttal of evidence of good character given by the accused is given for rebuttal only and not to raise an inference of bad conduct.⁴

2. Arkansas.—Weaver v. State, 83 Ark. 119, 102 S. W. 713 (1907).

California.—People v. Nunley, 142 Cal. 441, 76 Pac. 45 (1904).

Florida.—Cook v. State, 46 Fla. 20, 35 So. 665 (1903).

Georgia.—McKenzie v. State, 8 Ga. App. 124, 68 S. E. 622 (1910).

Iowa.—State v. Foster, 91 Iowa 164, 59 N. W. 8 (1894).

Louisiana.—State v. Farrer, 35 La. Ann. 315 (1883).

Massachusetts.—Com. v. Maddocks, 207 Mass. 152, 93 N. E. 253 (1910).

Missouri.—State v. Wills, 154 Mo. App. 605, 136 S. W. 25 (1911); State v. Williams, 77 Mo. 310 (1883).

New York.—People v. Hinksman, 192 N. Y. 421, 85 N. E. 676 (1908); People v. McKane, 143 N. Y. 455, 38 N. E. 950 (1894).

North Carolina.—State v. Cloninger, 149 N. C. 567, 63 N. E. 154 (1908).

Ohio.—Griffin v. State, 14 Ohio St. 55 (1862).

Texas.—Holsey v. State, 24 Tex. App. 35, 5 S. W. 523 (1887).

England.—See Reg. v. Rowton, 10 Cox Cr. C. 25, 11 Jur. (N. S.) 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865); Reg. v. Hughes, 1 Cox Cr. C. 44 (1843).

Canada.—King v. William Long, 11 Que. K. B. 328, 5 Can. Cr. Cas. 493 (1902).

3. Reg. v. Gadbury, 8 C. & P. 676 (1838); King v. William Long, 11 Que. K. B. 328, 5 Can. Cr. Cas. 493 (1902).

4. "The introduction of such evidence would of course call for great care on the part of the judge to see that the jury should not use it as evidence of guilt, but should treat it merely as meeting and nullifying (so far as it might have any effect) the evidence of the defendant's good reputation." Com. v. Maddocks, 207 Mass. 152, 157, 93 N. E. 253 (1910), per Sheldon, J.

§ 3278. (Rule Stated; Criminal Cases; Exclusion Conditional); A Deliberative Inference.—The inference of guilt or innocence of the accused in a criminal action deducible from a knowledge of his character may very properly be denominated a deliberative one.¹ Only a slight degree of probative force can be accredited to it. It does not appeal to the fair minded with a force at all to be compared with that of the testimony of an eye witness or of some clear circumstantial evidence. It simply tends to make the guilt or innocence of the accused more or less probable, depending upon whether his character is shown to be good or bad.

§ 3279. (Rule Stated; Criminal Cases; Exclusion Conditional); Opportunity for Prosecution.—While evidence adduced by the prosecution to rebut evidence of good character given on behalf of the accused is theoretically to be considered only as rebutting evidence and not as proof of guilt,¹ its effect upon the minds of the jurors is unquestionably very harmful to the accused. That the prosecution has a valuable opportunity whenever it can introduce such evidence cannot be doubted. Further, the administrative difficulty of drawing a line between evidence which, strictly speaking, rebuts the evidence of good character introduced by the accused and evidence which tends to prove bad character generally often suffices to allow the admission of evidence which is damaging to the accused. Thus, where the defendant in a prosecution for larceny, by means of cross-examining a witness for the state, elicited testimony tending to show that his character was good, the record of his conviction of larceny in another instance was admitted.² And where the defendant showed that his character was good in certain communities, the prosecution was allowed to show that it was bad both there and in other communities.³

In a prosecution for violating the local option law, where the defendant adduced evidence that he was a person of good character for truth and veracity, it was error to admit evidence that his reputation for obeying the local option law was bad. *Johnson v. State*, 42 Tex. Cr. App. 618, 62 S. W. 756 (1901).

§ 3278-1. §§ 52, 1714.

§ 3279-1. § 3277.

2. *McKenzie v. State*, 8 Ga. App.

124, 68 S. E. 622 (1910).

3. *State v. Foster*, 91 Iowa 164, 59 N. W. 8 (1894).

The rule which permits the prosecution to rebut evidence adduced for the purpose of proving the defendant's good character is not affected by the fact that the witness used for the purpose of showing good character was called to the stand by the state. *McKenzie v. State*, 8 Ga. App. 124, 68 S. E. 622 (1910).

§ 3280. (*Rule Stated*); Quasi Criminal Cases; Actions for Penalties.— Certain actions which are conducted as civil actions and are commonly spoken of as being such are in reality on the border line between civil and criminal actions. Features belonging to both classes of actions are to be found in them. Frequently the state of facts out of which the cause for the civil action arises makes the defendant liable to criminal prosecution also. It would seem, upon principle, that evidence of the character of a party should be received in the majority of such cases as readily as in criminal cases, for the same reason and subject to the same rules. The courts, however, have commonly held that evidence of character of a party is not admissible in such cases. The slight dissent from the general rule is discussed in the following sections.

Actions for penalties.— An action for a penalty so closely resembles a criminal prosecution in which the penalty is a fine that it might seem that evidence of character being admissible in the latter case it would be in the former. However, there appears to be no authority to that effect, the meager authority being to the contrary. Thus, in an action brought pursuant to a statute to recover treble the value of property feloniously taken, the court said: "All the rules of evidence applicable in civil actions are applicable to this."¹ So in an early English case,² the question was squarely presented to the court. The trial was of an information against the defendant for keeping false weights and for offering to corrupt an officer. Counsel for the defendant sought to show the defendant's character, urging that it was admissible as tending to show that the defendant was incapable of the crime imputed to him. The evidence was rejected, Eyre, Ch. B., saying: "I cannot admit this evidence in a civil suit. The offense imputed by the information is not in the shape of a crime. It would be contrary to the true line of distinction to admit it, which is this: that in a direct prosecution for a crime, such evidence is admissible, but where the prosecution is not directly for the crime, but for the penalty, as in this information it is not. If evidence as to character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the Excise and Custom House Laws."

§ 3280-1. Hall v. Brown, 30 Conn. (1791), reported in a note to Huntley v. Luscombe, 2 B. & P. 532, 551 (1862).

2. Attorney-General v. Bowman Rev. Rep. 697 (1801).

§ 3281. (*Rule Stated; Quasi Criminal Cases*); *Criminal Charges in Civil Cases; Evidence of Character Admitted*.— Although upon principle it would seem that evidence of character to prove conduct should be received as readily in a civil case involving a criminal charge as in a criminal case, the modern general rule is clearly to the contrary. With a few exceptions, such actions are treated by the courts as ordinary civil actions, as far as the law of evidence is concerned. The rule is an arbitrary one based upon authority and must be regarded as a rule of administrative policy, designed to avoid the confusion which would result in deciding in what cases character has sufficient relevancy to make it worthy of consideration and to avoid protracted trials. Of course, similar objections exist in reference to the use of such evidence in criminal cases; but they are disregarded by reason of the humane policy of our law in view of the fact that in criminal cases human life and liberty are at stake.

The attitude of those courts which have sought to adhere closely to principle and not allow any relevant evidence to be excluded because of considerations of policy may be shown by reference to the reasoning in certain opinions.¹ The undoubted relevancy of

§ 3281-1. "A party charged with crime may generally resort to proof of his general good character. . . . And when the defendant, as he may, to avoid a recovery of damages for the breach of agreement to marry, seeks to excuse and justify himself for refusing to perform the agreement by showing that the plaintiff has been guilty of the crime of procuring an abortion, or acts of unchastity, the attack upon the character of plaintiff is as direct as in the case of an indictment for a crime. . . . And no reason is perceived why, when such an attack is made, although it comes from a defendant instead of the plaintiff, the latter should not be permitted to prove general good character, for the purpose of rendering it improbable that the charge is well founded. The reason for doing so is the same in one case as in the other." *Sprague v. Craig*, 51 Ill. 288, 293 (1869), per Walker, J. (Breach

of promise suit. Defense, plaintiff unchaste and guilty of crime of abortion.)

"Inasmuch as the general rule is not based upon any philosophical reason, but is merely one of convenience, it ought not to be applied to cases where justice to the defendant requires that the inconvenience arising from a confusion of the issues should be disregarded, and he be permitted to give evidence of his previous good character; or, in other words, such evidence ought to be received in a civil action when it is of a character to bring it within all of the reasons for admitting such evidence in criminal cases." *Hein v. Holdridge*, 78 Minn. 468, 472, 81 N. W. 522 (1900), per Start, C. J.

"The defendant offered evidence of his character for chastity, and evidence of his good moral character, but it was excluded by the court. This also was error. The charges

character evidence in civil cases involving a criminal charge as indicated by the language of the opinions referred to has resulted in admitting the evidence in a considerable number of instances.²

against the man involved his moral delinquency. That a chaste man or a man of general good moral character would commit such acts as were charged upon him is improbable, because it is contrary to common experience. For its tendency to establish this improbability the evidence should have been received." *Schuek v. Hagar*, 24 Minn. 339 (344) (1877) (action for damages for indecent assault), per Berry, J.

"If, then, less proof be required to fix the charge upon him under the defendant's plea of justification than would be necessary on a criminal prosecution, surely, the plaintiff ought not to be deprived of the right to use any kind of testimony in the one case, which would be undoubtedly admissible for him in the other." *Burton v. March*, 6 Jones' L. (N. C.) 409, 413 (1859), per Battle, J. (Slander accusing plaintiff of larceny. Defense, justification. Preponderance of evidence only necessary to establish defense.)

2. An early New York case, which has been frequently cited, held that evidence of the good character of the defendant was admissible in a case charging the defendant "with gross depravity and fraud upon circumstances merely." *Ruan v. Perry*, 3 Caines (N. Y.) 120 (1805), *overruled* in *Gough v. St. John*, 16 Wend. (N. Y.) 646 (1837).

In *Indiana*, considerable latitude has been given to the use of good character for chastity when offered in rebuttal.

"When the adversary, under his averments, gives evidence of particular acts and circumstances from which natural and designed inferences throw strong suspicion upon the probity of the person affected, such

person may meet the suspicions thus aroused by proof of general good character in respect to the particular traits involved." *Hilker v. Hilker*, 153 Ind. 425, 431, 55 N. E. 81 (1899) (divorce), per Hadley, J.

In a breach of promise action, where the defendant has adduced evidence of particular acts of unchastity by the plaintiff, she may rebut by showing her good character for chastity. *Haymond v. Saucer*, 84 Ind. 3 (1882).

In *Tennessee*, it appears to be a well established rule that, in civil cases involving a charge of moral turpitude, the party charged may give evidence of his good character. *Continental Nat. Bank v. Nashville First Nat. Bank*, 108 Tenn. 374, 68 S. W. 497 (1902). (Honor and integrity of defendant assaulted in the bill of complaint.) *McBee v. Bowman*, 87 Tenn. 132, 14 S. W. 481 (1890). (Appellee charged with forging a will.) *Spears & Solomon v. International Ins. Co.*, 1 Baxt. (Tenn.) 370 (1872). (Action on fire insurance policy. Defense, fraud and arson.) *Henry v. Brown*, 2 Heisk. (Tenn.) 213 (1870). (Fraud. Evidence circumstantial); *Scott v. Fletcher*, 1 Overt. (Tenn.) 488 (1809).

"But we think the rule in *Tennessee* is that in cases where a party is charged with a great moral wrong, he may introduce evidence of good character and invoke the presumption of innocence." *Continental Nat. Bank v. Nashville First Nat. Bank*, 108 Tenn. 374, 379, 68 S. W. 497 (1902), per Wilkes, J.

"There can be no more reason for admitting evidence of character, when the general character of the party is involved in the nature of the action, than when the nature of the

Thus testimony as to the good character of the defendant has been received in actions for indecent assault,³ divorce on the ground of adultery,⁴ and seduction.⁵ Evidence of the good character of the defendant has also been received in actions for assault and battery,⁶ involving a charge of fraud,⁷ of embezzlement⁸ and the misappropriation of money.⁹ It has likewise been held reversible error to exclude evidence of the good character of an attorney in an action for his disbarment on the ground of conspiring with others to prevent the due course of law and justice by procuring a witness to testify falsely.¹⁰ Similarly the good character of the plaintiff has been allowed to be shown in an action for the vexatious suing out of an attachment in which the character of the plaintiff was put in issue by the evidence of the defendant.¹¹

Evidence of the good character of the plaintiff in an action for libel or slander has frequently been received where the alleged slanderous words charged a crime and the defendant pleaded justification as that the words spoken were true.¹² The evidence has

defense relied on by the defendant involves the general character of the plaintiff." *Spears & Solomon v. International Ins. Co.*, 1 Baxt. 370, 371 (1872), per Nicholson, C. J.

3. *Schuek v. Hagar*, 24 Minn. 339 (1877). Compare *Sayen v. Ryan*, 9 Ohio Cir. Ct. 631 (1895).

4. *O'Bryan v. O'Bryan*, 13 Mo. 16, 53 Am. Dec. 128 (1850). [Overruled. See *Home Lumber Co. v. Hartman*, 45 Mo. App. 649 (1891)]; *Dudley v. McClure*, 65 Mo. 241 (1877).

5. *Heim v. Holdridge*, 78 Minn. 468, 81 N. W. 522 (1900).

6. *Dean v. Horton*, 2 McMull (S. C.) 147 (1842). See also, *Alford v. Vincent*, 53 Mich. 555, 19 N. W. 182 (1884).

7. *Werts v. Spearman*, 22 S. C. 200 (1884) (evidence circumstantial); *Cudlipp v. Export Co.*, (Tex. Civ. App. 1912) 149 S. W. 444.

8. *Largent v. Beard*, (Tex. Civ. App. 1899) 53 S. W. 90 (1899).

9. *Falkner v. Behr*, 75 Ga. 671 (1885); *McNabb v. Lockhart & Thomas*, 18 Ga. 495 (1855); *Allison*

v. McClun, 40 Kan. 525, 20 Pac. 125 (1889).

10. *In re Darrow*, (Ind. App. 1908) 83 N. E. 1026.

11. *Goldsmith v. Picard*, 27 Ala. 142 (1855).

12. *Hereford v. Combs*, 126 Ala. 369, 28 So. 582 (1900); *Balcom v. Michels*, 49 Ill. App. 379 (1893); *Harbison v. Shook*, 41 Ill. 141 (1866); *Downey v. Dillon*, 52 Ind. 442 (1876); *distinguishing Miles v. Van Horn*, 17 Ind. 245, 79 Am. Dec. 477 (1861); *Byrket v. Monohon*, 7 Blackf. (Ind.) 83, 41 Am. Dec. 212 (1844); *Harding v. Brooks*, 5 Pick. (Mass.) 244 (1827). See also, *Howland v. Blake Mfg. Co.*, 156 Mass. 543, 31 N. E. 656 (1892); *Burton v. March*, 6 Jones L. (N. C.) 409 (1859); *Powell v. Harper*, 5 Car. & P. 590 (1833). *Contra*, *Cornwall v. Richardson*, 1 R. & M. 305, 27 R. R. 753 (1825).

"The very placing upon the record a solemn averment of the truth, will have a tendency to impeach the character, and the attempt to prove it, though it may fail, may have so far

been received even where the alleged slanderous words did not charge a crime.¹³ Where no justification is pleaded,¹⁴ or where a justification is pleaded, but no evidence offered under the plea,¹⁵ the evidence is rejected.

§ 3282. (Rule Stated; Quasi Criminal Cases; Criminal Charges in Civil Cases); Evidence of Character Rejected.—As has already been stated evidence of the character of a party, offered for the purpose of raising an inference as to conduct, is generally held to be inadmissible in quasi-criminal cases. The reason for this rule of exclusion is one of administrative policy as is indicated by the language used in judicial opinions.¹ Evidence of the good character of a party has accordingly been rejected² in actions for

succeeded as to raise an imputation against the character. In such case it seems to be just, that the plaintiff should have the right, by proof of the general tenor of his conduct and character, to repel such imputations, and to let his reputation in the community and his neighborhood outweigh the suspicions which might arise from an incomplete effort to prove him guilty of the facts charged against him. It is upon this principle, and with this view, that a man on trial for crime is allowed to show a fair general character to the jury; and the cases are quite analogous." *Harding v. Brooks*, 5 Pick. (Mass.) 244, 247 (1827), per Parker, C. J.

For contrary view, see § 3284.

13. *Sheehey v. Cokley*, 43 Iowa 183, 22 Am. Rep. 236 (1876).

14. *Haun v. Wilson*, 28 Ind. 296 (1867).

15. *McCabe v. Platter*, 6 Blackf. 405 (1843).

§ 3282-1. "His [defendant's] character was not in issue. It is true he was charged in the petition with having made false and fraudulent representations, and the charge was calculated to affect his character indirectly, and so in every case where one is sued for a debt, and he denies it, or pleads payment, his char-

acter is somewhat involved in the investigation." *Dudley v. McCluer*, 65 Mo. 241, 243, 27 Am. Rep. 273 (1877), per Henry, J.

"In investigations concerning character, feeling and prejudice are more frequently exhibited than in inquiries upon any other subject: the number of witnesses is often extended far beyond the limit, which, upon other topics, the court would indulge; and if there be contrariety of opinion, the matter is usually left at last in great uncertainty. These considerations suggest the propriety of adhering closely to the rules which have been established to regulate the admission of the evidence of reputation concerning general character. If, in every case, where an act of dishonesty is imputed, the imputation may be met by such evidence, then there are few cases into which such evidence might not be introduced; trials would be insupportably tedious, and the result of a trial would as often depend upon the popularity of a party, as upon the merits of his case." *Smets v. Plunket*, 1 Strobh. L. (S. C.) 372, 376 (1847), per Wardlaw, J.

2. For authorities holding contrary, see § 3281.

arson;³ bastardy;⁴ conversion of money;⁵ embezzlement;⁶ to recover fire insurance where the defense is fraud or that the plaintiff burned his own buildings;⁷ fraud or involving fraud, including cases where fraud is alleged in a counterclaim;⁸ malicious mischief⁹ and seduction.¹⁰ Evidence also of the bad character of a party offered to show a probability that he is guilty of the act charged is almost invariably regarded as inadmissible in civil

3. *Gebhart v. Burkett*, 57 Ind. 378, 26 Am. Rep. 61 (1877).

4. *Low v. Mitchell*, 18 Me. 372 (1841).

5. *Harrison v. Russell*, Wils. (Ind.) 391 (1873); *Wright v. McKee*, 37 Vt. 161 (1864).

6. *Home Lumber Co. v. Hartman*, 45 Mo. App. 647 (1891). Compare *Mullinax v. Pyron*, (Tex. Civ. App. 1909) 123 S. W. 1139.

7. *Iowa*.—*Stone v. Hawkeye Ins. Co.*, 68 Iowa 737, 28 N. W. 47, 56 Am. Rep. 870 (1886).

Massachusetts.—*Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray 529 (1854).

New York.—*Fowler v. Aetna F. Ins. Co.*, 6 Cow. 673, 16 Am. Dec. 460 (1827).

Oregon.—*Munkers v. Farmers' Ins. Co.*, 30 Oreg. 211, 46 Pac. 850 (1896).

Pennsylvania.—*American F. Ins. Co. v. Hazen*, 110 Pa. St. 530, 1 Atl. 605 (1885).

Compare *Spears & Solomon v. International Ins. Co.*, 1 Baxt. (Tenn.) 370 (1872); *Fire Ass'n of Philadelphia v. Jones*, (Tex. Civ. App. 1897) 40 S. W. 44; *Mosley v. Vermont Mut. F. Ins. Co.*, 55 Vt. 142 (1882).

8. *Arkansas*.—*Powers v. Armstrong*, 62 Ark. 267, 35 S. W. 228 (1896).

Connecticut.—*Woodruff v. Whitteley*, Kirby 60 (1786).

Maine.—*Potter v. Webb*, 6 Me. 14 (1829).

Maryland.—*Brooks v. Berry*, 2 Gill 83 (1844).

Massachusetts.—*Heywood v. Reed*, 4 Gray 574 (1855).

Michigan.—*Klein v. Bayer*, 81 Mich. 233, 45 N. W. 991 (1890).

Mississippi.—*Leinkauf & Strauss v. Brinker*, 62 Miss. 255, 52 Am. Rep. 183 (1884).

Missouri.—*Dudley v. McCluer*, 65 Mo. 241, 27 Am. Rep. 273 (1877); *Gutzwiller v. Lackman*, 23 Mo. 168 (1856).

New Hampshire.—*Boardman v. Woodman*, 47 N. H. 120 (1866).

New York.—*Gough v. St. John*, 16 Wend. 646 (1837), *overruling Ruan v. Perry*, 3 Cal. 120 (1805).

Pennsylvania.—*Anderson v. Long*, 10 Serg. & R. 55 (1823).

South Carolina.—*Smets v. Plunkett*, 1 Strobb. 372 (1847).

Texas.—*Roach v. Crume*, (Civ. App. 1897) 41 S. W. 86 (1897).

In an action brought by a woman on a policy of insurance on the life of her husband in which the defense was that the husband was still living, proof of the plaintiff's good character was inadmissible. *Traveler's Insurance Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18 (1890).

9. *Thayer v. Boyle*, 30 Me. 475 (1849).

10. *Delaware*.—*Herring v. Jester*, 2 Houst. 66 (1858).

Iowa.—*Delvee v. Boardman*, 20 Iowa 446 (1866).

Michigan.—*Watson v. Watson*, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111 (1884).

Missouri.—*McKern v. Calvert*, 59 Mo. 243 (1875).

North Carolina.—*McRae v. Lilly*, 1 Ired. L. 118 (1840).

cases involving a criminal charge without regard to whether the charge is included in the plaintiff's case or is a part of the defense.¹¹ This view is clearly correct upon principle, the reasons for the exclusion being identical with those which make such evidence inadmissible in a criminal case.¹² That a party is asked, on cross-examination, questions implying by inference wrongdoing on his part does not authorize proof by him of his general reputation.¹³

§ 3283. (Rule Stated; Quasi Criminal Cases; Criminal Charges in Civil Cases; Evidence of Character Rejected); Injuries to the Person.—The general rule excluding evidence of character to prove conduct applies also in quasi-criminal cases which involve injuries to the person. For example, evidence of the good character of the plaintiff is commonly rejected in actions to recover damages for assault and battery;¹ likewise, the good character of the defendant.² Evidence of the good character of the defendant is also inadmissible in an action for damages for homicide.³

11. *Delaware*.—Parke v. Blackstone, 3 Harr. 373 (1841).

Indiana.—Hallowell v. Guntle, 82 Ind. 554 (1882).

Massachusetts.—Stone v. Barney, 7 Metc. 86 (1843); Com. v. Snelling, 15 Pick. 321 (1834).

Michigan.—Finley v. Widner, 112 Mich. 230, 70 N. W. 433 (1897).

Missouri.—Stewart v. Watson, 133 Mo. App. 44, 112 S. W. 762 (1908).

North Carolina.—Smithwick v. Ward, 52 N. C. (7 Jones' L.) 64, 75 Am. Dec. 453 (1859).

Ohio.—Dewit v. Greenfield, 5 Ohio 225 (1831).

Texas.—Mitchell v. Spradley, 23 Tex. Civ. App. 43, 56 S. W. 134 (1900).

England.—Cornwall v. Richardson, 1 R. & M. 305 (1825).

Contra.—Cox v. Strickland, 101 Ga. 482, 28 S. E. 655 (1897); Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119 (1892).

12. § 3275.

13. Munroe v. Godkin, 111 Mich.

183, 69 N. W. 244 (1896).

§ 3283-1. *Givens v. Bradley*, 3 Bibb. (Ky.) 192, 6 Am. Dec. 646 (1813); *Noonan v. Luther*, 206 N. Y. 105, 99 N. E. 178 (1912); *Smithwick v. Ward*, 52 N. C., (7 Jones' L.) 64, 75 Am. Dec. 453 (1859). See also, *Denton v. Ordway*, 108 Iowa 487, 79 N. W. 271 (1899).

Bad character of plaintiff.—In an action for assault and battery where the defense was that the plaintiff received the injuries complained of by falling down while drunk, evidence that the plaintiff was a drinking man was inadmissible. *Hamsy v. Mudarri*, 195 Mass. 418, 81 N. E. 266 (1907).

2. *Gillespie's Case*, 4 City Hall Rec. (N. Y.) 154 (1819); *Porter v. Seiler*, 23 Pa. St. 424, 62 Am. Dec. 341 (1854); *Markey v. Angell*, 22 R. I. 343, 47 Atl. 882 (1901).

For authorities holding contrary, see § 3281.

3. *Morgan v. Barnhill*, 118 Fed. 24, 55 C. C. A. 1 (1902).

Negligence.—Somewhat closely related to the cases under present discussion, although not necessarily involving a criminal charge, are actions to recover damages resulting from negligence. The decisions indicate a slight tendency on the part of some courts to regard evidence of character for carefulness and prudence as admissible upon the issue of negligence or freedom from contributory negligence. An early Massachusetts case⁴ seems to hold that evidence that the plaintiff was “commonly careful and skillful” was admissible in an action for damages against a town for negligently maintaining a highway in such a condition that the plaintiff’s carriage was overturned while he was driving thereon. This apparent holding has been expressly explained and repudiated in a later case.⁵ The “habits” of the deceased for care, prudence and sobriety in actions for damages for death, where there were no eye-witnesses, have been allowed to be shown in evidence.⁶ Such evidence is excluded where there were eye-witnesses.⁷ Opposed to the cases to which reference has been made, there is an overwhelming weight of authority which favors the exclusion of all evidence of character offered for the purpose of raising an inference as to conduct in negligence actions.⁸

4. *Adams v. Carlisle*, 21 Pick. (Mass.) 146 (1838).

5. *McDonald v. Savoy*, 110 Mass. 49 (1872).

6. *Strollery v. R. Co.*, 243 Ill. 290, 90 N. E. 709 (1909); *Devine v. Deposit Co.*, 145 Ill. App. 322 (1908); *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521 (1898); *Toledo, St. L., etc., R. Co. v. Bailey*, 145 Ill. 159, 33 N. E. 1089 (1893); *Chicago, etc., R. Co. v. Clark*, 108 Ill. 113 (1883).

7. *Salem v. Webster*, 192 Ill. 369, 61 N. E. 323 (1901) (injuries not resulting in death); *Chicago & Alton R. Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633 (1900) (death); *Southern Kansas R. Co. v. Robbins*, 43 Kan. 145, 23 Pac. 113 (1890) (death).

8. *California.*—*Towle v. P. I. Co.*, 98 Cal. 342, 33 Pac. 207 (1893).

Connecticut.—*Morris v. East Haven*, 41 Conn. 252 (1874).

Florida.—*Saussy v. South Florida R. Co.*, 22 Fla. 327 (1886).

Georgia.—*Atlanta, etc., R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763 (1894).

Illinois.—*Hanchett v. Haas*, 125 Ill. App. 111 (1905).

Indiana.—See *Pittsburg, F. W. & C. R. Co. v. Ruby*, 38 Ind. 249, 10 Am. Rep. 111 (1871).

Iowa.—*Hall v. Rankin*, 87 Iowa 261, 54 N. W. 217 (1893).

Kansas.—*Erb v. Popritz*, 59 Kan. 264, 52 Pac. 871, 68 Am. St. Rep. 362 (1898); *Southern Kansas R. Co. v. Robbins*, 43 Kan. 145, 23 Pac. 113 (1890).

Maine.—*Dunham v. Rackliff*, 71 Me. 345 (1880); *Lawrence v. Mt. Vernon*, 35 Me. 100 (1852).

Massachusetts.—*McDonald v. Savoy*, 110 Mass. 49 (1872).

Minnesota.—*Fonda v. R. Co.*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341 (1898).

§ 3284. (*Rule Stated; Quasi Criminal Cases; Criminal Charges in Civil Cases; Evidence of Character Rejected*); *Injuries to Reputation*.—As has already been stated,¹ evidence of the good character of the plaintiff in an action for defamation is often received where the alleged libellous or slanderous words impute a crime and the defendant attempts to justify the making of the statements by showing that they were true. It is difficult to determine which is the prevailing doctrine in regard to the admissibility of the evidence under such circumstances, for there is very good authority supporting the view which favors its exclusion.² Where the act charged by the alleged slanderous words did not constitute a crime, although the defendant attempted to justify, evidence of the plaintiff's good character has been held inadmissible,³ the court conceding that such evidence would have been admissible if the act charged had been criminal. On the other hand, the evidence has been admitted where no crime was charged,⁴ the court being doubtful, but receiving the evidence apparently because of its unusually strong probative force under

Pennsylvania.—*Baltimore & O. R. Co. v. Colvin*, 118 Pa. St. 230, 12 Atl. 337 (1888); *Hays v. Miller*, 77 Pa. St. 238, 18 Am. Rep. 445 (1874).

Texas.—*Missouri, K. & T. R. Co. v. Johnson*, 92 Tex. 380, 48 S. W. 568 (1898).

Vermont.—*Bryant v. C. V. R. Co.*, 56 Vt. 710 (1884).

Washington.—*Carter v. Seattle*, 19 Wash. 597, 53 Pac. 1102 (1898).

Wisconsin.—*Propson v. Leatham*, 80 Wis. 608, 50 N. W. 586 (1891).

United States.—*Harriman v. Pullman P. C. Co.*, 85 Fed. 353, 29 C. C. A. 194 (1898); *Central Vermont R. Co. v. Ruggles*, 75 Fed. 953, 21 C. C. A. 575 (1896).

"You must not prove—e. g.—that a particular engine-driver is a careless man in order to shew that a particular accident was caused by his negligence on a particular occasion." *Brown v. Eastern & Midlands Ry.*, 58 L. J. Q. B. 212, 214, 22 Q. B. D. 391 (1889), per Stephen, J. (1889).

§ 3284-1. § 3281.

2. *Connecticut*.—*Stow v. Converse*, 3 Conn. 325, 8 Am. Dec. 189 (1820).

Delaware.—*Parke v. Blackiston*, 3 Harr. 373 (1841).

New Hampshire.—*Severance v. Hilton*, 24 N. H. 147 (1851); *Matthews v. Huntley*, 9 N. H. 146 (1838).

New York.—*Houghtaling v. Kilderhouse*, 1 N. Y. 530, 5 How. Prac. 80 (1848). *Contra*, *Inman v. Foster*, 8 Wend. (N. Y.) 602 (1832).

Washington.—*Hall v. Elgin Dairy Co.*, 15 Wash. 542, 46 Pac. 1049 (1896).

United States.—See *Wright v. Schroeder*, 30 Fed. Cas. No. 18,091, 2 Curt. 548 (1855).

In an action for libel where there is a plea of justification, it is error to allow the plaintiff, in his case-in-chief, to introduce evidence of his good character. *Blakeslee v. Hughes*, 50 Ohio St. 490, 34 N. E. 793 (1893).

3. *Howland v. Blake Mfg. Co.*, 156 Mass. 543, 31 N. E. 656 (1892).

4. *Sheehy v. Cokley*, 43 Iowa 183, 22 Am. Rep. 236 (1876).

the particular circumstances.⁵ That the bad character of the plaintiff in an action for libel or slander may not be shown for the purpose of raising an inference as to his guilt of the misconduct charged in the alleged slanderous utterances is, however, fairly well settled.⁶

§ 3285. (Rule Stated; Quasi Criminal Cases; Criminal Charges in Civil Cases; Evidence of Character Rejected); Immoral Conduct not Punishable as a Crime.—Evidence of character to prove conduct being generally inadmissible in civil actions involving a criminal charge,¹ *a fortiori* the rule should be the same where the charge is of a moral wrong which does not constitute a crime under the law of the jurisdiction. This has been judicially recognized in the following language: “On principle as well as authority evidence of good reputation is not competent to show that one is not guilty of a dishonorable or unlawful act which is not punishable as a crime.”² The principle has also been recognized by excluding evidence of the reputation of the plaintiff in a libel suit to rebut the evidence of the defendant who

5. “The charge against plaintiff, that she is a whore, involves the idea that her offenses against chastity were public and notorious. The charge is sought to be established by proof of moral delinquencies, which, however much they are to be condemned, do not necessarily lead to the conclusion that her character was such as was charged, but from which the jury, perhaps, might infer it to be such. Proof then, that her general reputation for chastity was good, would tend to show that, of whatever indiscretions she had been guilty, her irregularities had not been of such a nature as to impress upon her the character of a whore, and would thus tend to rebut any presumption that she was such, which might otherwise arise from the circumstances proved by the defendant.” *Sheehey v. Cokley*, 43 Iowa 183, 186, 22 Am. Rep. 236 (1876), per Day, J.

6. *Delaware*.—*Parke v. Blackiston*, 3 Harr. 373 (1841).

Indiana.—*Hallowell v. Guntle*, 82 Ind. 554 (1882).

Massachusetts.—*Stone v. Varney*, 7 Metc. 86 (1843); *Com. v. Snelling*, 15 Pick. 337 (1834).

Michigan.—*Finley v. Widner*, 112 Mich. 230, 70 N. W. 433 (1897).

Ohio.—*Dewit v. Greenfield*, 5 Ohio 225 (1831).

Texas.—*Mitchell v. Spradley*, 23 Tex. Civ. App. 43, 56 S. W. 134 (1900).

England.—*Cornwall v. Richardson*, 1 R. & M. 305 (1825).

Ireland.—*Bell v. Parke*, 11 Ir. C. L. 413 (1860).

Contra, *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655 (1897); *Sanford v. Rowley*, 93 Mich. 119, 52 N. W. 1119 (1892).

§ 3285-1. §§ 3281-3284.

2. *Lamagdelaine v. Tremblay*, 162 Mass. 339, 341, 39 N. E. 38 (1894), per Barker, J.

attempted to prove that the alleged libellous statements, which did not charge a crime, were true.³ The rejection of evidence of character to prove conduct in actions for damages for injuries resulting from negligence,⁴ may likewise be cited as another example of the application of the principle. One court has, however, made an exception in a case where a woman's reputation for chastity was assailed, proof of her good reputation being allowed.⁵

§ 3286. (Rule Stated); Administrative Details.—The judge presiding at the trial, in his administrative capacity, must avoid an improper presentation of character evidence to the jury by observing certain well-settled rules limiting the use of such evidence and keeping it within the logical bounds of relevancy. The proof of character received must be with reference to a trait which logically has some probative weight in assisting to reach a conclusion on the question at issue. In other words, the trait of character proved must be the same as that involved in the commission of the offense charged.¹ None but qualified witnesses must be allowed to testify. A witness must have been in a position to learn the reputation of the person in question during the period covered by the inquiry,² which must be limited to a time prior to the date when the alleged offense involved in the action may reasonably be regarded as affecting such reputation.³

§ 3287. (Rule Stated; Administrative Details); Physical or Mental Impairment.—A condition of physical or mental impairment is to be distinguished from a trait of character. The former is more easy of proof by direct evidence than the latter, making recourse to composite hearsay unnecessary.¹ Consequently, it has become a well established principle that general reputation in the

3. *Howland v. Blake Mfg. Co.*, 156 Mass. 543 (1892).

4. § 3283.

5. *Sheehy v. Cokley*, 43 Iowa 183, 22 Am. Rep. 236 (1876).

§ 3286-1. § 3288.

2. §§ 3315 *et seq.*

3. §§ 3327 *et seq.*

§ 3287-1. "The best evidence to prove insanity is proof of the facts and circumstances which demonstrate its existence. These facts and circumstances must be proven by the

production of witnesses to testify to them. . . . Public opinion, as to a man's insanity, is hearsay evidence. One swearing to the existence of such opinion or reputation, swears only to what he has heard from others—from a whole community, if you please. He swears to no facts which show to the jury the state or condition of the party's mind." *Foster v. Brooks*, 6 Ga. 287, 291 (1849), per Nisbet, J.

neighborhood is not admissible to prove what the physical or mental condition of a person was at a particular time. Thus the state of a person's bodily health² or his mental condition with respect to sanity³ cannot be proved by evidence of reputation as to those matters. Aside from the absence of the necessity to resort to hearsay to prove conditions of mental impairment there is the further reason that reputation in respect to insanity is very unreliable, eccentricity or genius being easily mistaken for it in the opinion of the neighborhood.⁴

§ 3288. (Rule Stated; Administrative Details); Trait must be Relevant.—It is a rule well enforced by reason and sanctioned by authority that character evidence, introduced for the purpose of laying a basis for an inference as to conduct, must be limited to proof of the existence of the particular trait or group of traits involved in the doing of an act like the one which is the subject of the investigation in which the evidence is offered.¹ This is for the obvi-

2. Mosser v. Mosser's Ex'r, 32 Ala. 551 (1858); *Home Circle Society v. Shelton*, (Tex. Civ. App. 1904) 81 S. W. 84.

3. California.—*People v. Pico*, 62 Cal. 50 (1882).

Connecticut.—*State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89 (1880).

District of Columbia.—*Snell v. United States*, 16 App. D. C. 501 (1900).

Georgia.—*Foster v. Brooks*, 6 Ga. 287 (1849).

Indiana.—*Walker v. State*, 102 Ind. 507, 1 N. E. 856 (1885).

Iowa.—*Ashcraft v. De Armond*, 44 Iowa 229 (1876) (rumors).

Massachusetts.—*Townsend v. Pepperell*, 99 Mass. 40 (1868).

Nebraska.—*Biddle v. Jenkins*, 61 Neb. 400, 85 N. W. 392 (1901).

New Mexico.—See *Territory v. Padilla*, 8 N. M. 510, 46 Pac. 346 (1896).

North Carolina.—*State v. Coley*, 114 N. C. 879, 19 S. E. 705 (1894).

Pennsylvania.—*Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. Rep. 181 (1871).

Texas.—*First Nat'l Bank v. McGinty*, 29 Tex. Civ. App. 539, 69 S. W. 495 (1902).

Wisconsin.—*Yanke v. State*, 51 Wis. 464, 8 N. W. 276 (1881).

Compare State v. Christmas, 6 Jones Law (N. C.) 471 (1859).

4. "Public opinion declared Copernicus a fool, when he promulgated the planetary system; and Columbus a fool when he announced the sublime idea of a New World. Hazardous in the extreme would it be to the rights of the parties under the law, if they were allowed to depend upon the opinion of a neighborhood of the sanity of individuals." *Foster v. Brooks*, 6 Ga. 287, 292 (1849), per Nisbet, J.

§ 3288-1. "In all criminal prosecutions, whether for a felony, or for a misdemeanor, the previous good character of the accused, having reference and analogy to the subject of the prosecution, is competent and relevant as original testimony." *Kilgore v. State*, 74 Ala. 1, 7 (1883), per Brickell, C. J. To same effect see *United States v. Wilson*, 176 Fed. 806 (1910).

ous reason that proof of the possession or non-possession, by the person whose conduct is sought to be proved, of some other trait does not tend to enlighten a reasoning mind as to the probabilities of the conduct of that person.² Such proof is irrelevant. For instance, that a man possesses a good character for loyalty to his sovereign is of no avail to him when on trial for murder.³ The administrative reason for excluding irrelevant evidence of this sort, based upon the necessity for avoiding protracted trials, has been expressed judicially as follows: "If a defendant, when put upon trial for an alleged crime, has a right to prove his character in all respects and in all its traits, without limitation to the traits supposed to render the commission of the crime improbable, and gives such evidence, it would seem to follow that the State would then have a right to attack that character in as broad a sense as that in which it was sustained by the evidence given by the defendant. The State would have the right, in other words, to disprove the case made by the defendant as to character in all its parts. Nothing occurs to us that the defendant may prove by way of defence,

Upon the trial of a police officer for shooting a person he was attempting to arrest, the court rejected proof of his reputation as a careful, conservative and conscientious peace officer. The appellate court, sustaining this ruling, said: "It is a general rule in criminal cases that evidence of the character of the accused, when offered by him, is relevant and therefore admissible. But the character or reputation he is entitled to prove must always be such as would make it unlikely that he would commit the particular offense with which he is charged. In this case the appellant's character as a peace officer was not involved, but his character as an individual was involved in the offense charged against him, and therefore evidence of his reputation as a peaceable and quiet citizen in the community where he resided would have been admissible." *State v. Surry*, 23 Wash. 655, 663, 63 Pac. 557 (1900), per Anders, J.

2. *Fletcher v. State*, 49 Ind. 124,

132, 19 Am. Rep. 673 (1879), per Buskirk, C. J., quoting *Atwood v. Impson*, 5 C. E. Green (N. J.) 150 (1869), as follows: "With many, telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing, gambling, roystering, and making close bargains. With others, lying is the habit or principle, and if elevated to be senators or legislators, or made church members or deacons, it does not always reform them."

"It has never been the practice in this State to permit a witness, in support of his character for veracity, to prove that he has been honest in his dealings, or moral and free from vice. It does not follow that because a man deals honestly, and is otherwise moral, he is therefore truthful. Nor is it believed that because a man is not fair, or is immoral, he is therefore untruthful." *Tedens v. Schumers*, 112 Ill. 263, 267 (1884), per Mr. Justice Walker.

which the State may not disprove. Hence, if, on the trial of a woman for larceny, she legally gives evidence of her general good character, without limitation, that evidence would include good character as to chastity, veracity, etc., as well as honesty. The State, it would seem, could then attack the case made by her in all its parts, and show that her general character for chastity, veracity, etc., as well as honesty, was bad. The law does not contemplate the raising of such irrelevant issues.”⁴

It is not always easy or even possible to definitely determine just what particular trait of character possessed by an individual renders his commission of an offence under consideration probable or improbable. Some decisions reveal a rather lax application of the rule resulting doubtless from this difficulty.

Sound administration does not insist on making hairbreadth distinctions in reference to the form of the questions asked witnesses in eliciting testimony in proof of character.⁵

§ 3289. (Rule Stated; Administrative Details; Trait Must be Relevant); Adultery.— In a criminal prosecution for adultery, the previous good character of the defendant for chastity is admissible in his favor,¹ as is also the same trait of the person alleged to be the other party to the crime.² That the defendant in such a prosecution had an adulterous and amorous disposition is, on the other hand, admissible to show guilt.³ The bad reputation for chastity of the other party to the crime may also be shown for the

3. Trial of Capt. Wm. Kidd, 14 How. St. Tr. 123, 146 (1701).

4. State v. Bloom, 68 Ind. 54, 57, 34 Am. Rep. 247 (1879), per Worden, J.

5. “If the court instructed the counsel that he could not interrogate the witness as to Crook’s [deceased’s] character for violence, unless he asked him whether or not he had the character of being ‘blood thirsty, quarrelsome, turbulent, revengeful and dangerous,’ then the rule was too exacting. A man may have a bad character for peacefulness, without possessing all the vicious qualities enumerated. There are degrees in a quarrelsome or turbulent character,

and, the proper predicate of knowledge being laid, counsel should be free to ask such legal questions as he may elect.” De Arman v. State, 71 Ala. 351, 360 (1882), per Stone, J.

§ 3289-1. State v. Donovan, 61 Iowa 278, 16 N. W. 130 (1883).

2. Com. v. Gray, 129 Mass. 474, 37 Am. Rep. 378 (1880).

3. State v. Eggleston, 45 Oreg. 346, 77 Pac. 738 (1904).

In a prosecution for miscegenation, testimony that the defendant was “foolishly fond of woman” has been rejected as improper rebuttal to the evidence of good character offered by the defendant. Cauley v. State, 92 Ala. 71, 9 So. 456 (1890).

same purpose,⁴ especially where the circumstances are such that abundant opportunity for the commission of the offence is apparent.⁵

§ 3290. (Rule Stated; Administrative Details; Trait Must be Relevant); Arson.—In a prosecution for arson, the trait most nearly relevant is probably honesty. Evidence of such a trait of character would most likely be received, but that the defendant is an orderly, industrious citizen cannot be shown in his behalf in such a case.¹

§ 3291. (Rule Stated; Administrative Details; Trait Must be Relevant); Assault.—The defendant's good character as a peaceable, law abiding citizen is admissible in his favor in a prosecution for assault with intent to kill,¹ but not his good character for industry² or truth and veracity,³ as such evidence has no probative force.⁴ That the accused in a case of assault is an excitable man is not admissible in his favor,⁵ nor is it proper for the prose-

4. *State v. Eggleston*, 45 Oreg. 346, 77 Pac. 738 (1904).

5. "That a married man pays frequent visits, at night, to the house of a female, and is seen with her in her bedroom, and lying with her in the same bed at night, are circumstances, which, of themselves, are well calculated 'to lead the guarded discretion of a reasonable and just man to the conclusion' that the parties have been guilty of adultery. The presumption that the criminal act had been committed would be strengthened by proof that the general reputation of the female was that of a woman who was not disinclined to yield to the temptations and improve the opportunities established by such evidence." *Blackman v. State*, 36 Ala. 295, 296 (1860), per Walker, J.

§ 3290-1. *State v. Emery*, 59 Vt. 84, 7 Atl. 129 (1886).

§ 3291-1. *State v. Schlegel*, 50 Kan. 325, 31 Pac. 1105 (1893); *State v. Dalton*, 27 Mo. 13 (1858).

2. *State v. Dalton*, 27 Mo. 13 (1858).

3. *Morgan v. State*, 88 Ala. 223, 6 So. 761 (1889).

4. "That he had the reputation of being a quiet, peaceable man, or the like, would have had a tendency to lead the jury to believe that he did not commit the violent act with which he was charged; but the fact that he bore a good character for truth, could exert no legitimate influence in determining whether he had been guilty of a malicious, violent and deadly assault, however potent such evidence would be had he been charged with *crimen falsi*. The object and effect of such evidence is to disprove guilt, by furnishing a presumption that the defendant would not have committed the offense; and hence the character sought to be proved must be such as would make it unlikely that the party would do the controverted act; as, for example, in murder, the prisoner's reputation for peace and good order is admissible." *Morgan v. State*, 88 Ala. 223, 6 So. 761 (1889), per McClellan, J.

5. *Com. v. De Vico*, 207 Mass. 251, 93 N. E. 570 (1911).

cution in such a case to show that the defendant conducted an unlawful business⁶ or that he sometimes used profane language.⁷ In a prosecution of a man for assault and battery on a woman, committed when making an indecent proposal, where the defendant introduced evidence of his good character it has been regarded as proper to show on cross-examination that the defendant's reputation "was bad for running after women."⁸ Such a case furnishes a good illustration of the extension of a rule to apply to special circumstances. Clearly the defendant's bad character for chastity would ordinarily be irrelevant on the question of his peaceableness or the probability of his committing an assault; but, in this instance, the close relation between the indecent proposal and the assault sufficed to cause the court to regard the evidence as admissible.

§ 3292. (Rule; Administrative Details; Trait Must be Relevant); Burglary.—To render evidence of the character of one prosecuted for burglary admissible, the trait shown must be one that would make the commission of the crime improbable. Other evidence of that nature is irrelevant. For example, the defendant in a criminal action for burglary who had been employed on the police force of a city was not allowed to show by the chief of police that his work had been of a satisfying character.¹

§ 3293. (Rule Stated; Administrative Details; Trait Must be Relevant); Carrying Concealed Weapons.—The good character of the defendant as a peaceable, law-abiding man is admissible in

In an assault case in which it appeared that the injured party and a brother of the accused were quarreling when the accused struck the blow, evidence of the quarrelsome disposition of the injured party, which was not known to the accused, was held immaterial. *People v. Kirk*, 151 Mich. 253, 114 N. W. 1023, 14 Det. Leg. N. (1908). That decision was apparently based on the theory that the disposition of the injured party, not known to the accused could not have affected the apprehension of danger to his brother which the accused might have felt, and which would properly govern his actions in the

matter of protecting the brother. Had the accused and the injured party been engaged in the altercation before the blow was struck and the question as to who was the aggressor had arisen on the trial, the character of the accused for violence would have been relevant. § 3276.

6. *Allen v. Com.*, 145 Ky. 409, 140 S. W. 527 (1911) (an illicit still).

7. *Vanhoeser v. State*, 55 Tex. Cr. App. 114, 113 S. W. 285 (1908).

8. *Balkum v. State*, 115 Ala. 117, 22 So. 532, 67 Am. St. Rep. 19 (1896).

§ 3292-1. *State v. Coates*, 22 Wash. 601, 61 Pac. 726 (1900).

his behalf in a prosecution for carrying concealed weapons where criminal intent is a necessary element of the offence.¹

§ 3294. (Rule Stated; Administrative Details; Trait Must be Relevant); Fraud.—In criminal actions for fraud or involving fraud, the good character of the defendant with respect to the trait involved may be shown in his favor;¹ but his personal habits² or character for sobriety and morality are irrelevant,³ as is likewise his reputation for industry.⁴

§ 3295. (Rule Stated; Administrative Details; Trait Must be Relevant); Homicide.—Character evidence is probably more frequently used on trials for homicide than in any other class of criminal cases. That the trait shown be relevant is ordinarily insisted on,¹ peaceableness and quietness being regarded as the relevant trait,² although the seriousness of the possible outcome of the trial in such a case to the accused has sometimes

§ 3293-1. *Lann v. State*, 25 Tex. App. 495, 8 S. W. 650, 8 Am. St. Rep. 445 (1888).

§ 3294-1. *State v. Dexter*, 115 Iowa 678, 87 N. W. 417 (1901) (obtaining goods under false pretenses).

2. *Blasland-Parcels-Jordan Shoe Co. v. Hicks*, 70 Mo. App. 301 (1897).

3. *Harper v. United States*, (Ind. Ter. 1907) 104 S. W. 673; *affirmed*, 170 Fed. 385, 95 C. C. A. 555 (1909).

4. *State v. Anslinger*, 171 Mo. 600, 71 S. W. 1041 (1903).

§ 3295-1. *People v. Haydon*, 18 Cal. App. 543, 123 Pac. 1102 (1912); *State v. Pearce*, 15 Nev. 188 (1880).

"That a person, upon trial for a crime charged against him, has a right to offer, in his defense, testimony of his good character, we can have no doubt. This is and ought to be the general rule; with one limitation, however, as laid down by the authorities, namely, that 'in such case the character sought to be proved must not be general, but such as would make it unlikely that the defendant would be guilty of the particular crime with which he is charged.'" *Kee v. State*, 28 Ark. 155, 164 (1873), per Searle, J.

"A good reputation for that virtue, had it been hers, and had she offered to show, as part of her defense, that she possessed that reputation, must have been excluded upon objections of the prosecution, inasmuch as it involves a trait of character not in the slightest degree involved in the alleged commission of the crime with which she stood charged. It is inexact to say that proof of the general character of the prisoner is received, even on his own behalf, in courts of common law, in trials for felonious homicide. The inquiry in such cases is confined to the general character as to the trial involved in the offense charged." *People v. Fair*, 43 Cal. 137, 147, 148 (1872), per Wallace, J.

2. *People v. Bezy*, 67 Cal. 223, 7 Pac. 643 (1885); *People v. Stewart*, 28 Cal. 395 (1865); *Kahlenbeck v. State*, 119 Ind. 118, 21 N. E. 460 (1888); *Walker v. State*, 102 Ind. 502, 1 N. E. 856 (1885); *Bayse v. State*, 45 Nebr. 261, 63 N. W. 811 (1895); *Gandolfo v. State*, 11 Ohio St. 114 (1860).

led to a liberal construction of the general rule.³ The good character of the defendant for peaceableness and quietness is admissible even where the instrument of death was poison.⁴ Examples of evidence, offered as character evidence on behalf of the accused, which have been excluded are that the accused was industrious and respectful to both white and black people,⁵ a good and valiant soldier,⁶ industrious and honest,⁷ a kind-hearted man⁸ or a "good worker."⁹ That the deceased in a case of homicide was a violent, turbulent man¹⁰ may, on the other hand, be shown by the accused under a plea of self-defence, but not the fact that he was engaged in selling whiskey,¹¹ was unchaste¹² or that he was a drinking man where there was no evidence that he had been drinking on the occasion in question.¹³ In a prosecution

3. On a trial for murder, the defendant sought to show "that he was of a mild disposition, and one of the last men who would willingly shed a woman's blood; that he was a kind and affectionate husband and father, honest and industrious, of strict integrity and pure morals." The appellate court, holding that this evidence should have been received, said: "The effort to avoid collateral issues seems, sometimes, to have excluded from the jury box, what every jurymen would wish to learn, and to have trenched closely upon the principles of humanity. It is but the just reward of many good actions, that they should be of some avail to a man in his utmost need." *State v. Parker*, 7 La. Ann. 83, 88 (1852), per Preston, J.

4. *Carr v. State*, 135 Ind. 1, 34 N. E. 533, 41 Am. St. Rep. 408, 20 L. R. A. 863 (1893); *Hall v. State*, 132 Ind. 317, 31 N. E. 536 (1892).

"The party puts in motion an instrument of death. It matters not whether that instrument be a bludgeon wielded by the party himself, or the igniting of an explosive substance, the firing of a gun putting the ball in motion which penetrates the body, or the administering of poisonous drugs, which produce death. In either case the party puts in motion a

force or power that produces death, and in either case it is the act of the party producing death, for which he is responsible, and for the doing of which and destroying life he is punished. A trait of character which would be inconsistent with the destruction of life by one method would be inconsistent with a disposition to take life by another." *Hall v. State*, 132 Ind. 317, 323, 31 N. E. 536 (1892), per Olds, J.

5. *Arnold v. State*, 131 Ga. 494, 62 S. E. 806 (1908).

6. *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162 (1868).

7. *State v. Green*, 229 Mo. 642, 129 S. W. 700 (1910). See also, *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228 (1892); *Basye v. State*, 45 Nebr. 261, 63 N. W. 811 (1895).

8. *Catheart v. Com.*, 37 Pa. St. 108 (1860).

9. *Ward v. State*, (Tex. Cr. App. 1912) 146 S. W. 931.

10. *Sandford v. State*, 2 Ala. App. 81, 57 So. 134 (1911); *Williams v. State*, 74 Ala. 18 (1883).

11. *Martin v. Com.*, 100 S. W. 872, 30 Ky. L. Rep. 1196 (1907).

12. *People v. Fair*, 43 Cal. 137 (1872).

13. *Sanford v. State*, (Ala. App. 1911) 57 So. 134.

for uxoricide, evidence that the defendant was immoral and guilty of criminal practices has been received.¹⁴

§ 3296. (Rule Stated; Administrative Details; Trait Must be Relevant); Illegal Sale of Liquor.—The rule admitting proof of relevant traits only, obtains likewise where the accused is charged with the unlawful sale of intoxicating liquors.¹ He may not show that his reputation as a law-abiding citizen,² or for peaceableness and quietness, is good,³ nor can the prosecution show that the defendant had many fights and had driven her daughters away from home.⁴ Again where the crime charged was procuring intoxicating liquor for a person in the habit of becoming intoxicated, the defendant was not permitted to show his good character for honesty and sobriety.⁵

§ 3297. (Rule Stated; Administrative Details; Trait Must be Relevant); Indecent Assault.—In the class of crimes, frequently termed sexual offences, the chastity of the female involved is often relevant on the question of the guilt or innocence of the accused. Indecent assault may be regarded as belonging to that group of crimes and the bad character of the prosecutrix for chastity is admissible in behalf of the accused in a prosecution for this offence as it is relevant on the question whether or not she consented to the acts complained of.¹ Where it appears that the prosecutrix was of unchaste character, a logical inference arises that the acts complained of did not constitute an assault. The character of the accused for chastity is also clearly relevant in such actions.

§ 3298. (Rule Stated; Administrative Details; Trait Must be Relevant); Infanticide.—In cases of homicide where the victim is other than a child, peaceableness and quietness is commonly regarded as the only relevant trait. The wisdom of this may be questioned as it would seem that other traits such as cruelty, bru-

14. *People v. Cleminson*, 250 Ill. 135, 95 N. E. 157 (1911).

§ 3296-1. *Chung Sing v. U. S.*, 4 Ariz. 217, 36 Pac. 205 (1894); *Westbrooks v. State*, 76 Miss. 710, 25 So. 491 (1899).

2. *Chung Sing v. U. S.*, 4 Ariz. 217, 36 Pac. 205 (1894).

3. *Baehner v. State*, 25 Ind. App. 597, 58 N. E. 741 (1900).

4. *Lewis v. State*, 56 Tex. Cr. App. 130, 119 S. W. 100 (1909).

5. *State v. Beede*, 151 Iowa 701, 130 N. W. 714 (1911).

§ 3297-1. *Com. v. Kendall*, 113 Mass. 210, 18 Am. Rep. 469 (1873).

tality and their opposites ought often to be considered. This view has been recognized in a case of infanticide wherein the accused was allowed to show that he was of a humane and kindly disposition toward children.¹

§ 3299. (Rule Stated; Administrative Details; Trait Must be Relevant); Larceny.— In larceny cases, proof of character must likewise be confined to the trait involved in the crime,¹ honesty being regarded as such trait.² The good character of the accused for truthfulness is not admissible in his behalf,³ nor is his character in respect to sobriety.⁴ On the other hand, the prosecution may not show that the accused has a bad reputation for profanity.⁵

§ 3300. (Rule Stated; Administrative Details; Trait Must be Relevant); Libel.— The reputation of the defendant, in a prosecution for criminal libel, for truth and veracity,¹ is inadmissible as is likewise his reputation for peaceableness and orderliness.² What trait would be relevant in a libel case appears to be an open question.

§ 3301. (Rule Stated; Administrative Details; Trait Must be Relevant); Malicious Mischief.— The reputation of the accused for honesty and truth has in one instance been received in a prosecution for malicious mischief.¹ However, the opinion in that case is not clear and it can hardly be regarded as establishing a precedent.

§ 3302. (Rule Stated; Administrative Details; Trait Must be Relevant); Perjury.— The obviously relevant trait in a perjury case is truth and veracity. Proof of the possession of this trait may always be given by the defendant in a prosecution for per-

§ 3298-1. *State v. Cunningham*, 111 Iowa 233, 82 N. W. 775 (1900).

§ 3299-1. *State v. Conlan*, 3 Pennw. (Del.) 218, 50 Atl. 95 (1901).

2. *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136 (1901); *Long v. State*, 11 Fla. 295 (1867); *State v. Bloom*, 68 Ind. 54, 34 Am. Rep. 247 (1879); *People v. Ryder*, 151 Mich. 187, 114 N. W. 1021, 14 Det. Leg. N. 912 (1908).

3. *Hays v. State*, 110 Ala. 60, 20

So. 322 (1895).

4. *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136 (1901).

5. *Butler v. State*, 91 Ala. 87, 9 So. 191 (1890).

§ 3300-1. *State v. Heacock*, 106 Iowa 191, 76 N. W. 654 (1898).

2. *Com. v. Irwin*, 1 Clark (Pa.) 344, 2 Pa. L. J. 329 (1843).

§ 3301-1. *Browder v. State*, 30 Tex. App. 614, 18 S. W. 197 (1892).

jury,¹ for the purpose of showing the improbability of his having committed the crime.

§ 3303. (Rule Stated; Administrative Details; Trait Must be Relevant); Rape.—The courts have experienced some difficulty in determining what trait of character of the defendant in a prosecution for rape is admissible in his favor. His reputation for “morality, virtue and honesty in living” has been received, the court explaining that honesty in that context means chastity.¹ Reputation for chastity and general moral character has also been admitted² and it has been decided that the defendant should have been allowed to show that he was a peaceable and law-abiding man.³ In an action for assault with intent to commit rape, the defendant's reputation for truth and veracity has, however, been rejected⁴ as has likewise evidence of his general character.⁵ The reputation of the prosecutrix in rape for chastity may always be shown by the accused as bearing on the question of consent.⁶ It must be observed that proof of character for chastity of the female involved in all cases of this general class, which includes adultery, rape, seduction and the like, is proof of the character of a third party and is not subject to the restriction placed upon proof of character of the accused which prevents the introduction by the prosecution in the first instance of proof of his bad character.

§ 3304. (Rule Stated; Administrative Details; Trait Must be Relevant); Receiving Stolen Goods.—The trait of character regarded by the courts as relevant in a prosecution for receiving stolen goods is honesty. The defendant may introduce evidence of his character for honesty and probity¹ for the purpose of raising

§ 3302-1. *State v. Kinley*, 43 Iowa 294 (1876); *Edgington v. U. S.*, 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467 (1896).

§ 3303-1. *State v. Snover*, 63 N. J. L. 382, 43 Atl. 1059 (1899).

2. *State v. Wolf*, 112 Iowa 458, 84 N. W. 536 (1900).

3. *Lincecum v. State*, 29 Tex. App. 328, 15 S. W. 818, 25 Am. St. Rep. 727 (1890).

4. *Territory v. Pierce*, (N. M. 1911) 113 Pac. 591.

5. *People v. Josephs*, 7 Cal. 129 (1857).

6. *Jackson v. State*, 91 Ark. 71, 122

S. W. 101 (1909); *State v. Williams*, (Del. O. & T. 1911) 80 Atl. 1004; *State v. Verto*, 65 W. Va. 628, 64 S. E. 1025 (1909).

§ 3304-1. *Hey v. Com.*, 32 Grat. (Va.) 946, 34 Am. Rep. 799 (1879).

Possessing Counterfeit Money.—“When a man is arrested with counterfeit money in his possession, . . . he may relieve the charge thus placed upon him by proof of former character, showing that he would not be likely to be engaged in that class of business.” *United States v. Kenneally*, 26 Fed. Cas. No. 15,522, 5 Biss. 122 (1870), per Blodgett, J.

an inference that he is not guilty of the crime charged but traits other than honesty are not regarded as relevant and are therefore excluded.² The language, however, which is used to express that general trait may vary, the words probity and integrity, for example, not being objectionable. The reputation of the person from whom the goods were received as a regular and honest dealer in goods such as those in question is relevant on behalf of the accused.³ Such evidence bears upon the good faith in which the goods were received and tends to prove absence of criminal intent.

§ 3305. (Rule Stated; Administrative Details; Trait Must be Relevant); Seduction.—The general good character of the accused in a case of seduction may not be introduced in his favor, but it is proper to show his good character for virtue.¹ Where he introduces such evidence it is proper to allow in rebuttal testimony of his bad reputation for chastity prior to the time he was accused of the crime.²

§ 3306. (Rule Stated; Administrative Details; Trait Must be Relevant); Train Wrecking.—In a prosecution for attempting to wreck a train by placing a tie upon a railroad track, the good character of the defendant as a peaceable, orderly and law-abiding citizen was held admissible in his behalf.¹

§ 3307. Inferences Other Than Conduct; Independent Relevancy.—The restrictions and limitations to the use of character evidence which have been discussed in the preceding sections of this chapter apply only where the proof of character is offered as a basis for an inference as to conduct. Whenever character is relevant as a basis for any other inference, it is admissible without restriction. Character may be an issue in the case. Under

2. *Berneker v. State*, 40 Nebr. 810, 59 N. W. 372 (1894).

3. "Any evidence was competent which would tend to prove the existence of facts which would naturally influence the minds of men, under the same circumstances, in forming a conclusion upon the subject-matter involved in the issue. . . . The reason is, that the belief of men who have not personal knowledge may reasonably be presumed to be influenced

by the reputation which a party, with whom they have transactions, has acquired and maintained among those who know him." *Com. v. Gazzolo*, 123 Mass. 220, 25 Am. Rep. 79 (1877), per Morton, J.

§ 3305-1. *State v. Curran*, 51 Iowa 112, 49 N. W. 1006 (1879).

2. *State v. King*, 9 S. D. 628, 70 N. W. 1046 (1897).

§ 3306-1. *State v. Douglass*, 44 Kan. 618, 26 Pac. 476 (1890).

such circumstances, the method of making the proof is, in some instances, the same as when character is used in its evidentiary capacity; but, aside from that, this use of character has no connection with the law of evidence. These other uses of character will be rather briefly discussed in the two sections following, the non-evidentiary uses being included principally in order that they may be distinguished from the evidentiary uses.

§ 3308. (*Inferences Other Than Conduct*); Character a constituent Fact.—

Breach of promise.—The character of the plaintiff in an action for the breach of a promise of marriage often becomes a fact in issue. The inquiry generally extends only to character for chastity, although it may properly extend to other traits. The situation which arises when the defense to such an action is the unchastity of the female presents some peculiarities. As proof of one act of unchastity on the part of the plaintiff is a complete defense to the action,¹ the proof is ordinarily of specific acts.² There can be no possible objection to this method, if such acts of misconduct are pleaded, thus avoiding unfair surprise. It should be noticed that this proof of specific acts has nothing in common with proof of general character which it is not the purpose of such evidence to establish.

It is also allowable for the defendant to show the bad general character of the plaintiff for chastity as a defense to the action,³ either by itself or together with proof of specific acts.⁴ There is a conflict of authority on the question whether the general good character of the plaintiff may be shown to rebut proof of specific

§ 3308-1. "The proposition that illicit intercourse of the plaintiff, prior to the promise and then unknown to the defendant, or subsequent to the promise, with another than the defendant is a defense to the action is fundamental and established beyond the reach of discussion." McKane v. Howard, 202 N. Y. 181, 183, 95 N. E. 642, 25 Am. & Eng. Ann. Cas. 960 (1911), per Collin, J.

2. Sprague v. Craig, 51 Ill. 288 (1869); Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. 745 (1893); Stratton v. Dole, 45 Nebr. 472, 63 N. W. 875

(1895); McKane v. Howard, 202 N. Y. 181, 95 N. E. 642, 25 Am. & Eng. Ann. Cas. 960 (1911).

3. Woodard v. Bellamy, 2 Root (Conn.) 354 (1796); McCarty v. Coffin, 157 Mass. 478, 32 N. E. 649 (1892); Markham v. Herrick, 82 Mo. App. 327 (1899); Foulkes v. Sellway, 3 Esp. 236 (1801). See also, Morgan v. Yarborough, 5 La. Ann. 316 (1850); Von Storch v. Griffin, 77 Pa. St. 504 (1875); Capehart v. Carradine, 4 Strob. (S. C.) 42 (1849).

4. Woodard v. Bellamy, 2 Root (Conn.) 354 (1796).

acts. It has been frequently held that such proof is allowable.⁵ More recently it has been held to the contrary.⁶ This latter view is clearly correct in the light of the general rule which excludes proof of character to show conduct in civil actions.⁷ The only purpose which proof of general good character can serve in such a case is to raise an inference that the plaintiff is not guilty of the specific acts charged, hence the rule excluding evidence of character to prove conduct in civil actions operates to exclude the evidence. Proof of general good character might properly be introduced by the plaintiff in rebuttal of proof of general bad character under the general rule governing the admission of rebuttal evidence.⁸

Seduction.—In a criminal prosecution for seduction, the character for chastity of the female alleged to have been seduced is one of the important issues. The penal statutes defining the offense usually make the previous chastity of the female an essential element. Where this is not done, it is properly implied in view of the accepted understanding of the nature of the offense.⁹ The words used to express this chastity requirement in the various statutes differ, and this is the chief cause of what appears to be a decided lack of harmony in the decisions in respect to the use of proof of specific acts of unchastity and proof of general reputation for chastity. Where the statute provides that the female must have been of "previous chaste character," specific acts of lewdness may be shown;¹⁰ but general bad reputation for chastity is inadmissible, as the question is not what was the reputation of the female, but what was her actual character.¹¹ Where the statute

5. *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386 (1897); *Sprague v. Craig*, 51 Ill. 288 (1869); *Hughes v. Nolte*, 7 Ind. App. 526, 34 N. E. 745 (1893); *Jones v. Layman*, 123 Ind. 569, 24 N. E. 363 (1889); *Haymond v. Saucer*, 84 Ind. 3 (1882).

6. *Colburn v. Marble*, 196 Mass. 376, 82 N. E. 28, 124 Am. St. Rep. 561 (1907); *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642, 25 Am. & Eng. Ann. Cas. 960 (1911), reversing 138 App. Div. 680, 123 N. Y. Suppl. 632 (1910).

7. § 3274.

8. See *McKane v. Howard*, 202 N.

Y. 181, 95 N. E. 642, 25 Am. & Eng. Ann. Cas. 960 (1911).

9. *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17 (1883); *People v. Clark*, 33 Mich. 112 (1876).

10. *State v. Prizer*, 49 Iowa 531, 31 Am. Rep. 155 (1878); *People v. Kenyon*, 5 Parker's Cr. Rep. 254 (1862); affirmed 26 N. Y. 203, 84 Am. Dec. 177 (1863); *Crozier v. State*, 1 Parker's Cr. Rep. 453 (1854). See also, *Safford v. State*, 1 Parker's Cr. Rep. 474 (1854).

11. *State v. Reinheimer*, 109 Iowa 624, 80 N. W. 669 (1899); *State v. Prizer*, 49 Iowa 531, 31 Am. Rep. 155

requires that the female must have been of "good repute" or of "good repute for chastity," the defendant may not introduce evidence of specific acts of unchastity on the part of the prosecutrix, as such evidence is immaterial. The proof must be confined to general reputation for chastity.¹² These decisions proceed on the theory that a woman may be actually unchaste and yet not have acquired a reputation for unchastity. The construction of the statutes involved in them may be justified only by maintaining that the respective legislatures intended that the woman's reputation should be regarded as of more value than her actual character. The courts of Missouri have reached a different conclusion in construing a similar statute, holding that the accused may give evidence of particular acts of lewdness by the female as well as of her general reputation for unchastity.¹³ These decisions look beyond the phrasing of the statute and have regard for the well-settled general definition of the offense.¹⁴ Evidence of particular

(1878); *People v. Kenyon*, 5 Parker's Cr. Rep. 254 (1862); *affirmed* 26 N. Y. 203, 84 Am. Dec. 177 (1863).

In a prosecution for seduction under a statute which provides that "no conviction shall be had if, on the trial, it is proved that such woman was, at the time of the alleged offense, unchaste," the defendant may not show that the general reputation of the prosecutrix is bad but he may give evidence of particular acts of unchastity. *Suther v. State*, 118 Ala. 88, 24 So. 43 (1898).

Reputation received for corroboration.— In jurisdiction where the presumption of the chastity of the female is regarded as overcome by the presumption of the innocence of the accused, thus throwing the burden of proving the chastity of the female upon the people, evidence of her general reputation for chastity is received to corroborate her own testimony upon that point. *Ex parte Vandiveer*, 4 Cal. App. 650, 88 Pac. 993 (1907); *State v. Lockerby*, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656 (1892).

In a prosecution under L. O. L., §

2076, providing that any person who, under a promise of marriage, shall seduce and have illicit connection with any unmarried female of previous chaste character shall be punished, etc., specific acts of lewdness by the prosecutrix may be shown and her general reputation for chastity may be shown to impeach or corroborate the evidence of specific acts, as it is the character of the woman which is her shield and not her reputation. *State v. Meister*, 60 Ore. 469, 120 Pac. 406 (1912).

12. *State v. Atterbury*, 59 Kan. 237, 52 Pac. 451 (1898); *State v. Bryan*, 34 Kan. 63, 8 Pac. 260 (1885); *Russell v. State*, 77 Neb. 519, 110 N. W. 380 (1906); *Foley v. State*, 59 N. J. L. 1, 35 Atl. 105 (1896); *Bowers v. State*, 29 Ohio St. 542 (1876).

13. *State v. Wheeler*, 94 Mo. 252, 7 S. W. 103 (1887); *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374 (1885), *overruling* *State v. Brassfield*, 81 Mo. 151 (1883).

14. "The word "*seduce*," though a general term, and having a variety of meanings, according to the subject to which it is applied, has, when it

acts of lewdness on the part of the prosecutrix has been allowed to be shown by the accused in prosecutions under statutes which are silent on the question of the chastity of the female.¹⁵ This is clearly the reasonable view to be taken in all cases where it is not objectionable to the obvious intent of the legislature. It is well settled that if the accused attacks the character of the prosecutrix for chastity whether by showing specific acts of lewdness¹⁶ or otherwise,¹⁷ the people may rebut by showing the good character of the prosecutrix for chastity. This evidence can have but one logical purpose where it is introduced in rebuttal to specific acts, namely, to raise an inference that the prosecutrix is not guilty of those acts.

Mitigation of damages.—The possession of a particular trait of character or the contrary by one of the parties to an action or, more frequently, the mere reputation in that regard must often be determined before the amount of damages can be properly fixed. In such cases, character is not used in its evidentiary capacity in any sense. The question is purely one of the substantive law of damages. The character or reputation in question becomes a fact in issue. The finding of a good character or reputation may warrant an assessment of a large amount of damages, while a contrary finding may properly result in a small award of damages or none at all. Reputation rather than actual character is usually investigated as that is commonly the important consideration. However,

is used with reference to the conduct of a man towards a female, a precise and determinate signification, and is universally understood to mean an enticement of her on his part to the surrender of her chastity by means of some art, influence, promise or deception calculated to accomplish that object, and to include the yielding of her person to him, as much as if it was expressly stated.' . . . Any evidence, therefore, which shows, or materially tends to show that there was, at the time the alleged offense is charged to have been committed, *no chastity*, in the given case cannot be otherwise than competent and relevant. . . . Is it not 'the *gravamen*' of the state's complaint that a

pure and chaste female has been rendered impure and unchaste by the seduction and illicit connection of the defendant?" *State v. Patterson*, 88 Mo. 88, 96, 57 Am. Rep. 374 (1885), per Sherwood, J.

15. *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17 (1883); *People v. Clark*, 33 Mich. 112 (1876).

16. *State v. Reinheimer*, 109 Iowa 624, 80 N. W. 669 (1899); *State v. Lenihan*, 88 Iowa 670, 56 N. W. 292 (1893); *State v. Shean*, 32 Iowa 88 (1871); *State v. Meister*, 60 Oreg. 469, 120 Pac. 406 (1912).

17. *Knight v. State*, 147 Ala. 93, 41 So. 850, 119 Am. St. Rep. 58 (1906); *Smith v. State*, 107 Ala. 139, 18 So. 306 (1894).

it is difficult to always draw a line of demarcation between these two closely related (in law) intangible subjects.

In actions for breach of a promise of marriage, the bad character of the plaintiff may be shown for the purpose of reducing damages,¹⁸ the theory being that the mental suffering caused by such a breach is less in the case of a woman of bad character than where the woman is of good character. It is immaterial, as far as the question of damages is concerned, that the defendant may have known of the plaintiff's bad character before making the promise.¹⁹ This situation must be distinguished from a case where the evidence of the bad character of the plaintiff is offered as a defense to the action. In defamation actions, evidence of the bad reputation of the plaintiff is commonly received in mitigation of damages.²⁰ The evidence may be regarded as relevant upon the theory that one should not be compensated for the loss of that which he did not possess at the time of the alleged injurious act. According to this view it is clearly reputation and not character which is involved as the libel or slander can go no farther than to injure the reputation and it is for an injury to the reputation that damages are sought. The evidence may also be sometimes relevant on the theory that the mental suffering is less in the case of a person of bad character.²¹ Character then becomes the important consideration, reputation being merely evidence of it. The evidence can be properly admitted on this theory only when damages are

18. *Burnett v. Simpkins*, 24 Ill. 264 (1860); *Denslow v. Van Horn*, 16 Iowa 476 (1864); *McGregor v. McArthur*, 5 U. C. C. P. 493 (1856).

19. *Burnett v. Simpkins*, 24 Ill. 264 (1860); *Denslow v. Van Horn*, 16 Iowa 476 (1864).

20. *Indiana*.—*McCabe v. Platter*, 6 Blackf. 405 (1843).

Kentucky.—*Campbell v. Bannister*, 79 Ky. 205, 2 Ky. L. Rep. (abstract) 72 (1880); *Smith v. Lovelace*, 1 Duv. 215 (1864).

Massachusetts.—*Howland v. Blake Mfg. Co.*, 156 Mass. 543, 569 (1892); *Leonard v. Allen*, 11 Cush. 241 (1853).

Minnesota.—*Lydiard v. News Co.*, 110 Minn. 140, 124 N. W. 985, 19 Am. & Eng. Ann. Cas. 985 (1910).

South Carolina.—*Sawyer v. Eifert*, 2 Nott & M. 511, 10 Am. Dec. 633 (1820).

Virginia.—*McNutt v. Young*, 8 Leigh 542 (1837).

United States.—See *Wright v. Schroeder*, 30 Fed. Cas. No. 18,091, 2 Curt. 548 (1855).

Ireland.—*Bell v. Parke*, 11 Ir. C. L. 413 (1860).

21. "It follows as the day the night that if the person libelled is an abandoned character, if he or she lacks the sensibilities of a pure and upright person, such a person necessarily suffers less in mind than those who possess such qualities." *Osterheld v. Star Co.*, 146 App. Div. 388, 393, 131 N. Y. Suppl. 247 (1911), per Woodward, J.

sought for mental distress. There is a conflict of authority in regard to the kind of reputation which may be shown in mitigation of damages. That both the general reputation and the reputation for the particular trait involved should be admissible, either singly or in conjunction seems reasonable;²² but, in some jurisdictions, general reputation alone is received,²³ in others, only general reputation for the particular trait involved,²⁴ while, in others, both general reputation and reputation for the trait involved are regarded as admissible.²⁵ The defendant in a suit for malicious prosecution may show the bad general character or reputation of the plaintiff to mitigate damages.²⁶ In actions of this sort also, it is reputation rather than character which is ordinarily regarded as important. This is correct upon principle where damages are asked for injury to reputation only. As a damaged reputation is

22. "There can be nothing more unreasonable than that a person, who by a long course of vice has proved himself to be so destitute of every moral principle as to be capable of committing any crime, should be entitled to recover the same damages in an action of slander as a person of spotless fame, merely because he had not acquired any general character with regard to the particular crime, of which he has been accused. It is within our daily experience that there are persons in every community so destitute of character, or rather, so notorious for their bad characters, as to furnish good grounds of belief that they are capable of committing many offences, of which they may never have been accused, and for which they may not have acquired any particular character." *Sawyer v. Bifert*, 2 Nott & McC. (S. C.) 511, 512, 10 Am. Dec. 633 (1820), per Mr. Justice Nott.

23. *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624 (1894). Compare *Bathrick v. Post*, 50 Mich. 629 (1883). See *Campbell v. Campbell*, 54 Wis. 90, 11 N. W. 456 (1882).

24. *Eastland v. Caldwell*, 2 Bibb. (Ky.) 21, 4 Am. Dec. 668 (1810); *Anthony v. Stevens*, 1 Mo. 254 (1822); *Moyer v. Moyer*, 49 Pa. St. 210

(1865); *Conroe v. Conroe*, 47 Pa. St. 198 (1864). Compare *Steinman v. McWilliams*, 6 Pa. St. 170 (1847).

25. *Clark v. Brown*, 116 Mass. 504 (1875). See *Lamos v. Snell*, 6 N. H. 413, 25 Am. Dec. 468 (1833); *Burford v. McLuny*, 1 Nott & M. 268 (1818); *Lincoln v. Chrisman*, 10 Leigh (Va.) 338 (1839); *McNutt v. Young*, 8 Leigh (Va.) 542 (1837); *Powell v. Harper*, 5 C. & P. 590 (1833).

26. *Connecticut*.—*Chatfield v. Bunnell*, 69 Conn. 511, 37 Atl. 1074 (1897).

Illinois.—*Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169 (1885).

Maine.—*Fitzgibbon v. Brown*, 43 Me. 169 (1857).

Massachusetts.—*Bacon v. Towne*, 4 Cush. 217 (1849).

Minnesota.—*Hlubek v. Pinske*, 84 Minn. 363, 87 N. W. 939 (1901).

Missouri.—*Gregory v. Chambers*, 78 Mo. 294 (1883).

New Jersey.—*O'Brien v. Frazier*, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170 (1885).

Oregon.—*Gee v. Culver*, 13 Oreg. 598, 11 Pac. 302 (1886).

West Virginia.—*Vinal v. Core*, 18 W. Va. 1 (1881).

less seriously affected by an injurious act, proof of a bad reputation will logically tend to reduce damages. However, where damages are sought not only for injury to reputation caused by the alleged malicious prosecution, but also for injury to the feelings, an inquiry into actual character would be proper upon the theory that a person of bad character is less likely to suffer from an injury to the feelings than is a person of good character. This distinction is of little moment, owing to the fact that character is proved by reputation. In civil actions for seduction, the defendant may in mitigation of damages introduce evidence of the bad general reputation of the female for chastity²⁷ and of specific acts of lewdness.²⁸ Where a mother sought damages for selling liquor to her minor son, proof that it was the habit of the boy to become intoxicated was held admissible to mitigate damages for injury to the mother's feelings.²⁹

§ 3309. (*Inferences Other Than Conduct*); Character a Probative Fact.—The character of a person may be evidentiary in connection with its effect upon the belief or knowledge of another person. It may also throw some light on the intent or motive with which an act was done.

A question which frequently arises in negligence actions is whether an employer had knowledge of the incompetency of an employee. Upon this question it is proper to show the reputation of the employee as tending to prove that the employer knew of his

27. Arkansas.—Simpson v. Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52 (1891).

Connecticut.—Mott v. Goddard, 1 Root 472 (1792).

Delaware.—Robinson v. Burton, 5 Harr. 335 (1851).

Indiana.—Gemmell v. Brown, 25 Ind. App. 6, 56 N. E. 691 (1900).

Iowa.—West v. Druff, 55 Iowa 335, 7 N. W. 636 (1880).

Michigan.—Stoudt v. Shephard, Jr., 73 Mich. 588, 41 N. W. 696 (1889).

Missouri.—Carder v. Forehand, 1 Mo. 504, 14 Am. Dec. 317 (1826).

New York.—Wandell v. Edwards, 25 Hun 498 (1881).

Pennsylvania.—Kenderdine v. Phelin, 9 Leg. Int. 54, 1 Phila. (Pa.) 343 (1852).

Tennessee.—Reed v. Williams, 5 Sneed 580, 73 Am. Dec. 157 (1858).

Wisconsin.—Stewart v. Smith, 92 Wis. 76, 65 N. W. 736 (1896) (specific acts admissible).

England.—Verry v. Watkins, 7 C. & P. 308, 32 E. C. L. 628 (1836).

28. Gemmell v. Brown, 25 Ind. App. 6, 56 N. E. 691 (1900); Wandell v. Edwards, 25 Hun (N. Y.) 498 (1881) (specific acts admissible).

29. Liebler v. Carrel, 155 Mich. 196, 118 N. W. 975, 15 Detroit Leg. N. 976 (1908).

incompetency.¹ In homicide cases, also, in which a plea of self-defense is made, the state of mind of the accused, at the time the alleged crime was committed, in respect to whether or not he was in actual fear of serious bodily injury at the hands of the deceased, becomes material. The reputation of the deceased, or his character known at the time to the accused, in reference to turbulence, violence, etc., may throw much light on this question and the defendant may introduce evidence of such reputation.² In a prosecu-

§ 3309-1. *Alabama*.—Cook & Scott v. Parham, 24 Ala. 21 (1853).

Illinois.—Metropolitan, etc., R. Co. v. Fortin, 203 Ill. 454, 67 N. E. 979 (1903); Western Stone Co. v. Whalen, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244 (1894); Chicago & Alton R. Co. v. Sullivan, 63 Ill. 293 (1872).

Indiana.—Pittsburg, etc., R. Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111 (1871).

Kansas.—Cherokee Co. v. Dickson, 55 Kan. 62, 39 Pac. 691 (1895).

Maine.—See Dunham v. Rackliff, 71 Me. 345 (1880).

Maryland.—Norfolk, etc., R. Co. v. Hoover, 79 Md. 253, 29 Atl. 994, 25 L. R. A. 710, 47 Am. St. Rep. 392 (1894).

Massachusetts.—Cooney v. Commonwealth Ave. St. Ry. Co., 196 Mass. 11, 81 N. E. 905 (1907); Carson v. Canning, 180 Mass. 461, 62 N. E. 964 (1902); Monahan v. Worcester, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226 (1890); Gahagan v. B. & L. R. Co., 1 Allen 187, 79 Am. Dec. 724 (1861). Compare Driscoll v. Fall River, 163 Mass. 105, 39 N. E. 1003 (1895).

Michigan.—Hilts v. Cha. & G. T. R. Co., 55 Mich. 437, 21 N. W. 878 (1885); Davis v. D. & M. R. Co., 20 Mich. 105 (1870).

New York.—Park v. N. Y. C. & H. R. R. Co., 155 N. Y. 215, 49 N. E. 674, 63 Am. St. Rep. 663 (1898); Youngs v. N. Y., O. & W. R. Co., 154 N. Y. 764, 49 N. E. 1106 (1897).

North Carolina.—Alley v. Char-

lotte Pipe & Foundry Co., 74 S. E. 885 (1912).

Utah.—Stoll v. Daly Mining Co., 19 Utah 271, 57 Pac. 295 (1899).

Wisconsin.—Moering v. Falk Co., 141 Wis. 294, 124 N. W. 402, 18 Am. & Eng. Ann. Cas. 926 (1909).

United States.—Pittsburgh Rys. Co. v. Thomas, 174 Fed. 591, 98 C. C. A. 437 (1909); Central Vt. R. Co. v. Ruggles, 75 Fed. 953, 21 C. C. A. 575 (1896); Baltimore & O. R. Co. v. Henthorne, 73 Fed. 634, 19 C. C. A. 623 (1896).

2. *Alabama*.—Williams v. State, 74 Ala. 18 (1883); De Arman v. State, 71 Ala. 351 (1882); Storey v. State, 71 Ala. 329 (1882).

Arkansas.—Palmore v. State, 29 Ark. 248 (1874).

California.—People v. Howard, 112 Cal. 135, 44 Pac. 464 (1896); People v. Edwards, 41 Cal. 640 (1871).

Colorado.—Davidson v. People, 4 Colo. 145 (1878).

Delaware.—State v. Short, (Del. O. & T., 1912) 82 Atl. 239.

Florida.—Garner v. State, 28 Fla. 113, 9 So. 335, 29 Am. St. Rep. 232 (1891).

Georgia.—Bowie v. State, 19 Ga. 1 (1855); Keever v. State, 18 Ga. 194, 63 Am. Dec. 269 (1855).

Idaho.—People v. Stock, 1 Idaho 218 (1868).

Illinois.—Carle v. People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208 (1902).

Indiana.—Boyle v. State, 97 Ind. 322 (1884); Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370 (1858).

tion for receiving stolen goods, the accused may properly show the good reputation of the person from whom he received the goods as evidence that he took the same without knowledge that they were stolen goods.³

Proof of the reputation of a person against whom legal proceedings have been taken may be relevant in determining the good faith or the contrary of the party instituting the proceeding. For example, where one causes the arrest for larceny of a person whose reputation for honesty he knows to be bad, there is a stronger probability that he acted in good faith and with probable cause than would be the case if the person arrested were known by the person causing the arrest to have an excellent reputation for honesty and integrity. This fact is employed evidentially in suits for malicious prosecution. The plaintiff in such an action may show his good reputation prior to the institution of the alleged malicious prosecution, known to the defendant or so generally known that the defendant must be presumed to have known it, as proof of want of probable cause for commencing the proceedings in question.⁴

Kansas.—*State v. Spangler*, 64 Kan. 661, 68 Pac. 39 (1902); *Wise v. State*, 2 Kan. 419, 85 Am. Dec. 595 (1864).

Kentucky.—*Riley v. Com.*, 94 Ky. 266, 22 S. W. 222, 15 Ky. L. Rep. 46 (1893).

Louisiana.—*State v. Napoleon*, 104 La. 164, 28 So. 972 (1901); *State v. Vallery*, 47 La. Ann. 182, 16 So. 745, 49 Am. St. Rep. 363 (1895).

Michigan.—*Brownell v. People*, 38 Mich. 732 (1878).

Minnesota.—*State v. Dumphey*, 4 Minn. 438 (1860).

Mississippi.—*Smith v. State*, 75 Miss. 542, 23 So. 260 (1898); *King v. State*, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681 (1888).

Missouri.—*State v. Pettitt*, 119 Mo. 410, 24 S. W. 1014 (1893).

Montana.—*State v. Shafer*, 22 Mont. 17, 55 Pac. 526 (1898).

Nevada.—*State v. Pearce*, 15 Nev. 188 (1880).

New York.—*Abbott v. People*, 86 N. Y. 460 (1881).

North Carolina.—*State v. Byrd*, 121 N. C. 684, 28 S. E. 353 (1897).

Oregon.—*State v. Morey*, 25 Oreg. 241, 35 Pac. 655, 36 Pac. 573 (1894).

Pennsylvania.—*Com. v. Straesser*, 153 Pa. St. 451, 26 Atl. 17 (1893).

South Carolina.—*State v. Turner*, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706 (1888).

Tennessee.—*Williams v. State*, 3 Heisk. (Tenn.) 376 (1872).

Texas.—*Dorsey v. State*, 34 Tex. 651 (1871).

Vermont.—*State v. Lull*, 48 Vt. 581 (1876).

Virginia.—*Harrison v. Com.*, 79 Va. 374, 52 Am. Rep. 634 (1884).

Compare State v. Field, 14 Me. 244, 31 Am. Dec. 52 (1837); *Com. v. Mead*, 12 Gray (Mass.) 167, 71 Am. Dec. 741 (1858); *Com. v. Hilliard*, 2 Gray (Mass.) 294 (1854).

3. *Com. v. Gazzolo*, 123 Mass. 220, 25 Am. Rep. 79 (1877).

4. *McIntire v. Levering*, 148 Mass. 546, 20 N. E. 191, 2 L. R. A. 517, 12 Am. St. Rep. 594 (1889); *Carp*

The defendant may show the bad reputation of the plaintiff to rebut proof of want of probable cause.⁵

Evidence of character has, also, to some extent, been used to show the intent or motive of a person in doing a particular act.⁶ For example, in a prosecution for having possession of counterfeit money with intent to utter, the good character of the accused has been considered admissible to show absence of criminal intent.⁷ Evidence of character has been similarly used in a prosecution for carrying concealed weapons brought under a statute making criminal intent an element of the offense.⁸ Also, in homicide cases, where the fact that the accused killed the deceased was unquestioned, the character of the accused has been regarded as admissible on the question of criminal intent to aid the jury in de-

v. Queens Ins. Co., 203 Mo. 295, 101 S. W. 78 (1907); *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650 (1901); *Bank of Miller v. Richmon*, 64 Nebr. 111, 89 N. W. 627; *affirmed*, 68 Nebr. 731, 94 N. W. 998 (1903); *Southern Ry. Co. v. Mosby*, 112 Va. 169, 70 S. E. 517 (1911).

5. *Alabama*.—*Martin v. Hardesty*, 27 Ala. 458, 62 Am. Dec. 773 (1855).

Illinois.—*Banker v. Ford*, 152 Ill. App. 12 (1909); *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265 (1902); *Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169 (1885).

Kentucky.—*Gregory v. Thomas*, 2 Bibb. (Ky.) 286, 5 Am. Dec. 608 (1811).

Massachusetts.—*Bacon v. Towne*, 4 Cush. 217 (1849).

Michigan.—*Thurkettle v. Frost*, 137 Mich. 115, 100 N. W. 283, 11 Detroit Leg. N. 202 (1904).

Minnesota.—*Shea v. Cloquet Lumber Co.*, 97 Minn. 41, 105 N. W. 552 (1906); *Hlubek v. Pinske*, 84 Minn. 363, 87 N. W. 939 (1901).

Missouri.—*Peck v. Chouteau*, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236 (1886); *Miller v. Brown*, 3 Mo. 94, 23 Am. Dec. 693 (1832).

Montana.—*Martin v. Cascadden*, 34 Mont. 308, 86 Pac. 33 (1906).

Ohio.—*Britton v. Granger*, 13 Ohio Cir. Ct. Rep. 281, 7 Ohio Dec. 182 (1897); *Miles v. Salisbury*, 21 Ohio Cir. Ct. Rep. 333, 12 O. C. D. 7 (1895).

See also, *Gee v. Culver*, 13 Oreg. 598, 11 Pac. 302 (1886).

Opinion Excluded.—It is error for the defendant in an action for malicious prosecution to testify that before he commenced the alleged malicious prosecution a person informed him that the plaintiff was a man of bad character and had been in trouble in various places, as the evidence is pure hearsay. *Hart v. McLaughlin*, 51 App. Div. (N. Y.) 411, 64 N. Y. Suppl. 827 (1900).

6. "In all criminal cases in this state, wherever a criminal intention is of the essence of the offense, evidence of the general character of the defendant is relative to the issue, and, therefore, admissible." *Coffee v. State*, 1 Tex. App. 548, 550 (1877), per Ector, J.

7. *United States v. Kenneally*, 26 Fed. Cas. No. 15,522 (5 Bliss 122) (1870).

8. *Lann v. State*, 25 Tex. App. 495, 8 S. W. 650, 8 Am. St. Rep. 445 (1888).

termining the grade of the offense or possibly to reach the conclusion that no crime had been committed, but that the killing was justifiable.⁹ That character is relevant for such a purpose seems clear,¹⁰ but slight attention, apparently, has been given to this phase of the relevancy of character in criminal actions by the bench and bar.

§ 3310. Proof of Character; "Reputation is Character."—

Notwithstanding the undoubted probative value of evidence of particular acts and the knowledge and opinion of individuals in arriving at a just estimate of a person's character, it is the almost universal rule that character must be proved by evidence of reputation,¹ which is a form of hearsay and may be appropriately designated as composite hearsay, or a community expression of opinion in which the individual voices blend and are indistinguishable. The use of reputation for this purpose is justified on the ground of necessity, other evidence not being available, as most jurisdictions for reasons of administrative policy exclude evidence of particular acts and personal opinions. It is regarded as reliable because of the discussion of the character of each individual and the close observation of his conduct by the other members of a community, as is customary in community life. The practice of proving char-

9. *Kee v. State*, 28 Ark. 155 (1873); *Davis v. State*, 10 Ga. 101 (1851). See also *State v. Jones*, 14 Mo. App. 595 (1883); *People v. Gleason*, 1 Nev. 173 (1865); *Hogan v. State*, 36 Wis. 226 (1874).

10. § 3272.

§ 3310-1. *Alabama*.—*Evans v. State*, 109 Ala. 11, 19 So. 535 (1895); *Thompson v. State*, 100 Ala. 70, 14 So. 878 (1893); *Jones v. State*, 76 Ala. 8 (1884); *De Arman v. State*, 71 Ala. 351 (1882).

Arkansas.—*Campbell v. State*, 38 Ark. 498 (1882).

California.—*People v. Gordan*, 103 Cal. 568, 37 Pac. 534 (1894).

Delaware.—*State v. Conlan*, 3 Pennw. 218, 50 Atl. 95 (1901).

Georgia.—*Powell v. State*, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277 (1897).

Iowa.—*State v. Blackburn*, 136 Iowa, 743, 110 N. W. 275 (1908).

Massachusetts.—*Hunneman v. Phelps*, 199 Mass. 15, 85 N. E. 169 (1908).

Michigan.—*Smitley v. Pinch*, 148 Mich. 670, 112 N. W. 686, 14 Detroit Leg. N. 324 (1907).

Minnesota.—*Lydiard v. News Co.*, 110 Minn. 140, 124 N. W. 985, 19 Am. & Eng. Ann. Cas. 985 (1910).

Nebraska.—*Berneker v. State*, 40 Nebr. 810, 59 N. W. 372 (1894).

Nevada.—*State v. Pearce*, 15 Nev. 188 (1880).

Washington.—*State v. Coates*, 22 Wash. 601, 61 Pac. 726 (1900).

England.—Reg. v. Rowton, 10 Cox C. C. 25, 11 Jur. (N. S.) 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865).

Canada.—*King v. William Long*, 11 Que. K. B. 328, 5 Can. Cr. Cas. 493 (1902).

acter by reputation has become so well settled and is of such long standing that the words character and reputation are often spoken of in law as though they were synonymous.²

§ 3311. (*Proof of Character; "Reputation is Character"*); Scope of Rule; Application.—The rule requiring that character be proved by reputation extends to all cases where character is used in an evidentiary capacity except where it is sought to show that a witness is of bad character for the purpose of raising an inference that he is not telling the truth, a process commonly called impeachment. In the last mentioned class of cases, the bad reputation of the witness for truth and veracity may always be shown but in addition proof of a prior conviction of a crime and cross-examination as to particular acts of misconduct are ordinarily allowed. The rule extends also to all other cases in which general character must be established, whether on direct proof or in rebuttal. Those in which the state of the pleadings make proof of one particular act of misconduct sufficient, as, for example, of one of unchastity in defence of an action for breach of a promise of marriage, must be distinguished. The rule finds application in a large variety of cases. A few instances may be mentioned. Reputation must be relied on to prove the character of the accused in prosecutions for crimes as, for example, in cases of assault,¹ burglary,² homicide³ and larceny.⁴ The character of the deceased in a case of homicide⁵ and that of the assaulted party in a case of

2. "Character, in this connection, is the estimate which the public places on the person, the subject of the inquiry; his reputation." *De Arman v. State*, 71 Ala. 351, 361 (1882), per Stone, J. "The term 'character' has a dual meaning. It may refer to a person's private life, about which the public may have no knowledge, or it may mean the character a person enjoys by reputation. In libel actions 'character' is synonymous with 'reputation.'" *Lydiard v. Daily News Co.*, 110 Minn. 140, 145, 124 N. W. 985, 19 Am. & Eng. Ann. Cas. 985 (1910), per Lewis, J.

§ 3311-1. *State v. Schlegel*, 50 Kan. 325, 31 Pac. 1105 (1893); *Allen v. Com.*, 145 Ky. 409, 140 S. W.

527 (1911); *State v. Dalton*, 27 Mo. 13 (1858).

2. *State v. Coates*, 22 Wash. 601, 61 Pac. 726 (1900).

3. *People v. Haydon*, (Cal. App. 1912) 123 Pac. 1102; *Basye v. State*, 45 Nebr. 261, 63 N. W. 811 (1895).

4. *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136 (1901); *State v. Bloom*, 68 Ind. 54, 34 Am. Rep. 247 (1879); *Leonard v. State*, 53 Tex. Cr. App. 187, 109 S. W. 149 (1908).

5. *Williams v. State*, 74 Ala. 18 (1883); *Alexander v. State*, 8 Ga. App. 531, 69 S. E. 917 (1911); *Thomas v. People* 67 N. Y. 218 (1876); *Gay v. State*, 40 Tex. Cr. App. 242, 49 S. W. 612 (1899).

assault and battery ⁶ must be shown by proving general reputation for the particular trait involved. Likewise, a witness who has been impeached by evidence of a bad reputation for truth and veracity can be sustained only by evidence of a good reputation in that particular.⁷

§ 3312. (*Proof of Character; "Reputation is Character;" Scope of Rule*); A Negative Fact.—Society demands of every individual member thereof that he be of upright character or somewhat differently expressed to be of good moral character is regarded as the normal, or at least proper condition of man. Any marked deviation by an individual from the standards of a particular community in this respect excites discussion and comment, while a close adherence thereto is likely to result in an entire or practical absence of any discussion concerning the character and conduct of such individual.¹ This well known fact of everyday experience suffices to render admissible evidence to prove character which is essentially negative. A witness who has been so situated that it is likely he would have heard anything that was said concerning the character or reputation of a particular person may, for the purpose of proving good character, testify that he has never heard any discussion concerning the matter or anything said in regard thereto.² Thus a witness who had known another for thir-

6. *Stevens v. State*, 84 Nebr. 759, 122 N. W. 58, 19 Am. & Eng. Ann. Cas. 121 (1909).

7. *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166 (1877).

§ 3312-1. "To acquire a knowledge of a person's general character, it is not necessary to know all his neighbors, or to hear any one speak of his disposition to tell the truth, or his integrity drawn in question. His virtues may be universally acknowledged and the bright spots so prominent that his reputation exhibits no dark traits. The veracity of such a man would rarely be spoken of, and if at all, in no other than terms of commendation." *Hadjo v. Gooden*, 13 Ala. 718, 722 (1848), per Collier, C. J.

"The reputation and character of

one who quietly and faithfully discharges his legal, civil and religious duties give little occasion for remark, and are seldom the subject of discussion." *Foerster v. United States*, 116 Fed. 860, 861, 54 C. C. A. 210, writ of certiorari denied 187 U. S. 644, 23 Sup. Ct. 844, 47 L. ed. 34 (1902).

2. *Alabama*.—*Hussey v. State*, 87 Ala. 121, 6 So. 420 (1888). See also *Holmes v. State*, 88 Ala. 26, 7 So. 193, 16 Am. St. Rep. 17 (1889).

Arkansas.—*Cole v. State*, 59 Ark. 50, 26 S. W. 377 (1894).

Georgia.—*Hodgkins v. State*, 89 Ga. 761, 15 S. E. 695 (1892); *Flemister v. State*, 81 Ga. 768, 7 S. E. 642 (1888).

Indiana.—*Hallowell v. Guntle*, 82 Ind. 554 (1882). See *Davis v. Foster*, 68 Ind. 238 (1879).

teen or fourteen years, had heard him talked about politically and knew his associates, was held to be competent to testify that he would believe him under oath although the witness had never heard the other's reputation for truth and veracity discussed.³ Also, a witness who has been in such a position that he should know the reputation of a person may testify that the reputation of such person is good even though he may never have heard any discussion or even remarks concerning either his reputation or character.⁴

Iowa.—*State v. Nelson*, 58 Iowa 208, 12 N. W. 253 (1882); *State v. Deitrick*, 51 Iowa 467, 1 N. W. 732 (1879).

Kansas.—*State v. Bryan*, 34 Kan. 63, 8 Pac. 260 (1885).

Maine.—See *State v. Lambert*, 104 Me. 394, 15 Am. & Eng. Ann. Cas. 1055, 71 Atl. 1092 (1908).

Massachusetts.—See *Day v. Ross*, 154 Mass. 13, 27 N. E. 676 (1891).

Michigan.—*Smitley v. Pinch*, 148 Mich. 670, 112 N. W. 286 (1907); *McLaughlin v. Salley*, 46 Mich. 219, 9 N. W. 256 (1881); *Lenox v. Fuller*, 39 Mich. 268 (1878). Compare *Webber v. Hanke*, 4 Mich. 198 (1856).

Minnesota.—*State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769 (1876).

Mississippi.—See *French v. Sale*, 63 Miss. 386 (1885).

Montana.—*Matusevitz v. Hughes*, 26 Mont. 212, 66 Pac. 939, 68 Pac. 467 (1901). See also, *State v. Shafer*, 22 Mont. 17, 55 Pac. 526 (1898).

Nebraska.—See *Berneker v. State*, 40 Neb. 810, 59 N. W. 372 (1894).

Nevada.—See *State v. Pearce*, 15 Nev. 188 (1880).

New York.—*National Bank v. Scriven*, 63 Hun 375, 18 N. Y. Suppl. 277, 44 N. Y. St. Rep. 331 (1892). See also *People v. Van Gaasbeck*, 189 N. Y. 408, 12 Am. & Eng. Ann. Cas. 745, 82 N. E. 718, 22 L. R. A. (N. S.) 650n. (1907); *McAllaster v. Britton*, 43 App. Div. 211, 60 N. Y. Suppl. 39 (1899); *People v. Davis*, 21 Wend. 309 (1839).

Ohio.—See *Gandolfo v. State*, 11

Ohio St. 114 (1860). See *Bucklin v. State*, 20 Ohio 18 (1851).

Pennsylvania.—*Morss v. Palmer*, 15 Pa. St. 51 (1850).

Texas.—See *Boon v. Weathered's Adm'r*, 23 Tex. 675 (1859).

West Virginia.—*State v. Cremeans*, 62 W. Va. 134, 57 S. E. 405 (1907); *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293 (1870). Compare *Clay v. Robinson*, 7 W. Va. 348 (1874).

Wisconsin.—*Spencer v. State*, 132 Wis. 509, 13 Am. & Eng. Ann. Cas. 969, 112 N. W. 462, 122 Am. St. Rep. 989 (1907).

England.—See *Reg. v. Rowton*, 10 Cox Cr. C. 25, 11 Jur. (N. S.) 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865).

Compare *State v. Speight*, 69 N. C. 72 (1873); *U. S. v. Mayer*, Deady 127, 26 Fed. Cas. No. 15,753 (1865).

3. *National Bank v. Scriven*, 63 Hun (N. Y.) 375, 18 N. Y. Suppl. 277, 44 N. Y. St. Rep. 331 (1892).

4. *Alabama*.—*Childs v. State*, 55 Ala. 28 (1876); *Ward v. State*, 28 Ala. 53 (1856); *Hadjo v. Gooden*, 13 Ala. 718 (1848).

California.—*People v. French*, 137 Cal. 218, 69 Pac. 1063 (1902); *Oakland First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748 (1889). Compare *People v. Moan*, 65 Cal. 532, 4 Pac. 545 (1884).

Georgia.—*Powell v. State*, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277 (1897); *Taylor v. Smith*, 16 Ga. ? (1854).

For example, witnesses called to sustain the character of an impeached witness, who were acquainted generally in the town where said witness resided, could properly testify that the reputation of the witness for truth and veracity was good, although they had never heard anyone say anything about it.⁵ It is commonly held that it is unnecessary for a character witness to state that he knows the reputation of the person in question to render negative evidence admissible. He may even state that he does not know such reputation.⁶

Illinois.—*Chicago v. Gurrell*, 137 Ill. App. 377 (1907); *Peters v. Bourmeau*, 22 Ill. App. 177 (1886). See also, *Overstreet v. Dunlap*, 56 Ill. App. 486 (1894); *Gifford v. People*, 148 Ill. 173, 35 N. E. 754 (1893).

Iowa.—*State v. Case*, 96 Iowa 264, 65 N. W. 149 (1895).

Kansas.—*Stevens v. Blake*, 5 Kan. App. 124, 48 Pac. 888 (1897).

Michigan.—*Compare Lee v. Andrews*, 151 Mich. 5, 114 N. W. 672 (1908).

Mississippi.—*Johnson v. State*, 40 So. 324 (1906); *Sinclair v. State*, 87 Miss. 330, 39 So. 522, 2 L. R. A. (N. S.) 553, 112 Am. St. Rep. 446 (1905). See also, *French v. Sale*, 63 Miss. 386 (1885).

Missouri.—*State v. Grate*, 68 Mo. 22 (1878).

Montana.—*State v. Shafer*, 22 Mont. 17, 55 Pac. 526 (1898).

Nebraska.—See *Berneker v. State*, 40 Neb. 810, 59 N. W. 372 (1894).

New York.—*Hand v. Miller*, 58 App. Div. 126, 68 N. Y. Suppl. 531 (1901).

Ohio.—See *Gandolfo v. State*, 11 Ohio St. 114 (1860).

Texas.—*Mitchell v. State*, 51 Tex. Cr. App. 71, 100 S. W. 930 (1907); *Reid v. State*, 57 S. W. 662 (1900); *Hendersos v. State*, 39 S. W. 116 (1897). See also, *Tyler v. State*, 46 Tex. Cr. App. 10, 79 S. W. 558 (1904); *Boon v. Weathered's Adm'r*, 23 Tex. 675 (1859).

Virginia.—*Davis v. Franke*, 33 Gratt. 413 (1880).

Washington.—*State v. Hosey*, 54 Wash. 309, 103 Pac. 12, 22 L. R. A. (N. S.) 670n. (1909).

West Virginia.—See *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293 (1870).

United States.—*Foerster v. U. S.*, 116 Fed. 860, 54 C. C. A. 210, writ of certiorari denied, 187 U. S. 644, 23 Sup. Ct. 844, 47 L. ed. 347 (1902).

5. *Hand v. Miller*, 58 App. Div. (N. Y.) 126, 68 N. Y. Suppl. 531 (1901).

6. *Hodgkins v. State*, 89 Ga. 761, 15 S. E. 695 (1892); *State v. Deitrick*, 51 Iowa 467, 1 N. W. 732 (1879); *McLaughlin v. Salley*, 46 Mich. 219, 9 N. W. 256 (1881); *Lenox v. Fuller*, 39 Mich. 268 (1878); *State v. Cremeans*, 62 W. Va. 134, 57 S. E. 405 (1907). See also *McAlaster v. Britton*, 43 App. Div. (N. Y.) 211, 60 N. Y. Suppl. 39 (1899); *National Bank v. Seriven*, 63 Hun (N. Y.) 375, 18 N. Y. Suppl. 277, 44 N. Y. St. Rep. 331 (1892); *People v. Davis*, 21 Wend. (N. Y.) 309 (1839). *Compare Clay v. Robinson*, 7 W. Va. 348 (1874).

In *Illinois* a witness called to sustain the character of an impeached witness is required to state that he knows the reputation of the person in question for truth and veracity before he can be questioned further, purely negative evidence being regarded as inadmissible in such cases. *Hays v. Johnson*, 92 Ill. App. 80 (1900); *Overstreet v. Dunlap*, 56 Ill. App. 486 (1894); *Magee v. People*, 139 Ill. 138, 28 N. E. 1077 (1891).

Bad character.— Since it is the common experience that bad actions and bad traits of character occasion discussion, while good actions and good traits of character are commonly accepted as a matter of course and rarely provoke a remark, it would seem to follow that silence and absence of discussion in regard to a person's character in the community in which he is known would never have any tendency to prove bad character. Further, if testimony that nothing has ever been heard against a person or that his character has never been discussed, is evidence that such character is good, as we have already seen, such testimony cannot well be at the same time evidence of bad character. In view of these considerations, it is clear that negative evidence of character is properly limited in its application to proof of good character.⁷

§ 3313. (*Proof of Character; "Reputation is Character;" Scope of Rule*); Stage of Application.— The opinion concerning the person in question must have passed the stage of mere rumor in the community and must have become definitely settled before it can be used in accordance with the rule under consideration.¹ The reputation must also be general throughout the community. If the public opinion be decidedly divided, it cannot well be relied on as furnishing any satisfactory proof of character. This restriction is however difficult to observe with exactness as some people who differ from others in such matters will inevitably be found.² The courts have recognized this difficulty but have nevertheless insisted that the reputation shown be substantially general.

7. See *Lenox v. Fuller*, 39 Mich. 268 (1878); *Webber v. Hanke*, 4 Mich. 198 (1856); *French v. Sale*, 63 Miss. 386 (1885); *Tyler v. State*, 46 Tex. Cr. App. 10, 79 S. W. 558 (1904). Compare *Spotswood v. Spotswood*, 4 Cal. App. 711, 89 Pac. 362 (1907).

§ 3313-1. "For the law supposes the latter [reputation] to be true, and therefore admits it as evidence. But it makes no such supposition in favor of a mere report, which we know to be commonly false. Reports may ripen into common reputation and common belief. When they arrive at that stage, it is supposed that they

are true. They have then the best test of their truth, common *opinion* and *belief*, and cease to be mere reports." *Barton v. Morpheus*, 13 N. C. (2 Devereux's Law) 520, 521 (1830), per Henderson, C. J.

2. *Alabama.*— *Jackson v. State*, 78 Ala. 471 (1885); *Hadjo v. Gooden*, 13 Ala. 718 (1848).

Colorado.— *Vickers v. People*, 31 Colo. 491, 73 Pac. 845 (1903).

Illinois.— *Crabtree v. Kile*, 21 Ill. 180 (1859); *Regnier v. Cabot*, 7 Ill. 34 (1845).

Indiana.— *Meyneke v. State*, 68 Ind. 401 (1879); *Fahnestock v. State*, 23 Ind. 331 (1864).

§ 3314. (*Proof of Character; "Reputation is Character," Scope of Rule*); Use of Rumors.—Rumors are not proper evidence of character,¹ but they may be used on the cross-examination of witnesses to good reputation for the ultimate purpose of weakening the force of their testimony. Where a witness testifies that the reputation of a certain person is good, he may be asked on cross-examination if he has not heard of particular acts of misconduct by such person.² The inquiry must be limited to what the

Kansas.—Coates v. Sulan, 46 Kan. 341, 26 Pac. 720 (1891).

Maryland.—Vernon v. Tucker, 30 Md. 456 (1869).

Michigan.—Sandford v. Rowley, 93 Mich. 119, 52 N. W. 1119 (1892).

Mississippi.—French v. Sale, 63 Miss. 386 (1885).

Nebraska.—Matthewson v. Burr, 6 Nebr. 312 (1877).

New Hampshire.—Hersom v. Henderson, 23 N. H. 498 (1851).

North Carolina.—State v. Parks, 3 Ired. Law 296 (1843).

Ohio.—French v. Millard, 2 Ohio St. 44 (1853).

South Carolina.—State v. Turner, 36 S. C. 534, 15 S. E. 602; *affirmed*, 36 S. C. 608, 16 S. E. 687 (1892).

Utah.—State v. Marks, 16 Utah 204, 51 Pac. 1089 (1898).

§ 3314-1. Powers v. Presgroves, 38 Miss. 227 (1859).

2. *Alabama*.—Barnett v. State, 165 Ala. 59, 51 So. 299 (1909); Jones v. State, 120 Ala. 303, 25 So. 204 (1899); De Arman v. State, 71 Ala. 351 (1882); Ingram v. State, 67 Ala. 67 (1880).

California.—People v. Burke, (Cal. App. 1912) 122 Pac. 435; People v. Mayes, 113 Cal. 618, 45 Pac. 860 (1896).

Georgia.—Dotson v. State, 136 Ga. 243, 71 S. E. 164 (1911). See Puliam v. Cantrell, 77 Ga. 563, 3 S. E. 280 (1886).

Indiana.—Randall v. State, 132 Ind. 542, 32 N. E. 305 (1892); Wachstetter v. State, 99 Ind. 290, 50 Am. Rep. 94 (1884).

Iowa.—State v. Kimes, 152 Iowa 240, 132 N. W. 180 (1911); State v. Lee, 95 Iowa 427, 64 N. W. 284 (1895); State v. Arnold, 12 Iowa 479 (1861).

Kansas.—State v. McDonald, 57 Kan. 537, 46 Pac. 966 (1896).

Kentucky.—Newton v. Com., 102 S. W. 264, 31 Ky. L. Rep. 327 (1907).

Louisiana.—State v. Oteri, 128 La. 939, 55 So. 582, 24 Am. & Eng. Ann. Cas. 878 (1911); State v. Pain, 48 La. Ann. 311, 19 So. 138 (1896).

Massachusetts.—Com. v. O'Brien, 119 Mass. 342, 20 Am. Rep. 325 (1876).

Missouri.—State v. Parker, 172 Mo. 191, 72 S. W. 650 (1903).

Nebraska.—Basye v. State, 45 Neb. 261, 63 N. W. 811 (1895). *Compare* Patterson v. State, 41 Neb. 538, 59 N. W. 917 (1894); Olive v. State, 11 Neb. 1, 7 N. W. 444 (1881).

Oregon.—State v. Ogden, 39 Oreg. 195, 65 Pac. 449 (1901).

Pennsylvania.—Com. v. McClellan, 42 Pa. Super. Ct. 504 (1910).

South Carolina.—State v. Dill, 48 S. C. 249, 26 S. E. 567 (1897).

United States.—United States v. Whittaker, 6 McLean 342 (1855).

England.—Rex v. Hodgkiss, 7 C. & P. 298 (1836).

Contra, Jennings v. People, 189 Ill. 320, 59 N. E. 515 (1901); Aiken v. People, 183 Ill. 215, 55 N. E. 695 (1889); State v. Holly, 155 N. C. 485, 71 S. E. 450 (1911); Marcom v. Adams, 122 N. C. 222, 29 S. E. 333 (1898).

Compare State v. Wilson, 158 N.

witness has heard, facts within his personal knowledge not being regarded as competent.³ The evidence is not received with a view to affecting the reputation of the person under consideration.⁴ It is said to be admitted to test the credibility⁵ or the knowledge⁶ of the witness. This practice of cross-examination may be justified on either ground and the inquiry may disclose both a lack of knowledge and a lack of fairmindedness. A witness to good character in effect says either that he never has heard anything to the discredit of the person in question or that whatever bad rumors may have been existent are outweighed and overwhelmed by a general

C. 599, 73 S. E. 812 (1912); *Luther v. Skeen*, 53 N. C. 356 (8 Jones' Law) (1861).

"It is certainly competent on cross-examination of a witness who testified as to defendant's good moral character to ask whether there have not been rumors or reports in the community as to his bad character with reference to particular transactions." *State v. Kimes*, 152 Iowa 240, 249, 132 N. W. 180 (1911), per McClain, J.

"To inquire touching the rumors and suspicions about a man prevalent in the community in which he lives is to inquire touching his reputation. Rumor and suspicion, whether well or ill founded, is what reputation is made of. It is the very warp and woof of reputation. Reputation is made up not so much of what a man actually is or does as what he is supposed or suspected to be or do." *State v. Green*, 127 La. 830, 832, 54 So. 45 (1911), per Provosty, J.

Where a character witness called by the defendant in a prosecution for forgery testified that he had never heard anything against the defendant, it was proper to ask him on cross-examination if he did not know that the defendant was once arrested for attempting to pass counterfeit money. *Com. v. Wilson*, 44 Pa. Sup. Ct. 183 (1910).

3. *White v. State*, 111 Ala. 92, 21 So. 330 (1896); *Moulton v. State*, 88

Ala. 116, 6 So. 758, 6 L. R. A. 301 (1889); *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494 (1850); *Kearney v. State*, 68 Miss. 233, 8 So. 292 (1890). Compare *Rucker v. State*, 135 Ga. 391, 69 S. E. 541 (1910).

4. *White v. State*, 111 Ala. 92, 21 So. 330 (1895); *Newton v. Com.*, 102 S. W. 264, 31 Ky. L. Rep. 327 (1907); *Com. v. Wilson*, 44 Pa. Super. Ct. 183 (1910).

"It is firmly settled by the adjudications in this country that, upon cross-examination of a witness who has testified to general reputation, questions may be propounded for the purpose of eliciting the source of the witness' information, and particular facts may be called to his attention, and [he may be] asked whether he ever heard them. This is permissible, not for the purpose of establishing the truth of such facts, but to test the witness' credibility, and to enable the jury to ascertain the weight to be given to his testimony." *Basye v. State*, 45 Nebr. 261, 285, 63 N. W. 811 (1895), per Norval, C. J.; *distinguishing Olive v. State*, 11 Nebr. 1, 7 N. W. 444 (1881), and *Patterson v. State*, 41 Nebr. 538, 59 N. W. 917 (1894).

5. *Andrews v. State*, 159 Ala. 14, 48 So. 858 (1909).

6. *State v. Oteri*, 128 La. 939, 55 So. 582, 24 Am. & Eng. Ann. Cas. 878 (1911).

good reputation. Hence, it follows that an inquiry as to bad rumors may disclose that the witness is willfully testifying to good reputation without regard to the facts or that he has no sufficient knowledge upon which to base his testimony. The practice borders dangerously near the forbidden practice of proving reputation by specific acts of misconduct,⁷ as testimony of a rumor that a person has been guilty of a particular act naturally must have some effect on the minds of the jurors in the direction of injuring the reputation of such person, although the presiding judge may expressly charge that it is to be considered as affecting the weight of the testimony of the witness only. There is authority for the doctrine that the cross-examination in regard to rumors must be limited to rumors of acts of misconduct which have relation to the particular trait of character which is under consideration;⁸ for example, if the character of a person for peaceableness is under consideration, only rumors of acts which indicate a contrary character can be inquired into.⁹ The view is correct in principle, but it is not always adhered to in actual practice.¹⁰

§ 3315. (*Proof of Character; "Reputation is Character";*)
What Witnesses are Qualified; Adequate Knowledge.— Before a witness can testify as to the reputation of a person he must have adequate knowledge in regard thereto.¹ His personal opinion con-

7. § 3341.

8. *People v. Haydon*, (Cal. App. 1912) 123 Pac. 1102; *People v. Burke*, (Cal. App. 1912) 122 Pac. 435.

9. If the defendant in a homicide case introduces evidence of his character for peace and quiet, it is proper on cross-examination of the witnesses who give the evidence to ask if they have not heard of specified acts of violence committed by the defendant. *Goodwin v. State*, 102 Ala. 87, 15 So. 571 (1892); *De Arman v. State*, 71 Ala. 351 (1882).

10. *Hunter v. State*, 133 Ga. 78, 65 S. E. 154 (1909); *State v. Oteri*, 128 La. 939, 55 So. 582, 24 Am. & Eng. Ann. Cas. 878 (1911); *Com. v. Knapp*, 45 N. H. 148 (1863).

On a trial for homicide a witness, who testified that the character of the defendant as a peaceable citizen was

good, was properly asked on cross-examination in regard to the reputation of the defendant for violating the laws governing the manufacture and sale of intoxicating liquors. *State v. Dill*, 48 S. C. 249, 26 S. E. 567 (1896).

§ 3315-1. *Campbell v. Bannister*, 79 Ky. 205, 2 Ky. L. Rep. 72 (abstract) (1880); *R. v. Rowton*, 10 Cox Cr. C. 25, 11 Jur. (N. S.) 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865).

"Adequate knowledge of the prevailing opinion on the subject is a prerequisite to the admissibility of such evidence." *Allison's Exec. v. Wood*, 104 Va. 765; 771, 52 S. E. 559, 7 Am. & Eng. Ann. Cas. 721 (1906), per Whittle, J.

A character witness may not tes-

cerning it is inadmissible.² It is a common practice for the party producing the witness to make preliminary inquiries in reference to his opportunities for acquiring that knowledge. This practice is not objectionable³ but it is generally regarded as unnecessary, a simple question propounded to the witness as to whether he knows the reputation in question being sufficient, unless the presiding judge in his discretion directs further inquiries. The form of such question is not important, if it brings out the fact of the knowledge of the witness in regard to the reputation of the particular person in the community in which he may be assumed to have gained a reputation.⁴ Such an inquiry is absolutely essential where bad reputation is sought to be shown and it must be answered in the affirmative before the witness can proceed;⁵ but, where good reputation is sought to be proved, it is allowable for the witness to testify in regard to it even though he states that he knows nothing directly concerning it, provided he has been so situated as to be likely to know.⁶ Inquiries into the means and extent of the knowledge are properly left for cross-examination.⁷

The reputation which is regarded as possessing probative force is that which has been established in the community or communities in which the person, whose character is involved, has either lived or followed some occupation for a considerable time. It is

tify on the basis of what he heard at an earlier trial. *Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110 (1907).

2. *State v. Thoemke*, 11 N. D. 386, 92 N. W. 480 (1903); *Holsey v. State*, 24 Tex. App. 35, 5 S. W. 523 (1887).

3. *Peeples v. State*, 103 Ga. 629, 29 S. E. 691 (1898).

4. "While it is proper in questions of this nature to ask the witness if he knows the general reputation of the witness whose testimony is sought to be impeached, yet the mere omission of the word 'general' will not affect the testimony of the witness, provided it is shown by the questions and answers that he, in fact, does know the general reputation of the witness, and words meaning the same thing are used, when the witness is asked if he is acquainted with the

reputation of the witness for truth and veracity in the vicinity in which he lives." *State v. Madison*, 23 S. D. 584, 588, 122 N. W. 647 (1909), per Corson, J.

5. *Bush v. State*, 109 Ga. 120, 34 S. E. 298 (1899); *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, *petition for writ of error dismissed*, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. ed. 80 (1887); *Carlson v. Winterson*, 147 N. Y. 652, 723, 42 N. E. 347, *rehearing denied*, 148 N. Y. 754, 43 N. E. 936 (1895). See also *People v. Seldner*, 62 App. Div. (N. Y.) 357, 71 N. Y. Suppl. 35 (1901).

6. § 3312.

7. *Nelson v. State*, 32 Fla. 244, 13 So. 361 (1893); *Cunningham v. Underwood*, 116 Fed. 803, 811, 53 C. C. A. 99 (1902).

the composite result of the blending of all the voices for and against him in such community or communities. The building of a reputation is necessarily a slow process as is likewise the acquiring by a witness of knowledge regarding it. Obviously, no definite rule can be laid down as to the length of time which the witness must have resided in or near the place where the reputation obtains or how near such place he must have resided in order to competently report such reputation. The circumstances of each case must control the determination of these questions to a great extent. The decisions indicate that it is largely a matter for administrative discretion.⁸ Although residence by the character witness in the vicinity where the reputation in question obtains is commonly spoken of as being essential, it is simply a convenient term indicating more or less continued presence in the vicinity. It is the means and extent of the knowledge of the witness irrespective of residence which is logically controlling.⁹ That the witness should be acquainted personally with the one whose character is under consideration is not logically essential. It is not necessary that he should have heard the majority of the members of the community express themselves in reference to the matter.¹⁰ However, hearing such person's character discussed on two¹¹ or three occasions or by two or three people¹² has been regarded as insufficient to render a witness competent to testify to bad reputation.

8. *Hadjo v. Gooden*, 13 Ala. 718 (1848) (witness lived twelve miles away, but stated that he knew the reputation of the person in question in the latter's neighborhood. Competent); *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315 (1899) (witness resided in a town five miles from person in question. Competent); *People v. Seldner*, 62 App. Div. (N. Y.) 357, 71 N. Y. Suppl. 35 (1901) (witness knew party for fifteen years, knew a great many people who knew him and had conversed with them concerning him. Competent); *Com. v. Wilson*, 44 Pa. Super. Ct. 183 (1910) (witness had seen party only a few hours each year when on annual vacation visits and did not know any people who knew him. Incompetent).

9. *State v. Cunningham*, 130 La. 749, 58 So. 558, 559 (1912).

10. *Robinson v. State*, 16 Fla. 835 (1878); *Cunningham v. Underwood*, 116 Fed. 803, 53 C. C. A. 99 (1902).

"If the witness has heard enough to enable him to say that he thinks he knows the prevailing opinion entertained of him [person inquired about] by his acquaintances, he is competent to speak, subject to cross-examination, as to sources, extent, and correctness of his information." *Cunningham v. Underwood*, 116 Fed. 803, 53 C. C. A. 99 (1902), per Lurton, J.

11. *Com. v. Rogers*, 136 Mass. 158 (1883).

12. *Matthewson v. Burr*, 6 Nebr. 312 (1877)|

§ 3316. (*Proof of Character; "Reputation is Character;" What Witnesses are Qualified*); Administrative Practice upon Cross-Examination.—Witnesses who testify in regard to the reputation of a person may be freely cross-examined with a view to determining the value of their testimony. The questions may relate to the extent and sources of their knowledge¹ and to the time when the reputation involved existed.² Inquiries may also be made as to rumors and reports which have come to the witnesses' ears in regard to specific misdeeds of the person whose reputation is in question, for the purpose of discrediting their testimony by showing lack of knowledge or deliberate intention to testify to good reputation without regard to the facts.³

§ 3317. (*Proof of Character; "Reputation is Character;" What Witnesses are Qualified*); Action of Appellate Court. — The appellate court will reverse where a witness is allowed to testify that a person's reputation is bad and it appears that the witness had no sufficient knowledge as, for example, where he based his testimony on what he had heard at a prior trial.¹ Likewise, it is reversible error to continue the examination of a witness called to prove that a person has a bad character after he has stated that

§ 3316-1. *Alabama*.—*De Arman v. State*, 71 Ala. 351 (1882).

Florida.—*Nelson v. State*, 32 Fla. 244, 13 So. 361 (1893).

Indiana.—*Baehner v. State*, 25 Ind. App. 597, 58 N. E. 741 (1900).

North Carolina.—*State v. Holly*, 155 N. C. 485 (1911).

Canada.—*Rex v. Barsalou*, 4 Can. Cr. Cas. 347 (1901).

See also, *Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325 (1876); *State v. Holly*, 155 N. C. 485, 71 S. E. 450 (1911).

2. *Halloway v. People*, 181 Ill. 544, 54 N. E. 1030 (1899).

3. *Alabama*.—*Barnett v. State*, 165 Ala. 59, 51 So. 299 (1909); *Andrews v. State*, 159 Ala. 14, 48 So. 858 (1909); *Jones v. State*, 120 Ala. 303, 25 So. 204 (1898); *White v. State*, 111 Ala. 92, 21 So. 330 (1895).

California.—*People v. Burke*, (App. 1912) 122 Pac. 435; *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933 (1893).

Georgia.—*Dotson v. State*, 136 Ga. 243, 71 S. E. 164 (1911); *Hunter v. State*, 133 Ga. 78, 65 S. E. 154 (1909).

Iowa.—*State v. Kimes*, 152 Iowa 340, 132 N. W. 180 (1911).

Kentucky.—*Newton v. Com.*, 102 S. W. 264, 31 Ky. L. Rep. 327 (1907).

North Carolina.—*State v. Wilson*, 158 N. C. 599, 73 S. E. 812 (1912).

Pennsylvania.—*Com. v. Wilson*, 44 Pa. Super. Ct. 183 (1910); *Com. v. McClellan*, 42 Pa. Super. Ct. 504 (1910).

South Carolina.—*State v. Dill*, 48 S. C. 249, 26 S. E. 567 (1896).

For further discussion of the use of rumors, see § 3314.

§ 3317-1. *Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110 (1907).

he has no knowledge of the reputation of such person.² On the other hand, the appellate court will not reverse because a witness, called to prove bad character is not allowed to answer a question concerning the reputation of the person in question where it was not shown that the witness had any knowledge of such reputation;³ nor is it reversible error to admit testimony as to the good character of a defendant in a criminal action by witnesses who have lived in the same community as the defendant but who have never heard of any particular facts affecting his character.⁴ Likewise a departure from the regular order of examining a character witness is not ground for reversal, as the trial court has a wide discretion in such matters.⁵

Error in the admission of evidence having no tendency to prove the crime charged but only to show that the defendant was immoral and guilty of criminal practices in his profession is not sufficient to warrant a reversal, where the competent evidence received establishes the guilt of the defendant beyond a reasonable doubt.⁶

§ 3318. (*Proof of Character; "Reputation is Character;" What Witnesses are Qualified*); Knowledge of the Community.

— The community or neighborhood in which an admissible reputation may exist must be one in which the person in question is well known. It is commonly said that the community where he resides is the proper one to be considered when proof of reputation is attempted.¹ This view is clearly the result of the idea, generally accepted in earlier times, that a person ordinarily spends the greater part of his time and is best known in the place of his residence. Formerly, this was doubtless true but in modern times it not infrequently happens that a person really spends a very small part of his waking hours in the place where he technically

2. *State v. Grinden*, 91 Iowa 505, 60 N. W. 37 (1899).

3. *Bush v. State*, 109 Ga. 120, 34 S. E. 298 (1899).

4. *State v. Hamilton*, 151 Iowa 533, 132 N. W. 44 (1911).

5. *Nelson v. State*, 32 Fla. 244, 13 So. 361 (1893).

6. *People v. Cleminson*, 250 Ill. 135, 95 N. E. 157 (1911).

§ 3318-1. *Alabama*.—*Rutledge v.*

Rowland, 161 Ala. 114, 49 So. 461 (1909).

District of Columbia.—*Lomax v. United States*, 37 App. D. C. 414 (1912).

Nebraska.—*Younger v. State*, 80 Neb. 201, 114 N. W. 170 (1907).

New York.—*Conkey v. People*, 1 Abb. Dec. 418, 5 Park. Cr. Rep. 31 (1860).

England.—*Foulkes v. Sellway*, 3 Esp. N. P. 236 (1801).

resides. As a result, a less accurate estimate of his character can be formed in the place of his residence than in some other locality. The really logical place to consider in making proof of a person's reputation is the one where he is best known.² His reputation in a community where it is not shown that he is known is inadmissible.³ No fixed rule can be stated in regard to the time which a person must spend in a community in order that evidence of his reputation there may be given. The facts and circumstances of each case must be largely controlling. That a person spent three months on a visit in a certain place has been held insufficient to make evidence of his reputation there admissible.⁴

§ 3319. (*Proof of Character; "Reputation is Character;" What Witnesses are Qualified; Knowledge of the Community*); Limited Communities.—The size of the "community" in which an admissible reputation may exist cannot in the nature of things be defined by any hard and fast rules. It is not reasonably to be expected, moreover, that courts will always agree in deciding cases in which the facts in this respect are similar. It may be said generally, however, that the "community" must be of such a size and description as to make possible the growth of what may be called an unbiased reputation, that is, a general opinion which is controlled by something other than partisan sentiment. Aside from this, little can be done by way of pointing out the law in this regard beyond referring to a few judicial precedents. For example the local reputation in a neighborhood remote from the party's residence, and among a community not having the means of forming, from personal acquaintance, an

2. See *Powers v. Presgrove*, 38 Miss. 227 (1859); *Holsey v. State*, 24 Tex. App. 35, 5 S. W. 523 (1887).

"It would be a very narrow view of the subject to say, that a man had no reputation for honesty except in the immediate vicinity of his residence. He might not have much dealing with his immediate neighbors, but might do all his dealing a dozen miles away. Many merchants in cities spend only the nights and Sundays at their homes, which are many miles away from their places of business, and they are not as well known

as to their honesty, where they reside as where they do business. It would be absurd to say that no inquiry could be made about their reputation except in the immediate vicinity of their homes. The best evidence of a man's reputation is the opinion of him expressed by the community who know him best." *State v. Henderson*, 29 W. Va. 147, 168, 1 S. E. 225 (1886), per Johnson, Pres.

3. *Griffin v. State*, 14 Ohio St. 55 (1862).

4. *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27 (1887).

intelligent judgment on the subject, has been rejected.¹ The good reputation of the defendant in a homicide case among the workmen with whom he worked upon the railroad has likewise been held inadmissible.² On the other hand, the reputation of a certain workman in the shop where the plaintiff, in a negligence action, was injured as an incompetent, careless man has been received,³ as has also the good reputation for peaceableness of the deceased in a homicide case while he was confined in a state prison, the crime having been committed there by a fellow-convict.⁴

§ 3320. (Proof of Character; "Reputation is Character;" What Witnesses are Qualified; Knowledge of the Community); Place of Trial.—Under the modern practice in relation to the function of the jury, the reputation of a party at the place of trial is of no moment, merely as such. However, where the place of trial is also that of a party's residence and has been for some years, evidence of reputation may be properly restricted to reputation in that place; and it has been held that, where the defendant in a criminal action had resided for the five years preceding the trial at the place of trial, his reputation at places where he had formerly resided could not be shown.¹ On the contrary, it has been held an abuse of discretion for a trial judge to exclude evidence of the reputation of the defendant in a criminal case at a former residence, although he had resided at the place of trial for about six years.²

§ 3321. (Proof of Character; "Reputation is Character;" What Witnesses are Qualified; Knowledge of the Community); Reputation at a former Residence.—Whether evidence of a person's reputation in a place where he formerly resided

§ 3319-1. *Griffin v. State*, 14 Ohio St. 55 (1862).

2. *Sacchini v. United States*, 38 App. D. C. 371 (1912).

3. *Kansas City Consol., etc., Co. v. Taylor*, (Tex. Civ. App. 1908) 107 S. W. 889.

4. "It matters not that the witnesses had only known the deceased in the prison; there was a large community there, and a man can have a general character there as well as elsewhere; and it is just as competent for witnesses to speak of that char-

acter there where they have become acquainted with it, as at any other place. The evidence may not be entitled to much weight, as a very bad man may behave well under compulsion in prison, but there can be no doubt of its competency." *Thomas v. People*, 67 N. Y. 218, 224 (1876), per Earl, J.

§ 3320-1. *Stat v. Potts*, 78 Iowa 656, 43 N. W. 534, 5 L. R. A. 814 (1889).

2. *Fry v. State*, 96 Tenn. 467, 35 S. W. 883 (1895).

may be introduced depends upon the facts of the particular case.¹ The circumstance which is of greatest importance is the length of time the person has lived in his present place of residence. The more recently he came to the latter, the more likely is evidence of his reputation at his former residence to be regarded as admissible and *vice versa*. Thus, evidence of reputation in a community where the person in question formerly resided has been received where he had been removed from thence for a period of six weeks,² sixty days,³ several months,⁴ less than a year,⁵ two years,⁶ and three years;⁷ but it has been rejected where the period was ten years.⁸ Two reasons exist for this attitude of the courts, namely, a rather recent reputation has more probative force than one that is remote in point of time and a person who has recently become a member of a community may not have had time to acquire a reputation there, making it necessary to resort to his reputation in the community of his former residence. Where the witness has known the reputation of the person whose character is under consideration for a long time, the fact that the two may have lived a few miles apart for some time before the trial will not ordinarily render evidence of reputation at the place where they both formerly resided inadmissible.⁹

§ 3321-1. "The fact that a person has moved away from a community in which he has lived a long time, when his change of residence is recent, does not render the evidence of his old neighbors as to his reputation incompetent. There is no arbitrary, iron-clad rule in relation to such evidence. It must depend largely upon the circumstances of the particular case. Sometimes it may be sought some distance away, both in point of time and space." *Coates v. Sulau*, 46 Kan. 341, 343, 26 Pac. 720 (1891), per Strang, C.

2. *Louisville, etc., R. Co. v. Richardson*, 66 Ind. 43, 32 Am. Rep. 94 (1879).

3. "Reputation seldom grows in weeks and months, but is the product of time, and we cannot hold . . . that a reputation is ordinarily gained or lost in sixty days; on the contrary, we are firmly convinced that a man

who goes to a new home, leaving a bad reputation at his old, cannot so effectually cast off that reputation in his sixty days' residence at his new abode as to prevent its being given in evidence against him." *Pape v. Wright*, 116 Ind. 502, 510, 19 N. E. 459 (1888), per Elliott, C. J.

4. *Ballew v. State*, 48 Tex. Cr. Rep. 46, 85 S. W. 1063 (1905).

5. *Coates v. Sulau*, 46 Kan. 341, 26 Pac. 720 (1891).

6. *Lawson v. State*, 32 Ark. 220 (1877); *State v. Lanier*, 79 N. C. 622 (1878).

7. *Kelly v. State*, 61 Ala. 19 (1878).

8. *State v. Albanese*, (Me. 1912) 83 Atl. 548.

9. *Prater v. State*, 107 Ala. 26, 18 So. 238 (1894).

A witness who has been acquainted with the accused in a homicide case for twenty-five or thirty years is not

§ 3322. (*Proof of Character; "Reputation is Character;" What Witnesses are Qualified; Knowledge of the Community*); Practice on Cross-Examination.—The cross-examination of a character witness, with a view to determining the value and probative weight of a reputation concerning which he has testified, may properly include inquiries relating to the size and character of the community in which the reputation is alleged to exist, the length of time the person in question has spent there, the opportunities, generally, for a reliable reputation to have become established, the lack of unanimity of opinion among the members of the community and the like. It has been held that a witness to the good character of the defendant in a criminal action may properly be asked on cross-examination as to the reputation of the defendant as to his conduct in a neighborhood where he had formerly resided, the witness, on his direct examination, having referred to certain rumors which had followed the defendant from that neighborhood.¹ The practice upon the cross-examination of a character witness to ascertain his knowledge of the reputation which he asserts to exist is discussed elsewhere.²

§ 3323. (*Proof of Character; "Reputation is Character;" What Witnesses are Qualified; Knowledge of the Community*); Practice on Rebuttal.—Evidence of good reputation can be rebutted only by evidence of bad reputation. Evidence of specific acts of misconduct is inadmissible for that purpose.¹ A

disqualified from testifying to the general reputation of the latter as to peaceableness because of the fact that for five or six years before the trial the accused has lived in a place about ten miles distant from that in which the witness resides and in which the accused, prior to such period of five or six years, had resided. *People v. Van Gaasbeck*, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650n, 12 Am. & Eng. Ann. Cas. 745 (1907).

§ 3322-1 *Beauchamp v. State*, 6 Blackf. (Ind.) 299 (1842).

2. § 3316.

§ 3323-1. *Arkansas*. — *Ware v. State*, 91 Ark. 555, 121 S. W. 927 (1909).

Illinois.—*Waters v. West Chicago*

St. R. Co., 101 Ill. App. 265 (1902).

Iowa.—*State v. Sterrett*, 71 Iowa 386, 32 N. W. 387, 68 Iowa 76, 25 N. W. 936 (1887).

Kansas.—*State v. Frederickson*, 81 Kan. 854, 106 Pac. 1061 (1910).

Louisiana.—*State v. Donelon*, 45 La. Ann. 744, 12 So. 922 (1893); *State v. Farrer*, 35 La. Ann. 315 (1883).

Massachusetts.—*Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325 (1876).

Nebraska.—*Basye v. State*, 45 Neb. 261, 63 N. W. 811 (1895).

New Jersey.—*Bullock v. State*, 65 N. J. L. 557, 47 Atl. 788, 86 Am. St. Rep. 668 (1900).

New York.—*People v. Faulkner*, 55

report concerning a particular fact cannot be shown in rebuttal of evidence of general good reputation.² Neither can a general reputation with respect to a particular offense be shown for that purpose.³ To rebut evidence of a person's reputation, it is, however, allowable to adduce proof of his reputation in a community other than the one which was considered in the testimony of such person's witnesses, provided all other conditions are such as to make the reputation there relevant.⁴ For example, where the defendant in a criminal prosecution had introduced evidence of his good reputation for truth and veracity in the place where he then lived, it was proper for the state to show in rebuttal that his reputation in that respect was bad in a place twelve miles distant where he had lived two and one-half years before.⁵

§ 3324. (Proof of Character; "Reputation is Character;" What Witnesses are Qualified; Knowledge of the Community); Administrative Details.—The trial judge is properly allowed a wide discretion in various details relating to the use of evidence of character. Aside from the matters referred to in

HUN 603, 8 N. Y. Suppl. 376 (1889).
Pennsylvania.—Com. v. Brown, 23 Pa. Super. Ct. 470 (1903).

"Where a party undertakes to show that his reputation is good, or that the reputation of the other party or a witness is bad, he cannot put in evidence particular facts to prove the general reputation he is endeavoring to establish. And to meet evidence of general reputation the opposing party may put in evidence to the contrary of a like general character. But he cannot prove particular facts for the reason that a particular fact does not necessarily establish a general reputation or fairly meet the issue presented, and may also raise collateral issues; and for the further reason that while a party is presumed always to be ready to defend his general reputation, he is not expected to be prepared to meet a distinct and specific charge." Com. v. O'Brien, 119

Mass. 342, 345, 20 Am. Rep. 325 (1876), per Endicott, J.

This principle must not be confused with that which allows the cross-examination of a character witness as to rumors of particular acts by the person whose character is in question.

See §§ 3314 and 3316.

2. Griffin v. State, 14 Ohio St. 55 (1862).

3. On the trial of an indictment for abortion where the defendants gave evidence of their reputation as peaceable, law-abiding citizens, it was error to allow witnesses for the commonwealth to testify that one of the defendants had a general reputation as an abortionist. Com. v. Gibbons, 3 Pa. Super. Ct. 408, 39 Wkly. Notes Cas. 565 (1897).

4. People v. Nunley, 142 Cal. 441, 76 Pac. 45 (1904); State v. Foster, 91 Iowa 164, 59 N. W. 8 (1894).

5. People v. Nunley, 142 Cal. 441, 76 Pac. 45 (1904).

another place,¹ he must pass upon all questions having reference to whether a community, wherein it is sought to be shown that a reputation exists, has such a knowledge of the person in question as to make any reputation which may exist there concerning that person, of any relevancy.² He must decide whether the time at which a reputation sought to be shown existed is too remote to have sufficient probative force to make its consideration by the jury proper.³ He may also in the exercise of his administrative powers limit the number of witnesses to character which may be called by either side.⁴

§ 3325. (Proof of Character; "Reputation is Character;" What Witnesses are Qualified; Knowledge of the Community); Action of Appellate Court.—The well known general principle that an appellate court will not direct a reversal because of the action of the trial judge in matters involving the exercise of his administrative functions unless there has been a manifest abuse by him of his powers, frequently finds application in reviewing on appeal rulings concerning the use of character evidence. For example, it is applied to rulings as to whether the reputation of a person at a place of former residence is admissible,¹ those limiting the number of character witnesses allowed to be sworn² and those in regard to the question of the admissibility of a reputation which is remote in point of time.³ Naturally, courts will not all agree as to whether there has been such an abuse. Thus, it has been held ground for reversal to admit evidence of a party's reputation at a former residence when he had resided at the place of trial for five years.⁴ It has on the other hand been held reversible error to exclude evidence of the reputation of the accused in a criminal action at a place where he had lived six years before.⁵

§ 3324-1. § 3286.

2. § 3318.

3. § 3328.

4. § 3326.

§ 3325-1. *Arkansas*. — *Snow v. Grace*, 29 Ark. 131 (1874).

Indiana.—*Pape v. Wright*, 116 Ind. 502, 19 N. E. 459 (1888).

Iowa.—*State v. Potts*, 88 Iowa 656, 43 N. W. 534, 5 L. R. A. 814 (1889).

Maine.—*State v. Albanes*, (Me. 1912) 83 Atl. 548.

Tennessee.—*Fry v. State*, 96 Tenn. 467, 35 S. W. 883 (1895).

2. See case cited in § 3326.

3. See cases cited in § 3328.

4. *State v. Potts*, 78 Iowa 656, 43 N. W. 534, 5 L. R. A. 814 (1889).

5. *Fry v. State*, 96 Tenn. 467, 35 S. W. 883 (1895).

Limiting the number of character witnesses to six⁶ or even to five⁷ has also been considered no abuse of discretion. On the other hand it has been held error for the trial court to limit the number of the accused's character witnesses to three without previous warning, where the accused had been using the less valuable of his witnesses, reserving those most competent to speak until the last, and the adverse ruling, therefore, caused him to lose the benefit of his strongest character evidence.⁸ A decision from which there could hardly be any dissent holds that the trial court committed an error in rejecting evidence of a person's reputation in a place where he had lived until within sixty days of the time of trial.⁹

§ 3326. (Proof of Character; "Reputation is Character;" What Witnesses are Qualified); Number of Witnesses.—It is well settled that the trial judge may reasonably limit the number of witnesses which each side may call for the purpose of proving character.¹ His determination in this respect will not be reviewed on appeal except in cases where gross abuse of discretion, as the administrative action of the court is frequently termed, is apparent.² The decisions show that the number which has been, in different instances, regarded as a reasonable limitation varies greatly.³ Obviously, circumstances may properly be considered by

6. *State v. Rodriguez*, 115 La. 1004, 40 So. 438 (1906).

7. *Com. v. Thomas*, 31 Ky. L. Rep. 899, 104 S. W. 326 (1907).

8. *Morrison v. State*, 37 Tex. Cr. App. 601, 40 S. W. 591 (1877).

9. *Pape v. Wright*, 116 Ind. 502, 19 N. E. 459 (1888).

§ 3326-1. *State v. Albanes*, (Me. 1912) 83 Atl. 548.

Character witness related to a juror.—That a character witness is related to one of the jurors is no ground for refusing to allow him to testify, even though there are several other witnesses. *People v. Wilson*, 170 Mich. 669, 137 N. W. 92 (1912).

2. *People v. Burke*, (Cal. App. 1912) 122 Pac. 435; *People v. Arnold*, 248 Ill. 169, 93 N. E. 786 (1911); *Com. v. Thomas*, 31 Ky. L. Rep. 899, 104 S. W. 326 (1907).

3. *California*.—*People v. Burke*, (Cal. App. 1912) 122 Pac. 435 (thirteen); *People v. Casselman*, 10 Cal. App. 234, 101 Pac. 693 (1909) (seven).

Illinois.—*People v. Arnold*, 248 Ill. 169, 93 N. E. 786 (1911) (twenty-five).

Kentucky.—*Com. v. Thomas*, 31 Ky. L. Rep. 899, 104 S. W. 326 (1907) (five).

Louisiana.—*State v. Rodriguez*, 115 La. 1004, 40 So. 438 (1906) (six).

Missouri.—*State v. Rutherford*, 152 Mo. 124, 53 S. W. 417 (1899) (six).

Texas.—*Bryant v. State*, (Tex. Cr. App. 1898) 47 S. W. 373 (twenty-four).

A restriction to three witnesses has been held an abuse of discretion.

the presiding judge in reaching his conclusion in the matter. Thus where six witnesses were called by the defendant in a criminal case, it was held not to be error to reject others whose knowledge of his reputation was very slight.⁴ So the fact that the prosecution in a criminal case does not adduce any evidence of bad character may warrant the judge in restricting the number of witnesses to the good character of the accused more than otherwise would be considered reasonable.⁵ Likewise an admission by the prosecution in a criminal action that the character of the accused is good may make it proper to greatly limit the number of character witnesses for the latter⁶ or even make the entire exclusion of such witnesses reasonable.⁷ The trial judge in restricting the number of character witnesses must, however, avoid unfair surprise to a party by announcing his intentions in proper time.⁸ A reasonable practice demands that the limit be fixed before any witnesses are sworn.

Markham v. Herrick, 82 Mo. App. 327 (1899).

4. State v. Rutherford, 152 Mo. 124, 53 S. W. 417 (1899).

5. See People v. Burke, (Cal. App. 1912) 122 Pac. 435; Bryant v. State, (Tex. Cr. App. 1898) 47 S. W. 373.

6. See Manley v. State, (Tex. Cr. App. 1911) 137 S. W. 1137.

7. Beard v. State, 44 Tex. Cr. App. 402, 71 S. W. 960 (1903).

8. "On the trial defendant offered testimony as to his general reputation for peace and quietude being good. On this branch of the case three witnesses were introduced by him, who testified to the above effect. At this juncture the court interposed an inquiry of the state, if they intended to introduce any evidence against the credit of the defendant, to which the district attorney at first stated, 'We do not know,' but then replied that they would not. The court then stated that he would not permit any other testimony of the defendant's character to be introduced by the defendant until the state had introduced testimony against him. Defendant's counsel then stated that they did not anticipate this ruling; that they had

a number of witnesses to prove the good character of the appellant in regard to peace and quietude in the neighborhood where he lived, and they could not anticipate the course the state would pursue; that, if they had known the court intended to limit this character of evidence, they would have put on the stand, instead of the three witnesses, three others who lived in the immediate neighborhood of the defendant, and had known him since his childhood; the others who had been introduced not being so familiar with him. But the court adhered to its ruling, and refused to admit any further testimony on the issue. This action of the court is assigned as error. We believe that it is within the province of the court to limit the number of witnesses upon an issue of this character, but such limitation should be timely. If, when the court's attention was first directed to the fact that the issue was being made, he had then limited the number of witnesses to a side, or, in case the state proposed to use no witnesses, he had restricted the defendant to a reasonable number of witnesses, unless there appears a clear abuse of discretion in

§ 3327. (Proof of Character; "Reputation is Character;" What Witnesses are Qualified); Remoteness in Time.—It has been sometimes judicially intimated that the remoteness of the time when the reputation of which proof is offered existed should not be considered as affecting the admissibility of the evidence, but that it should be received in all cases and the jury allowed to give it whatever weight seems proper.¹ However, that the trial judge may in the exercise of his administrative function exclude evidence of a reputation which existed at a remote date seems reasonably clear upon authority.² This view is logically correct as otherwise the time of the court might often be occupied in considering almost, if not quite, worthless testimony. Furthermore, another rule might result in unfairness to one side or the other, because of inability to produce rebuttal evidence relating to a remote time.³ Naturally, the length of the period which must

the limitation as to the number of witnesses, and that defendant suffered some injury on that account, this court would not revise the action of the lower court. In this case, however, it occurs to us that the action of the court was not timely; and on the suggestion made that other witnesses present were more intimate, and lived nearer appellant, than those introduced, he should have allowed the introduction of a few other witnesses on that issue." *Morrison v. State*, 37 Tex. Cr. App. 601, 605, 40 S. W. 591 (1897), per Henderson, J.

§ 3327-1. "A fact once established is presumed to continue as a fact until the contrary appears. If A. was alive two years ago it will be presumed that he still lives, nothing else appearing. If he was a citizen of Virginia two years ago he is presumed to be such citizen still, nothing else appearing. If he had a bad character two years ago that character is presumed to be still the same, nothing else appearing. If he had a good or bad character one week ago, that fact is *some* evidence that his character is still the same. If he had a bad character two or three years ago that fact

is *some* evidence that his character is still the same, and the weight of the evidence is for the jury." *State v. Lanier*, 79 N. C. 622, 623 (1878), per Faircloth, J. See also *Jones v. State*, 104 Ala. 30, 16 So. 135 (1893).

2. See § 3328.

3. "If a defendant puts in evidence as to good character, it is competent for the prosecution to show bad character, and in order that this right of the prosecution may be effective it is necessary that the evidence on the part of the defendant should be confined to a time not too remote from the date of the commission of the crime. It would be impracticable for the prosecution in most cases to trace the life and habits of a defendant for more than a few years, and to allow him to go back to boyhood and put in proof which it would be out of the power of the prosecution to contradict, or in any manner rebut, however false it might be, would result in an advantage to the defendant which the rule in question never contemplated." *State v. Barr*, 11 Wash. 481, 492, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154 (1895), per Hoyt, C. J.

elapse in order to render a reputation probatively worthless cannot be fixed by a rule which will apply in all cases. The decisions show a variety of rulings in this respect.⁴ The circumstances in each case must be considered. The fact that an ample number of witnesses to a recent reputation may be obtained may justify the exclusion of evidence of one more remote,⁵ while the fact that a remote reputation was probably better established and more reliable than a recent one, because of the greater length of time during which the former was developing, may make proper its admission.⁶ A liberal policy in this regard should be observed in a criminal case where the evidence is purely circumstantial.⁷

§ 3328. (*Proof of Character; "Reputation is Character;" What Witnesses are Qualified; Remoteness in Time*); Question of Administration.—The judge presiding at the trial, having before him all the peculiar facts and circumstances of the case at bar, is logically the proper authority to determine whether a reputation offered to be proved existed at too remote a date to be considered by the jury or otherwise. To admit evidence of this nature of doubtful relevancy or of no relevancy at all wherever it is offered and leave the jury to pass upon its weight would be a waste of time. Of course, after the judge has decided to receive evidence of a reputation, the probative weight to which it is entitled must be determined by the jury and it may disregard the evidence entirely. The ruling of the trial judge should be reversed

4. *Alabama*.—*Jones v. State*, 104 Ala. 30, 16 So. 135 (1893) (seven or eight years, admitted); *Kelly v. State*, 61 Ala. 19 (1878) (three years, admitted).

Arkansas.—*Lawson v. State*, 32 Ark. 220 (1877) (two years, admitted).

California.—*People v. Cord*, 157 Cal. 562, 108 Pac. 511 (1910) (twenty years, excluded).

Louisiana.—*State v. Fontenot*, 48 La. Ann. 305, 19 So. 111 (1896) (seven years, excluded).

Maine.—*State v. Albanes*, (Me. 1912) 83 Atl. 548 (ten years, excluded).

Nevada.—*State v. Espinozei*, 20

Nev. 209, 19 Pac. 677 (1888) (fifteen years, admitted).

New York.—*Graham v. Crystal*, 2 Abb. Dec. (N. Y.) 263, 2 Keyes (N. Y.) 21, 37 How. Pr. (N. Y.) 279 (1865) (eight or ten years, admitted); *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 431 (1847) (four years, admitted).

Tennessee.—*Fry v. State*, 96 Tenn. 467, 35 S. W. 883 (1895) (six years, admitted).

5. See *State v. Albanes*, (Me. 1912) 83 Atl. 548.

6. *Fry v. State*, 96 Tenn. 467, 35 S. W. 883 (1895).

7. *Fry v. State*, 96 Tenn. 467, 35 S. W. 883 (1895).

on appeal only where a gross abuse of discretion is apparent. Authorities are not wanting in support of these views.¹

§ 3329. (Proof of Character; "Reputation is Character;" What Witnesses are Qualified); Absence of Controlling Motive to Misrepresent.—To render evidence of a person's reputation in a given community admissible, there should exist in that community no motive or cause to build up an apparent reputation because of prejudice or partisanship. In order that this result may be obtained the reputation which is received in evidence for the consideration of the jury must be one that was acquired by the person in question before the proceedings in which the reputation is sought to be used could have influenced it in any way, that is, the reputation must have been established *ante litem motam*.¹ This rule is a result of the fact that reputation is merely composite hearsay and is, therefore, admissible only in accordance with the rules governing that class of evidence. It will be remembered that hearsay evidence is never admissible except where the circumstances attending its utterance or formation are such as to

§ 3328-1. Arkansas.—Snow v. Grace, 29 Ark. 131 (1874).

California.—People v. Cord, 157 Cal. 562, 108 Pac. 511 (1910).

Illinois.—Brown v. Luehrs, 1 Ill. App. 74 (1877).

Indiana.—Pape v. Wright, 116 Ind. 502, 19 N. E. 459 (1888).

Maine.—State v. Albanes (Me. 1912) 83 Atl. 548.

Washington.—State v. Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154 (1895).

§ 3329-1. "A different rule will expose the defendant to the great danger of having his character ruined or badly damaged, by the arts of a popular or artful prosecutor, stimulated to activity by the hope of thus making his prosecution successful. Evidence of character is of the nature of hearsay, and the general rule in relation to that kind of testimony is, that it shall not be received if the hearsay be *post litem motam*. . . . The reason for this is, 'that no man

is presumed to be indifferent in regard to matters in actual controversy; for, when the contest has begun, people, generally, take part on the one side or the other—their minds are in a ferment, and if they are disposed to speak the truth, facts are seen by them through a false medium. To avoid, therefore, the mischiefs which would otherwise result, all *ex parte* declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy, are rejected." State v. Johnson, 60 N. C. (Winston's L.) 151, 152 (1863), per Battle, J.

For further authorities, see cases cited in § 3330.

Good reputation.—The good reputation of the defendant which he acquired subsequent to the commission of the offense is properly excluded. Moore v. State, 96 Tenn. 209, 33 S. W. 1046 (1896); Graham v. State, 29 Tex. App. 31, 13 S. W. 1013 (1890).

justify the court in regarding it as reliable.² The rule applies not only to the use of reputation as evidence of character for the purpose of raising an inference as to conduct but to proof of reputation generally. For example, it applies to the proof of the plaintiff's reputation in an action for the breach of a promise of marriage, when offered in mitigation of damages,³ to proving the bad character of the prosecutrix in a case of rape for the purpose of showing that she probably consented to the intercourse⁴ and to proving the unchaste character of the female in an action for seduction.⁵

An exception to the rule herein stated is commonly recognized in the case of a witness. Where the person whose reputation is sought to be shown is a witness, his reputation for truth and veracity may be shown down to the moment of testifying.⁶ No

2. §§ 2725 *et seq.*

3. *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122 (1807); *Capehart v. Carradine*, 4 Strob. (S. C.) 42 (1849).

4. *State v. Ward*, 73 Iowa 532, 35 N. W. 617 (1887); *State v. Verto*, 65 W. Va. 628, 64 S. E. 1025 (1907); *State v. Barrick*, 60 W. Va. 576, 55 S. E. 652 (1906).

5. *Illinois*.—*White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100 (1874).

Indiana.—*Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686 (1889).

Iowa.—*Clifton v. Granger*, 86 Iowa 573, 53 N. W. 316 (1892).

Missouri.—*Morgan v. Ross*, 74 Mo. 318 (1881); *McKern v. Calvert*, 59 Mo. 243 (1875).

New Jersey.—*Coon v. Moffitt*, 3 N. J. L. 169, 4 Am. Dec. 392 (1809).

New York.—*Ayer v. Colgrove*, 81 Hun 322, 30 N. Y. Suppl. 788, 62 N. Y. St. Rep. 751 (1894).

North Carolina.—*State v. Malonee*, 154 N. C. 200, 69 S. E. 786 (1910).

Tennessee.—*Thompson v. Clendening*, 1 Head 287 (1858).

6. *Indiana*.—*Thrawley v. State*, 153 Ind. 375, 55 N. E. 95 (1899).

Kansas.—*Fisher v. Conway*, 21 Kan. 18 (1878).

Mississippi.—*Mask v. State*, 36 Miss. 77 (1858).

New Hampshire.—*State v. Howard*, 9 N. H. 485 (1838).

Pennsylvania.—*Smith v. Hine*, 179 Pa. St. 203, 36 Atl. 222 (1897).

Tennessee.—*Lea v. State*, 94 Tenn. 495, 29 S. W. 900 (1894).

Texas.—*Fassett v. State*, 41 Tex. Cr. App. 400, 55 S. W. 497 (1900).

Vermont.—*Sterling v. Sterling*, 41 Vt. 80 (1868).

Contra, *Reid v. Reid*, 17 N. J. Eq. 101 (1864); *Johnson v. Brown*, 15 Tex. 65 (1879).

"The object of impeaching testimony is to aid the jury in ascertaining the degree of credit due to the witness in question, so far as it may depend on his character for truth. In reason it must be his character at the time of giving his testimony. If it were certainly made known that at the moment of testifying it was good or otherwise, it would be wholly immaterial to inquire what it was at any time before or after. The issue, therefore, relates to that precise time, and hence the form of the question, as a rule, relates to it, and to the neighborhood where he then resided. That form generally bears most di-

distinction is ordinarily made in a case where the witness is also a party to the action,⁷ although there may be often good reason for a different rule in case of a party, for example, the defendant in a prosecution for perjury may have had his reputation for truth and veracity badly injured solely because of such prosecution. The motives of a witness in testifying to a person's reputation are for the consideration of the jury in determining the weight to be given the testimony.⁸

§ 3330. (Proof of Character; "Reputation is Character;" What Witnesses are Qualified; (2) Absence of Constrolling Motive to Misrepresent); Initiation of the *lis mota*.—There is no question concerning the soundness of the rule requiring that a

rectly upon the issue, since impeaching witnesses generally, in fact, testify at the same trial, which is practically at the same time, with the witnesses sought to be impeached, and in the neighborhood where he then resides, and has whatever reputation he does have. But in some cases that reason of the rule fails, and therefore the rule, as to the form of the question, is not inflexible. He may have no actual reputation at the time of testifying, in the neighborhood where he then resides, and yet have a marked reputation in another neighborhood, where he formerly resided." *Brown v. Luehrs*, 1 Ill. App. 74, 77 (1877), per Pleasants, J.

"A different rule would prevent valid objections against witnesses whose character for truth had become bad subsequent to a suit." *State v. Howard*, 9 N. H. 485, 487 (1838), per Upham, J.

"It is his character at the time he testifies that is under investigation, and this is to be established by evidence of his general reputation at that time, and not his reputation at a time prior to the commencement of the suit, which may be a period remote from that at which he testifies." *Smith v. Hine*, 179 Pa. St. 203, 207, 36 Atl. 222 (1897), per Mr. Justice Fall.

7. *Com. v. Hourigan*, 89 Ky. 305, 12 S. W. 550, 11 Ky. L. Rep. 509 (1889); *Lea v. State*, 94 Tenn. 495, 29 S. W. 900 (1894); *Renfro v. State*, 42 Tex. Cr. App. 393, 56 S. W. 1013 (1900). *Contra*, *State v. Marks*, 16 Utah 204, 15 Pac. 1089 (1898).

"The rule [regarding reputation *post litem motam*] is different where the question is the reputation of the defendant, or a witness, as to his truthfulness, in order to affect the credibility of the defendant on trial, who has offered himself as a witness, or of another witness testifying therein. The reputation of the defendant, or the witness, for truthfulness in such case at the time of the trial is admissible, for it is to the act of testifying that the reputation is then addressed and it is to effect his present credibility in the evidence which he is giving." *State v. Sprague*, 64 N. J. L. 419, 423, 45 Atl. 788 (1900), per Lippincott, J.

8. "In considering the weight to be given to the testimony you must consider the nature, temperament and disposition of the witnesses testifying to his character, whether they may not be in sympathy with the defendant." *United States v. Wilson*, 176 Fed. 806, 810 (1910), per Sheppard, J.

reputation to be admissible in evidence must be one that was established *ante litem motam*.¹ However, it must be observed that the initiation of the *lis mota* is not always coincident with the commencement of the legal proceeding in which the reputation is sought to be used in evidence. As the object of the rule excluding evidence of a reputation formed *post litem motam* is to avoid having the reputation colored or affected in any way as a result of the alleged existence of the facts upon which the liability of the defendant, in the action in which the reputation is sought to be used, is founded,² it must be that the *lis mota*, using the term in its broad

§ 3330-1. There is one contrary decision of doubtful soundness which holds that where the defendant in a criminal action gives evidence of his good character up to the time of the commission of the offense charged, the people may show that subsequent to that time his character has been bad, but such evidence should be received with great caution. *Com. v. Sacket*, 39 Mass. (22 Pick.) 394 (1839). See also *Campbell v. Bannister*, 79 Ky. 205, 2 Ky. L. Rep. (abstract) 72 (1880).

2. "But independent of authority, we think the reason of the rule applied by the court below, in which the court extends the evidence up to the time of the arrest, would stop it at the time of the discovery of the fact that the offense had been committed. The only reason for stopping the evidence at either point is, that the probabilities of innocence arising from previous good character may not be destroyed or embarrassed by the fact that the offense under consideration has been committed. If the inquiry may be extended to the time of arrest, it may, upon the same ground, be extended to the moment of the trial. But this cannot, manifestly, be done, because it would cause the particular offense with which the accused is charged to destroy previous good character. After the discovery that an offense has been committed, a previous good character may be de-

stroyed, and a bad one created by discussion of the circumstances connected with the offense, as well before as after the formal charge by legal proceeding is had." *White v. Com.*, 80 Ky. 480, 486, 4 Ky. L. Rep. 373 (1882), per Hines, J.

"Defendant having put his character in issue, witnesses for the state, in rebuttal, were permitted to testify that they knew defendant's general reputation for chastity and morality in the vicinity in which he resided during 1896, and prior to May 25th of that year, and that it was bad. The crime was committed, if at all, in the preceding February, and defendant insists that evidence touching his character should have been restricted to a period preceding the latter date. Manifestly it is improper to introduce evidence showing the talk of people caused by the charge upon which the accused is being tried, and witnesses should state their knowledge of his reputation before being accused thereof; but there was no error in allowing the questions to be asked as they were in this case, for the reason that the undisputed evidence shows that defendant was not accused prior to May 25th, 1896, and the evidence offered by the state could not have been predicated upon any rumors resulting from defendant's conduct towards the prosecutrix." *State v. King*, 9 S. D. 628, 630, 70 N. W. 1046 (1897), per Haney, J.

sense, is initiated at the moment when those facts become known to the public, as at that moment discussion logically may be assumed to commence and the reputations of the various persons connected with the transaction to undergo change.³ Such moment, however, is not easy to determine and, apparently, as a result of this fact, the decisions do not exhibit an entire uniformity as to the time to which an admissible reputation must be limited. Many cases simply hold that proof of a reputation which existed after the doing of the act complained of, as the commission of the crime charged in a criminal case⁴ or the accomplishment of the seduction in a civil action for that offense,⁵ cannot be made. Other cases, with more logic, fix the time after which a reputation may not be shown to exist at some juncture when it may be assumed that the knowledge of the facts becomes public property, for example, the

3. "The proof of chastity should relate to the time preceding the seduction or the date when it became known, as it is manifest that her reputation in that regard would be injuriously affected by the offense itself when revealed, and the very crime would thus become the means of protecting the criminal, and the more notorious the seduction, and the more extensively her shame had been published to the world, the more certain would be the immunity from punishment." *State v. Maloney*, 154 N. C. 200, 202, 69 S. E. 786 (1910), per Walker, J.

4. *Alabama*.—*Robinson v. State*, (Ala. App. 1912) 59 So. 321; *Carter v. State*, (Ala. App. 1912) 59 So. 222; *White v. State*, 111 Ala. 92, 21 So. 330 (1895); *Brown v. State*, 46 Ala. 175 (1871).

California.—*People v. McSweeney*, (Cal. 1894) 38 Pac. 743.

Indiana.—*In re Darrow*, 175 Ind. 44, 92 N. E. 369, 372 (1910).

Iowa.—*State v. Ward*, 73 Iowa 532, 35 N. W. 617 (1887).

Kentucky.—*Allen v. Com.*, 134 Ky.

110, 119 S. W. 795, 20 Am. & Eng. Ann. Cas. 884 (1909).

New Hampshire.—*State v. Forscher*, 43 N. H. 89, 80 Am. Dec. 132 (1861).

North Carolina.—*State v. Holly*, 155 N. C. 485, 71 S. E. 450 (1911).

Ohio.—*Wroe v. State*, 20 Ohio St. 460 (1870).

South Carolina.—*State v. Taylor*, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575 (1900).

Tennessee.—*Moore v. State*, 96 Tenn. 209, 33 S. W. 1046 (1896).

Texas.—*Skaggs v. State*, 31 Tex. Cr. App. 563, 21 S. W. 257 (1893). (reputation of deceased in homicide, acquired after homicide, inadmissible).

West Virginia.—*State v. Verto*, 65 W. Va. 628, 64 S. E. 1025 (1909); *State v. Barrick*, 60 W. Va. 576, 55 S. E. 652 (1906).

United States.—*Spurr v. United States*, 87 Fed. 701, 31 C. C. A. 202, reversed 174 U. S. 728, 19 Sup. Ct. 812, 43 L. ed. 1150 (1898).

5. *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122 (1807).

time of arrest,⁶ charge of offense,⁷ commencement of action,⁸ discovery of offense⁹ and indictment.¹⁰ There is in effect very little disagreement among these decisions, as the commission of the act and the various results therefrom, including legal proceedings, often are so closely associated in point of time as to make the interval of but little moment, as far as applying the rules of evidence in respect to proof of reputation is concerned.

§ 3331. (*Proof of Character; "Reputation is Character"*); Animals.—Common experience indicates that an animal will act even more consistently in harmony with its disposition or character than will one of the human race. This being the case, it follows that evidence of an animal's character in respect to a particular trait is of material assistance in determining how the animal conducted itself on a certain occasion. No objection can be made to the use of such evidence on the ground of exciting an unfair prejudice, as the animal is not on trial, nor does the objection that the consideration of such evidence tends to confuse the issues and unduly prolong the trial assume as much importance as in a case where the character under consideration is that of a party.¹ It would seem, therefore, that evidence of an animal's character, or what might more properly be called its disposition, should be received in all cases where the animal's conduct on a given occasion is in question.² Few decisions on this point are

6. *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396 (1899) (that witness had learned since defendant's arrest that his reputation before arrest was bad, inadmissible); *State v. Sprague*, 64 N. J. L. 419, 45 Atl. 788 (1900).

7. *State v. Laxton*, 76 N. C. 216 (1877); *State v. Johnson*, 60 N. C. (Winston) 151 (1863); *Lea v. State*, 94 Tenn. 495, 29 S. W. 900 (1894); *Carter v. Com.*, 2 Va. Cas. 169 (1819).

8. *Capehart v. Carradine*, 4 Strob. (S. C.) 42 (1849) (breach of marriage promise).

9. *White v. Com.*, 80 Ky. 480, 4 Ky. L. Rep. 373 (1882); *State v. Sprague*, 64 N. J. L. 419, 45 Atl. 788 (1900).

10. *State v. Kinley*, 43 Iowa 294 (1876).

§ 3331-1. § 3274.

2. Proof of the character of a horse has been received to show that it probably acted in such a manner as to be the cause of an accident, *Maggi v. Cutts*, 123 Mass. 535 (1877), and the habit of a dog to rush out and attack passing horses has been received to show that he did it on the occasion in question, *Broderick v. Higginson*, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 269 (1897), but this last mentioned case seems to refer to a fixed habit rather than to a trait of character, such as viciousness or gentleness. On the other hand, it has been held that the character of a dog was in-

available, owing probably to the fact that the acts of the animal in any given case are usually proved beyond question by direct evidence or are conceded.

As in the case of persons, it is only for the purpose of laying the basis for an inference as to conduct that evidence of character can be objectionable. Whenever the character of an animal is relevant for any other purpose³ or is in issue,⁴ evidence of it may be given.

The character of an animal is ordinarily proved by giving evidence of specific acts. This matter is discussed elsewhere.⁵ General reputation has in some instances been received to prove an animal's character⁶ and, again, it has been rejected.⁷ As in the case of persons,⁸ general reputation is not admissible to prove the physical condition of an animal at a particular time.⁹

§ 3332. (*Proof of Character; "Reputation is Character"; Probative Force; Reputation.*)—In theory, the probative force of the general reputation of a person in a community where he is well known as evidence of his character lies in the following more or less generally accepted ideas: that, under ordinary conditions, a person cannot conceal his real self from those with whom he frequently associates, that the character of one's associates is a natural and most interesting topic of conversation making inevitable an intelligent and generally unprejudiced discussion of the character of each member of a community by the other members, resulting in a crystallized general expression which sums up the moral worth of each individual in the community.

admissible to show that it probably killed certain sheep. *East Kingston v. Towle*, 48 N. H. 57 (1868), or to show that it was improbable that it attacked the plaintiff in the action without being first assaulted by him. *KeMy v. Alderson*, 19 R. I. 544, 37 Atl. 12 (1896).

3. In a prosecution for malicious mischief in which the defendant was charged with shooting a mule while it was in his cornfield, evidence of the mule's thievish and unmanageable character should have been received to prove absence of malice on the part of the defendant by showing that he probably shot to protect

his crop. *Wright v. State*, 30 Ga. 325, 76 Am. Dec. 656 (1860).

4. For precedents, see cases cited in §§ 3346, 3347.

5. §§ 3346, 3347.

6. *Murray v. Young*, 12 Bush (Ky.) 337 (1876); *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453 (1889).

7. *Norris v. Warner*, 59 Ill. App. 300 (1894). See also, *Whittier v. Franklin*, 46 N. H. 23, 26, 88 Am. Dec. 185 (1865).

8. § 3287.

9. *Nations v. Love*, (Tex. Civ. App. 1894) 26 S. W. 232 (that a horse had loin distemper).

§ 3333. (*Proof of Character; "Reputation is Character;" Probative Force; Reputation*); An Unreliable Test.— Reputation is doubtless reliable evidence of character in the case of individuals who are habitual violators of their moral and legal obligations and in the case of those who are so consistently upright in all their doings as to occasion commendatory remarks. However, it may often be wholly unreliable in respect to the great mass of persons who cannot properly be said to belong to either of those two classes. A single failure to adhere to the standard of right conduct set up in a community or a report of having done so, whether true or false, may result in a blasted reputation which is no true index of the actual character. The conduct of the average individual in respect to ascertaining the character of a prospective member of his circle of friends serves to illustrate the second rate nature of reputation as evidence of character. One does not in such a case call witnesses to speak as to the general reputation of the person in question. On the contrary, he consults those who have been in a position to form an individual opinion and to have knowledge of particular facts.

§ 3334. (*Proof of Character; "Reputation is Character;" Probative Force; Reputation*); A Decided Anachronism.— The change in living conditions in respect to community life, which has taken place since the days when the rule providing for proof of character by reputation only was established, has been so great that the rule is at present on anachronism, as far as its application in the majority of instances is concerned. The proposition that a person's reputation is a reliable index of his character would hardly receive a very high degree of credit in the mind of an intelligent person living under the conditions which exist in our modern cities. Community life in which any considerable general knowledge of the character of its individual members is possessed by the community at large is rare in the twentieth century city of medium or large size. Even in the smaller cities a person frequently does not know the name or occupation of those living in an adjoining house, while in the large cities the same is true in respect to others living in the same building or apartment. Frequent change in place of residence prevails. Living in hired houses or apartments rather than in permanent homes owned by the occupant is common. The members of a family are scattered

much of the time, one is at a distant institution of learning, one is traveling abroad, the occupation of another requires frequent journeys to distant points, while another gains a livelihood by engaging in some form of employment in a part of his own city remote from his residence. Under such conditions, it is manifestly impossible for a person to gain a community reputation which is trustworthy as evidence of his character. In communities of moderate density of population, homogeneity of race and similarity of occupation, one may logically expect to find the neighborhood reputation of an individual a reliable guage of his character. These conditions were fairly well met in England in the days when the rule under consideration had its origin. The same may also be said concerning rural communities generally to-day.

§ 3335. (*Proof of Character; "Reputation is Character," Probative Force; Reputation*); An Administrative Advantage.

— With all its infelicities in point of principle, the practice of using reputation only as evidence of character presents a striking advantage for administrative purposes. It avoids the introduction of collateral issues and conserves the time of the court.¹ The

§ 3335-1. "The danger of allowing a witness to testify directly as to moral character rather than as to general reputation in the community is that the witness' knowledge of character must almost necessarily be based on specific acts of immorality, and to allow such acts to be gone into with the consequent right of rebutting the testimony as to such specific acts would be to introduce immaterial collateral issues and complicate the trial." *State v. Blackburn*, (Iowa 1907) 110 N. W. 275, 277, per McClain, J.

"The answer to this argument [favoring proof of character by evidence of personal knowledge and belief] is found in overwhelming considerations of practical convenience. If a witness is to be permitted to testify to the character of an accused person, basing his testimony solely on his own knowledge and ob-

servation, he cannot logically be prohibited from stating the particular incidents affecting the defendant, and the particular actions of the defendant which have led him to his favorable conclusion. In most instances it would be utterly impossible for the prosecution to ascertain whether occurrences narrated by the witness as constituting the foundation of his conclusion were or were not true. They might be utterly false, and yet incapable of disproof at the time of trial. Furthermore, even if evidence were accessible to controvert the specific statements of the witness in this respect, its admission would lead to the introduction into the case of innumerable collateral issues which could not be tried out without introducing the utmost complication and confusion into the trial, tending to distract the minds of the jurymen and begot the chief

practice has in its favor the further administrative advantage that the party affected ordinarily is ready to meet proof of general reputation without unfair surprise.² The existence and nature of a given reputation is a fact which may be proved or disproved.³ The practical importance of this may, however, be overestimated. Not only may it fairly be assumed that the defendant in a criminal case will not in the first instance open the consideration of the inference of character from conduct; but even should it chance to be otherwise a rule of court requiring notice to the party affected is calculated to serve every purpose of a just administrative regard in this respect.⁴ On the other hand, the inferences as to actual character based upon conduct may well be conflicting and inconclusive, while the use of illustrative incidents will in many instances present a long series of transactions each of which is corroborative of the others.

§ 3336. (*Proof of Character; "Reputation is Character;" Probative Force*); How Tested.—Like most evidence, that of reputation as a gauge of character is tested, in probative value,

issue in litigation." *People v. Van-Gaasbeck*, 189 N. Y. 408, 418, 82 N. E. 718, 22 L. R. A. (N. S.) 650n., 12 Am. & Eng. Ann. Cas. 745 (1907), per Bartlett, J.

2. *Alabama*.—*McQueen v. State*, 108 Ala. 54, 18 So. 843 (1895).

Kentucky.—*Campbell v. Bannister*, 79 Ky. 205, 2 Ky. L. Rep. (abstract) 72 (1880).

Massachusetts.—*Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325 (1876).

Mississippi.—*Kearney v. State*, 68 Miss. 233, 8 So. 292 (1890).

New York.—*People v. White*, 14 Wend. 111 (1835).

North Carolina.—*Nixon v. McKinney*, 105 N. C. 23, 11 S. E. 154 (1890).

"If an inquiry as to specific facts or acts, or as to the cause producing the reputation, should be indulged, it would often be interminable; and the defendant embarrassed or oppressed, for however well prepared he may be to support his gen-

eral reputation, it cannot be supposed that he is prepared to defend against specific acts or facts; nor is he apprised of a necessity or occasion to defend against them." *McQueen v. State*, 108 Ala. 54, 55, 18 So. 843 (1895), per Brickell, C. J.

3. "That [common reputation] is single in its nature, and but one issue can arise upon it. Nor can the party or the witness be taken by surprise, by such evidence; for it must be known to many, otherwise it is not common reputation. If a bad character therefore be falsely by this evidence, attributed to a witness, it is easily repelled by evidence of the same kind." *Barton v. Morpheus*, 13 N. C., (2 Dev. L.) 520, 521 (1830), per Henderson, C. J.

4. *Martin v. Hardesty*, 27 Ala. 458, 62 Am. Dec. 773 (1857); *Reg. v. Rowton*, 10 Cox Cr. C. 25, 11 Jur. (N. S.) 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865).

upon cross-examination. These tests are several. Prominent among them is a demand for specifications. At this stage, the party injuriously affected by the direct evidence of a witness as to his reputation, may with perfect propriety inquire of the reporting witness as to what specific charges were made against him and as to who made them.¹ The administrative basis for such a rule is thus stated by the Supreme Judicial Court of Massachusetts: "The propriety of allowing the party whose character is impeached by a general statement of his bad reputation for moral worth, to elicit particulars on a cross-examination, seems to follow from the general practice in reference to evidence of bad reputation of a party, more frequently occurring in the case of witnesses, who are impeached. It has been thought useful and favorable to the elucidation of truth in such cases to allow on cross-examination an inquiry as to particulars in the charges, and also in reference to the persons who made them, or gave their opinion as to the character of the individual impeached. We think the ruling was right upon this point."² The statements so elicited are simply hearsay. Their office is to test the intelligence and good faith of the witness, the extent and precision of his information and thereby to enable the jury to weigh his testimony. In other words these specifications do not furnish evidence of the truth of facts stated;³ unless they are available as an admission of the party.⁴

§ 3337. (*Proof of Character; "Reputation is Character;" Probative Force; How Tested*); Contradictory Statements.—

If, upon cross-examination, statements inconsistent with the reputation which has been testified to can be shown it is permissible to do this. The value of the evidence may be tested and the witness discredited by eliciting the fact that he has, at a particular time and place made a statement, contrary to his present testimony, as to the person's character;¹ or by inquiring as to what is the

§ 3336-1. *Leonard v. Allen*, 11 Cush. (Mass.) 241 (1853); *Sawyer v. Eifert*, 2 Nott & M. (S. C.) 511, 10 Am. Dec. 633 (1820).

2. *Leonard v. Allen*, 11 Cush. (Mass.) 241, 245 (1853), per Dewey, J.

3. *Peterson v. Morgan*, 116 Mass.

350 (1874); *Teese v. Huntingdon*, 23 How. (U. S.) 2, 16 L. ed. 479 (1859).

4. For further discussion of cross-examination, see §§ 3316, 3322.

§ 3337-1. *Jackson v. State*, 78 Ala. 471 (1885); *State v. Dove*, 156 N. C. 653, 72 S. E. 792 (1911).

reputation which the latter has acquired from certain specified transactions within the reasonable scope of the direct evidence.² It is, however, the administrative duty of the court to make it clear to the jury that the purpose and effect of this evidence is not to show that the facts are as stated in the questions,³ and, in that way, to show the bad reputation of the person in question.⁴ In other words the court will be careful to point out that the effect of this line of inquiry is limited to the witness who speaks as to reputation, and that the statements themselves are only to be regarded so far as they test the accuracy and good faith of the latter.⁵

§ 3338. (Proof of Character; "Reputation is Character;" Probative Force; How Tested); Inconsistent Statements.—The reporting witness as to reputation may not only be tested upon cross-examination by a demand for the specifications or particulars but also he may be discredited by the proof of deliberative facts. Prominent among these is the circumstance that he has heard or made prior and inconsistent statements. Thus, on a criminal case, a witness who has testified as to the good reputation of the accused, may be asked on cross-examination, as to whether he has not heard rumors to the contrary effect¹ or is not actually aware of facts which are inconsistent with the truth of the reputation which

2. *People v. McKane*, 80 Hun (N. Y.) 322, 30 N. Y. Supp. 95, 9 N. Y. Cr. Rep. 352, 62 N. Y. St. Rep. 6; *affirmed*, 143 N. Y. 455, 38 N. E. 950 (1894).

3. *Alabama*.—*Moulton v. State*, 88 Ala. 116, 6 So. 758, 6 L. R. A. 301 (1889).

Florida.—*Nelson v. State*, 32 Fla. 244, 13 So. 361 (1893).

Indiana.—*Jones v. State*, 118 Ind. 39, 20 N. E. 634 (1888); *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494 (1850); *Redman v. State*, 1 Blackf. 96 (1820).

Iowa.—*State v. McGee*, 81 Iowa 17, 46 N. W. 764 (1890); *State v. Arnold*, 12 Iowa 479 (1861); *Gordon v. State*, 3 Iowa 410 (1856).

Massachusetts.—*Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325 (1876).

Mississippi.—*Kearney v. State*, 68

Miss. 233, 8 So. 292 (1890).

England.—*Reg. v. Rowton*, 10 Cox Cr. C. 25, 11 Jur. (N. S.) 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865).

4. *Terry v. State*, 118 Ala. 79, 23 So. 776 (1897).

5. *Smith v. State*, 103 Ala. 57, 15 So. 866 (1893).

§ 3338-1. *Smith v. State*, 103 Ala. 57, 15 So. 866 (1893); *Goodwin v. State*, 102 Ala. 87, 15 So. 571 (1893); *Hawes v. State*, 88 Ala. 37, 7 So. 302 (1889); *De Arman v. State*, 71 Ala. 351 (1882); *People v. Gordan*, 103 Cal. 568, 37 Pac. 534 (1894); *People v. Ah. Lee Doen*, 97 Cal. 171, 31 Pac. 933 (1893); *Baehner v. State*, 25 Ind. App. 597, 58 N. E. 741 (1900); *McDonel v. State*, 90 Ind. 320 (1883); *People v. Elliott*, 163 N. Y. 11, 57 N. E. 103 (1900).

he has stated.² For example, on an indictment for rape, defendant's witnesses as to reputation were properly asked whether they had heard that his wife had obtained a divorce from him on the ground of adultery and whether this fact affected their opinion as to his good character.³ The purpose of eliciting this evidence and the limitations placed upon its probative effect are thus outlined by the Supreme Court of Alabama: "Opinions, therefore, and rumors and reports, concerning the conduct or particular acts of the party under inquiry, are the source from which, in most instances, the witness derives whatever knowledge he may have on the subject of general reputation; and, as a test of his information, accuracy and credibility, but not for the purpose of proving particular acts or facts, he may always be asked on cross-examination as to the opinions he has heard expressed by members of the community, and even by himself as one of them, touching the character of the defendant or deceased, as the case may be, and whether he has not heard one or more persons of the neighborhood impute particular acts or the commission of particular crimes to the party

2. *Alabama*.—*Barnett v. State*, 165 Ala. 59, 51 So. 299 (1909); *White v. State*, 111 Ala. 92, 21 So. 330 (1895); *Goodwin v. State*, 102 Ala. 87, 15 So. 571 (1893); *Thompson v. State*, 100 Ala. 70, 14 So. 878 (1893); *Moulton v. State*, 88 Ala. 116, 6 So. 758, 6 L. R. A. 301 (1889); *Holmes v. State*, 88 Ala. 26, 7 So. 193, 16 Am. St. Rep. 17 (1889); *De Arman v. State*, 71 Ala. 351 (1882); *Ingram v. State*, 67 Ala. 67 (1880).

California.—*People v. Burke*, (Cal. App. 1912) 122 Pac. 435.

Connecticut.—*State v. Jerome*, 33 Conn. 265 (1866).

Georgia.—*Dotson v. State*, 136 Ga. 243, 71 S. E. 164 (1911).

Illinois.—*Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265 (1902).

Iowa.—*State v. Kimes*, 152 Iowa 240, 132 N. W. 180 (1911); *State v. Arnold*, 12 Iowa 479 (1861).

Kentucky.—*Newton v. Com.*, 102 S. W. 264, 31 Ky. Law Rep. 327 (1907).

Louisiana.—*State v. Oteri*, 128 La.

939, 55 So. 582, 24 Am. & Eng. Ann. Cas. 878 (1911).

Massachusetts.—*Leonard v. Allen*, 11 Cush. 241 (1853).

Michigan.—*People v. Mills*, 94 Mich. 630, 54 N. W. 488 (1893).

Nebraska.—*McCormick v. State*, 66 Nebr. 337, 92 N. W. 606 (1902); *Olive v. State*, 11 Nebr. 1, 7 N. W. 444 (1881).

New Hampshire.—*State v. Knapp*, 45 N. H. 148 (1863).

New York.—*People v. Elliot*, 163 N. Y. 11, 57 N. E. 103 (1900).

North Carolina.—*State v. Murray*, 63 N. C. 31 (1868).

Pennsylvania.—*Com. v. McClellan*, 42 Pa. Super Ct. 504 (1910).

South Carolina.—*Eifert v. Sawyer*, 2 Nott & M. 511, 10 Am. Dec. 633 (1820).

Vermont.—*State v. Reed*, 39 Vt. 417, 94 Am. Dec. 337 (1867).

United States.—*King v. U. S.*, 112 Fed. 988, 50 C. C. A. 647 (1902).

3. *People v. Elliot*, 163 N. Y. 11, 57 N. E. 103 (1900).

under investigation, or reports and rumors to that effect.”⁴ The inquiries must not be concerning facts within the actual knowledge of the witness but must be confined to rumors and reports which have come to his ears.⁵ The testimony thus elicited is not to be considered by the jury as having any bearing on the reputation of the person under consideration.⁶ It is received merely in order that the value of the testimony given by the witness on his direct examination may be properly estimated by the jury.⁷

§ 3339. (Proof of Character; “Reputation is Character;” Probative Force; How Tested); Rebuttal.—To rebut evidence of good reputation evidence of bad reputation must be adduced. Specific acts of misconduct by the person in question cannot be shown for that purpose.¹ The rule is the same even where the evidence of good reputation is brought out on the cross-examination of a witness for the prosecution.²

A contrary view.—It has, however, very anomalously, been held that where the accused, in a criminal case, has relied upon and offered evidence tending to show good character, the government may, in rebuttal, prove particular facts, inconsistent with the character claimed for the defendant.³ A very illuminating discussion of the general reasons in favor of a more extended range of evidence in connection with proof of character is that presented by Chief Justice Erle in the course of his dissenting opinion delivered in the leading case of *Reg. v. Rowton*.⁴

4. *Moulton v. State*, 88 Ala. 116, 119, 6 So. 758, 6 L. R. A. 301 (1889), per McClellan, J.

5. *White v. State*, 111 Ala. 92, 21 So. 330 (1896); *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494 (1850); *Kearney v. State*, 68 Miss. 233, 8 So. 292 (1890).

6. *White v. State*, 111 Ala. 92, 21 So. 330 (1895); *Newton v. Com.*, 102 S. W. 264, 31 Ky. L. Rep. 327 (1907); *Com. v. Wilson*, 44 Pa. Super. Ct. 183 (1910).

7. *Andrews v. State*, 159 Ala. 14, 48 So. 858 (1909); *State v. Oteri*, 128 La. 939, 55 So. 582, 24 Am. & Eng. Ann. Cas. 878 (1911); *Basye v. State*, 45 Nebr. 261, 63 N. W. 811 (1895).

§ 3339-1. For authorities, see § 3323.

2. *Evans v. State*, 109 Ala. 11, 19 So. 535 (1895).

3. *State v. Williams*, 77 Mo. 310 (1883); *State v. Parks*, 109 N. C. 813, 13 S. E. 939 (1891).

4. “What is the principle of admitting evidence of character? I am of opinion that the evidence is admissible for the purpose of showing the disposition of the party accused, and raising a presumption from that disposition, that he had not committed the crime imputed to him. Now, disposition cannot be ascertained directly; it is only to be ascertained by the opinion of others, and the opinion of others must be

§ 3340. (*Proof of Character*); Proof Other Than by Reputation; Inference by Observers.—As a matter of principle, evidence of a probative force in the proof of character, superior at times to that of reputation in the community, might have been utilized

founded either on their own personal experience, or must be founded on the expression of opinion by others whose opinion, if it ought to have any avail, ought to be founded on their personal experience. The point at issue between us is whether the court is at liberty to receive a statement of the repute of a person founded on personal experience of the witness who attends to give in evidence his estimate of the disposition of the prisoner, an estimate of the character of the prisoner, taking it in the sense of disposition, which long personal knowledge and acquaintance of his habits enable him to form. I am of opinion that each source of evidence is admissible: you may have the general rumor prevalent in the neighborhood where the party resides, and, according to my opinion, you may have the personal experience of those who have had abundant opportunity of forming a more real substantial guiding opinion than that which is to be gathered from the casual conversation of persons. According to my experience I never saw a witness examined to character without an inquiry into his own personal means of knowledge of that character. I have never known the evidence to go to the jury without, according to my experience, their being told to estimate the weight of the evidence entirely upon the personal experience of the witness. A witness is called to say that 'this man has been in my employ for twenty years, and I have always regarded him with the highest estimation and respect, but I never heard a human being speak of him

in my life.' I take it that the principle that the Lord Chief Justice has laid down would require that the presiding judge when the evidence was offered should say it is not admissible. 'I know nothing but from my personal experience; I never heard a human being express an opinion of him, but I have had abundant experience of him, and he is one of the worthiest of the race he belongs to.' That is personal experience. That is the point on which I differ. To my mind that personal experience enables the witness to say 'my repute of him is such as I express,' and that personal experience gives cogency to the evidence; whereas a witness saying 'I have heard some persons say—I have heard generally a report in favour of the prisoner,' is very slight in comparison. I think if the proposition is that general character is alone admissible, it is an impossible fact to state. There is no such thing as general rumor; it lies in the collection of the sayings of a number of individuals; you cannot ask who spoke that as an individual fact, but it is a general inference supposed to be from hearing a number of separate and specific statements in favor of the party. I think that the notion that general character is alone admissible is not strictly accurate, if you come to limit it to separate individuals. If a witness was asked what individual has he ever heard give a particular opinion—an opinion of a particular fact, that would be wholly inadmissible. I attach considerable weight to this distinction, because in my opinion the best

and a rule, other than the one based upon the principle that "reputation is character" developed. Character might have been, and should properly be, regarded as provable by evidence of the effect of its manifestation upon the mind of an observer or upon that of a jury. It is as a rule by the effect of these manifestations upon the community that character may be proved, as shown by the fact of the reputation, if any, which there prevails with regard to it. On principle, witnesses who had observed the person in question might well be permitted to state their inferences or conclusions as to his actual combination of moral qualities, or as to the existence of any particular trait which the nature of the case made material.¹ It is settled, however, that this class of evidence is inadmissible to establish character,² either as part of an original

character is that which is the least talked about." *R. v. Rowton*, 10 Cox Cr. C. 25, 32, 11 Jur. (N. S.) 325, L. & C. 520, 533, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865), per Erle, C. J.

§ 3340-1. "Numerous cases may be put in which a man may have no general character in the sense of any reputation or rumor about him at all, and yet may have a good disposition. For instance, he may be of a shy, retiring disposition, and known only to a few; or again, he may be a person of the vilest character and disposition, and yet only his intimates may be able to testify that this is the case. One man may deserve that character without having acquired it which another man may have acquired without deserving it. In such cases the value of the judgment of a man's intimates upon his character becomes manifest. In ordinary life, when we want to know the character of a servant, we apply to his master. A servant may be known to none but the members of his master's family; so the character of a child is only known to its parents and teachers, and the character of a man of business to those with whom he deals. I apprehend that

there is nothing to prevent a man of business from calling every person with whom he has dealt for years, and asking each in succession whether he was a person, according to the witness's observation, of an honest and just character; and such evidence would be of the highest value. But, if a witness to character were to say that the man had got a good character in the parish, it might be that he had gained it because he had gone through the parish offices with decency, and the witness may have had no opportunity of judging of the man's real character and disposition. According to the experience of mankind one would ordinarily rely rather on the information and judgment of a man's intimates than on general report; and why not in a Court of Law?" *R. v. Rowton*, 10 Cox Cr. C. 25, 11 Jur. (N. S.) 325 L. & C. 520, 542, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865), per Willes, J.

2. *Alabama*.—*Andrews v. State*, 159 Ala. 14, 48 S. 858 (1909); *McQueen v. State*, 108 Ala. 54, 18 So. 843 (1895); *Hussey v. State*, 87 Ala. 121, 6 So. 420 (1888).

Delaware.—*State v. Briscoe*, 3 Pennw. 7, 50 Atl. 271 (1900).

case or on rebuttal.³ This is the more remarkable as the early law admitted this species of evidence in the present connection.⁴ It is of no consequence under the rule that the observer is entirely competent to form an illuminating opinion and has had adequate opportunities for observing the conduct of the person in question.⁵

Georgia.—Bowens v. State, 106 Ga. 760, 32 S. E. 666 (1899).

Illinois.—Beasley v. People, 89 Ill. 571 (1878).

Mississippi.—McDaniel v. State, 8 Sm. & M. 401, 47 Am. Dec. 93 (1847).

Missouri.—Carp v. Queen Ins. Co., 203 Mo. 295, 101 S. W. 78 (1907); State v. King, 78 Mo. 555 (1883).

Nebraska.—Berneker v. State, 40 Nebr. 810, 59 N. W. 372 (1894).

New York.—People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650n., 12 Am. & Eng. Ann. Cas. 745- (1907); People v. Elliott, 163 N. Y. 11, 57 N. E. 103 (1900); Hart v. McLaughlin, 51 App. Div. 411, 64 N. Y. Suppl. 827 (1900).

Ohio.—Gandolfo v. State, 11 Ohio St. 114 (1860).

Texas.—McCormick v. Schtrenck, (Civ. App. 1910) 130 S. W. 720; East Line, etc., R. Co. v. Scott, 68 Tex. 694, 5 S. W. 501 (1887).

Vermont.—State v. Emery, 59 Vt. 84, 7 Atl. 129 (1886).

United States.—Bird v. Halsy, 87 Fed. 671 (1898).

England.—Reg. v. Rowton, 10 Cox Cr. C. 25, 11 Jur. (N. S.) 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865).

Contra, People v. Wade, 118 Cal. 672, 50 Pac. 841 (1897); State v. Sterrett, 68 Iowa 76, 25 N. W. 936 (1885); State v. Lee, 22 Minn. 407, 21 Am. Rep. 769 (1876); Ardmore Coal Co. v. Bevil, 61 Fed. 757, 10 C. A. 41 (1894) (*semble*).

"Witnesses may give their opinion concerning the general character of a person for prudence or careless-

ness, when an issue of that kind is raised by the pleadings. To avoid the trial of numerous collateral issues concerning the conduct of a person on particular occasions, it is competent for a witness to give the result of his observation of a person's general conduct, with respect to his being negligent or otherwise, provided always that the witness has had a fair opportunity to observe his conduct. The rule in question, permitting witnesses to give their opinion on such questions, rests largely upon grounds of convenience and necessity." Ardmore Coal Co. v. Bevil, 61 Fed. 757, 760, 10 C. C. A. 41 (1894), per Thayer, J.

Hypothetical question.—"A party's character cannot be established by asking the witness in regard to various offenses, of most of which he has never heard, and then making him state whether, if those things were true, he would call the person a peaceable, etc., man." Rutledge v. Rowland, 161 Ala. 114, 126, 49 So. 461 (1909), per Simpson, J.

3. State v. Grinden, 91 Iowa, 505, 60 N. W. 37 (1894); Reg. v. Rowton, 10 Cox Cr. C. 25, 11 Jur. (N. S.) 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865).

4. Jones' Case, 31 How. St. Tr. 251, 309 (1809); Davison's Case, 31 How. St. Tr. 99 (1808); Hardy's Case, 24 How. St. Tr. 199, 292, 299 (1794).

5. Hart v. McLaughlin, 51 App. Div. (N. Y.) 411, 64 N. Y. Suppl. 827 (1900); Sawyer v. People, 91 N. Y. 667, 1 N. Y. Cr. 249 (1883).

§ 3341. (*Proof of Character; Proof Other Than by Reputation*); Illustrative Occurrences.—The law of evidence might, with great propriety, admit not only the inference of competent observers in proof of character but also receive, when a suitable forensic necessity presents, testimony as to individual occurrences which may logically be regarded as indicating the operation of a relevant trait. In other words a witness might be allowed to state the existence of habits, indicative of character, which he had observed or even to detail occurrences embodying the manifestation by the person in question of a particular element of disposition. Such, however, is not the law. It is exceedingly well settled that instances of conduct or habitual conduct cannot be shown for the purpose of proving character.¹ Thus, the character of the deceased in a homicide case as a bloodthirsty and dangerous man cannot be shown by proof that he had struck a person on the head with a club.² That the evidence is to be used in rebuttal does not alter the rule.³

§ 3341-1. *Alabama*.—*Morgan v. State*, 88 Ala. 223, 6 So. 761 (1889); *Steele v. State*, 83 Ala. 20, 3 So. 547 (1887).

Georgia.—*Columbus, etc., R. Co. v. Christian*, 97 Ga. 56, 25 S. E. 411 (1895).

Massachusetts.—*Colburn v. Marble*, 156 Mass. 376, 82 N. E. 28 (1907).

Minnesota.—*Lydiard v. Daily News Co.*, 110 Minn. 140, 124 N. W. 985, 19 Am. & Eng. Ann. Cas. 185 (1910).

Mississippi.—*Neal v. State*, (Miss. 1912) 57 So. 419.

Missouri.—*State v. Colvin*, 226 Mo. 446, 126 S. W. 448 (1910); *State v. Welsor*, 117 Mo. 570, 21 S. W. 443 (1893).

Nebraska.—*Trousil v. Bayer*, 85 Nebr. 431, 123 N. W. 445 (1909); *Dorsey v. Clapp*, 22 Nebr. 564, 35 N. W. 389 (1887); *Matthewson v. Burr*, 6 Nebr. 312 (1877).

New Jersey.—See *State v. Baans*, 77 N. J. L. 123, 124, 71 Atl. 111 (1908).

North Carolina.—*Nixon v. McKinney*, 105 N. C. 23, 11 S. E. 154 (1890).

Oregon.—*State v. Garrand*, 5 Oreg. 156 (1874).

Pennsylvania.—*Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104, 80 Am. Dec. 467 (1860).

Wisconsin.—*Robinson v. State*, 143 Wis. 205, 126 N. W. 750 (1910).

Admissibility to show a mental state of another person.—On the issue whether an uncle, who had long known his niece intimately, believed that she had an irritable disposition, it was competent to show specific acts of ill-temper and quarrelsomeness on the part of the niece, although the uncle did not witness such acts. *Curtice v. Dixon*, 74 N. H. 386, 68 Atl. 587 (1907).

2. *Noel v. State*, 161 Ala. 25, 49 So. 824 (1909).

3. *Arkansas*.—*Ware v. State*, 91 Ark. 555, 121 S. W. 927 (1909).

Illinois.—*Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265 (1902).

Kansas.—*State v. Frederickson*, 81 Kan. 854, 106 Pac. 1061 (1910).

Louisiana.—*State v. Donelon*, 45 La. Ann. 744, 12 So. 922 (1893);

§ 3342. (*Proof of Character; Proof Other Than by Reputation; Illustrative Occurrences*); Administrative Considerations.

— An infirmative consideration of considerable practical importance in connection with the use of this species of testimony is the danger of raising collateral issues.¹ A matter of this kind is, however, largely controllable by the administrative function of the court and, in itself considered, furnishes no apparent justification for removing from a proponent, who can establish his case only in this way, all opportunity of using this evidence, whatever may be the view of the court on the subject. The principal other objections to the use of specific occurrences as evidence of character is that their use would often result in unfair surprise to a party,² or in creating a prejudice against him in the minds of the jurors.³

State v. Farrer, 35 La. Ann. 315 (1883).

Massachusetts.—*Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325 (1876).

New Jersey.—*Bullock v. State*, 65 N. J. L. 557, 47 Atl. 788, 86 Am. St. Rep. 668 (1900).

New York.—*People v. Faulkner*, 55 Hun 603, 8 N. Y. Suppl. 376 (1889).

North Carolina.—*State v. Laxton*, 76 N. C. 216 (1877).

Pennsylvania.—*Com. v. Brown*, 23 Pa. Super. Ct. 470 (1903).

§ 3342-1. *People v. Van Gaasbeck*, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650n. 12 Am. & Eng. Ann. Cas. 745 (1907).

"The principal reason why it is not allowed to extend to particular instances of good and bad conduct is, that such evidence might raise an unlimited number of collateral issues, for which neither the accused nor the commonwealth would come prepared, and which issues would necessarily becloud the issue of guilt or innocence in the charge under consideration. And it may be said that the rule is a good one for another reason, and that is, that the growth of character is so subtle that its existence cannot always be predicated

of, or based upon, certain acts, or formulated from specific conduct to which one can point as tangible and satisfactory evidence of the conclusion at which he may have arrived. A single lapse from virtue, or a single infraction of the world's code of honor, may blast a character, but its growth to good is slow. It is made of numberless and infinitesimal acts, the individuality of which is lost sight of as they pass, and the aggregation alone remains as a monument to character. A growth so slow, a character so formed, ought to weigh in the consideration of the probabilities that the accused has been guilty of a specific offense which is inconsistent with it." *White v. Com.*, 80 Ky. 480, 485, 4 Ky. L. Rep. 373 (1882), per Hines, J.

2. "The plaintiff [in slander] is supposed also to be ready at all times to show the general goodness of his character; but it would be unreasonable to require him to have witnesses ready to disprove particular facts, which he has no notice are intended to be proved against him." *Bodwell v. Swan*, 3 Pick. (Mass.) 376, 378, 15 Am. Dec. 228 (1825), per Parker, C. J.

3. "A person cannot be convicted

A strong administrative demand looking toward a broadening of the range of character evidence so far, at least, as to include opinion and the influence of illustrative occurrences comes from the fact that to separate them from proof by reputation is a matter of extreme difficulty if not, at times, of practical impossibility. This is a fact to which judicial administration may well give careful consideration, for much evil, by way of reversals and new trials, arises from any attempt to establish rules of law, for the separation of cognate matters which are hard to keep apart. The majority of the Court for Crown Cases Reserved, in a case from which liberal quotation has already been made,⁴ states this difficulty clearly.⁵

of one offense upon proof that he committed another, however, persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one." *Coleman v. People*, 55 N. Y. 81, 90 (1873), per Allen, J.

4. *R. v. Rowton*, 10 Cox Cr. C. 25, 29, 30, 11 Jur. (N. S.) 325, L. & C. 520, 530, 34 L. J. M. C. 57, 11 L. T. Rep. (N. S.) 745, 13 Wkly. Rep. 436 (1865).

5. "No one pretends," said Cockburn, C. J., "that you can ask as to a specific fact, though every one will agree that one fact of honesty or dishonesty, as the case may be, would weigh infinitely more than the opinion of his friends or neighbors as to his general character. But that cannot, according to the practice, be done. The truth is, this part of our law is an anomaly. . . . This allowing of evidence of good character

in favour of the prisoner to be given, has grown up from a desire to administer this part of our law with mercy as far as possible. It has sprung up from a time when the law was according to the common estimation of mankind severer than it should have been. Be that as it may, this class of evidence has engrafted itself as a sort of anomalous exception on our law, and we must deal with it as we find it, and the opinion of all who have dealt with the subject of evidence is, that it is to reputation we must confine it. It is true that in practice, whenever a witness is called to character it gives a greater cogency and force to his evidence, if the evidence be introduced by a statement of circumstances from which it may be the more apparent and readily believed that the witness has had a full and abundant opportunity to acquire information so as to be able to speak satisfactorily upon the character of the prisoner; and in practice it is very often carried beyond what, I think, if we stood upon the strict letter of the law, can be altogether justified. But Mr. Phillips has truly pointed out that facts which do not come within the rule that evidence may be received of general character, are very often given in evidence in

§ 3343. (*Proof of Character; Proof Other Than by Reputation*); Particular Facts; Good Character.—Finally, the law of evidence might, with good reason, admit as proof of actual character not only the inferences of observers and probative instances of the manifestation of the trait in question, but also probative individual facts which tend circumstantially to establish the existence of a material trait. Proof of character is, however, confined to proof of reputation. Specific facts and circumstances, though tending to prove the reputation or confirm the statements of witnesses regarding it, are excluded. Thus it cannot be shown that A. (the person whose character is involved in the inquiry) is a minister or priest¹ or church member.² Nor can it be shown that he has not quarreled with any one,³ has never been accused⁴ or convicted⁵ of a crime or that he has received a certificate of endorsement from his neighbors.⁶ That he has received an honorable discharge as a soldier is equally immaterial.⁷ In like manner the facts that his employer found no fault with him,⁸ that he occupied a position of trust at a good salary⁹ however valuable, on a matter of sentence or other exercise of the administrative function of the court are rejected if offered as proof of actual character.¹⁰

§ 3344. (*Proof of Character; Proof Other Than by Reputation*); Particular Facts); Bad Character.—Equally stringent is the rule which forbids the use of particular facts to establish bad character. It cannot be shown, as against A's good character

favour of prisoners. But when we come to consider the question of what, in the strict interpretation of the law is the limit of such evidence, I must say, in my judgment, it must be restrained to this, the evidence must be of the man's general reputation and not the individual opinion of the witness."

§ 3343-1. *State v. Brooks*, 23 Mont. 146, 57 Pac. 1038 (1899).

2. *Hussey v. State*, 87 Ala. 121, 6 So. 420 (1888).

3. *State v. Ferguson*, 71 Conn. 227, 41 Atl. 769 (1898).

4. *State v. Marfaudille*, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.)

346n., 15 Am. & Eng. Ann. Cas. 584 (1907).

5. *Posey v. United States*, 26 App. D. C. 302 (1906).

6. *Jones v. Duchow*, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256 (1890).

7. *Taylor v. State*, 120 Ga. 857, 48 S. E. 361 (1904); *People v. Eckman*, 72 Ga. 582, 14 Pac. 359 (1887).

8. *State v. Brooks*, 23 Mont. 146, 57 Pac. 1038 (1899).

9. *Howard v. State*, 37 Tex. Cr. App. 494, 36 S. W. 475, 66 Am. St. Rep. 812 (1896).

10. *State v. Ferguson*, 71 Conn. 227, 41 Atl. 769 (1898); *Com. v. Mulien*, 150 Mass. 394, 23 N. E. 51 (1890).

that he keeps a disorderly house,¹ uses intoxicants, associates with bad company,³ has had many quarrels with identified persons,⁴ has been confined in jail⁵ or other place of detention, has been indicted⁶ or has been pursued by officers of the law⁷ with a warrant for his arrest.⁸

§ 3345. (*Proof of Character; Proof Other Than by Reputation; Particular Facts*); Administrative Considerations.—No administrative reason apparently forbids proof of character by the establishment of facts from which it or the estimate which the community places on it, by the bestowal of its confidence, may logically be inferred. The court, in the discharge of its own exclusive functions, as in the selection of jurors or the imposition of criminal sentences customarily considers and weighs inferences naturally arising from such facts. It is true that the evidence is circumstantial, but general reputation is mere hearsay and these particular facts may be fully as probative of actual character as is the evidence of reputation. It is a severe reflection upon the scientific nature of the English common law system of administration in respect to the proof of facts for the ascertainment of truth and its present ability to protect the real interests of society that while these facts, and all similar ones, are excluded as against society and in favor of the criminal, because at one time in England there was an unduly rigorous penal code, precisely these same matters may be inquired into on the cross-examination of a witness whose misfortune it is to become involved in other persons' matters, with which he has no concern, and who finds himself compelled, under penalty of perjury, to disgrace innocent persons

§ 3344-1. *People v. Christy*, 65 Hun (N. Y.) 349, 20 N. Y. Suppl. 278, 8 N. Y. Cr. 480, 47 N. Y. St. Rep. 924 (1892).

2. *State v. Castle*, 133 N. C. 769, 46 S. E. 1 (1903).

3. *Cheney v. State*, 7 Ohio 222 (1835); *Holsey v. State*, 24 Tex. App. 35, 5 S. W. 523 (1887).

4. *Campbell v. State*, 38 Ark. 498 (1882); *State v. Sterrett*, 71 Iowa 386, 32 N. W. 387 (1887); *King v.*

State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681 (1888).

5. *State v. Bysong*, 112 Iowa 419, 84 N. W. 505 (1900); *People v. White*, 14 Wend. (N. Y.) 111 (1835).

6. *Harris v. Com.*, 74 S. W. 1044, 25 Ky. L. Rep. 297 (1903).

7. *Reddick v. State*, 25 Fla. 112, 433, 5 So. 704 (1889); *Sanford v. Craig*, 52 Nebr. 483, 72 N. W. 864 (1897).

8. *Murphy v. State*, 108 Ala. 10, 18 So. 557 (1895).

whom a long life of repentance and virtue is impotent to shield from the effects of acts which for many years he has been trying to live down.

§ 3346. (*Proof of Character; Proof Other Than by Reputation*); Animals; Illustrative Occurrences.—While, as has been noted,¹ illustrative occurrences cannot be used for the purpose of proving the character of a person, they may be resorted to as evidence of the character or disposition of an animal; and evidence may be given of the behavior of an animal on particular occasions for the purpose of showing the possession of a trait relevant to the inquiry.² In this way it may be proved, for example, that a horse is gentle³ or is vicious⁴ or that a dog⁵ or a bull⁶ is vicious and dangerous to mankind. It is not necessary that the occurrences should have preceded the occasion upon which the existence of the trait in question is rendered important by the evidence. It may be that these occurrences or some of them were subsequent

§ 3346-1. § 3341.

2. Kentucky.—Murray v. Young, 12 Bush 337 (1876).

Maine.—Fitzgerald v. Dobson, 78 Me. 559, 7 Atl. 704 (1887).

Massachusetts.—Broderick v. Higginson, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 296 (1897); Maggi v. Cutts, 123 Mass. 535 (1877); Todd v. Rowley, 8 Allen 51 (1864).

Montana.—Kennon v. Gilmer, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45 (1885), *reversed on other grounds*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. ed. 110 (1888).

New Hampshire.—Whittier v. Franklin, 46 N. H. 23, 88 Am. Dec. 185 (1865).

New York.—Kessler v. Lockwood, 16 N. Y. Suppl. 677, 42 N. Y. St. Rep. 563 (1891); Rogers v. Rogers, 4 N. Y. St. Rep. 373 (1887). See also, Weber v. Hoag, 8 N. Y. Suppl. 76, 28 N. Y. St. Rep. 563 (1889).

Rhode Island.—Buckley v. E. & P. Express Co., 22 R. I. 358, 48 Atl. 7 (1900); Stone v. Pendleton, 21 R. I. 332, 43 Atl. 643 (1899).

Washington.—Robinson v. Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50 (1892).

United States.—Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. ed. 110 (1888).

England.—Worth v. Gilling, L. R. 2 C. P. 2 (1866).

3. Stone v. Pendleton, 21 R. I. 332, 43 Atl. 643 (1899).

4. Whittier v. Franklin, 46 N. H. 23, 88 Am. Dec. 185 (1865); Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. ed. 110 (1888), *sustaining this point in* Kennon v. Gilmer, 5 Mont. 257, 6 Pac. 847, 51 Am. Rep. 45 (1885).

5. Broderick v. Higginson, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 296 (1897); Kessler v. Lockwood, 62 Hun 619, 16 N. Y. Suppl. 677, 42 N. Y. St. Rep. 563 (1891); Robinson v. Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50 (1892).

6. Rogers v. Rogers, 4 N. Y. St. Rep. 373 (1887).

in point of time,⁷ even to the extent of several months.⁸ Evidence in reference to an animal's disposition should, of course, be limited to such as is strictly relevant, as in the case of any other evidence. Thus, evidence of a mare's conduct while in the stable cannot be rebutted by evidence of her behavior on the street.⁹

§ 3347. (Proof of Character; Proof Other Than by Reputation; Animals); Inferences by Observers.—A still further departure from the administrative rules applied in case of human beings¹ is the rule which permits, in case of the lower animals, a qualified observer to state the inference as to a relevant trait of character which he has gained from his observation of the animal. This rule has, apparently, thus far been applied only in reference to the disposition of horses as to gentleness or the contrary.² The reasons, administrative or other, which justify and indeed require the use of this species of evidence in connection with proof of the character or disposition of the lower animals, are thus stated in a Connecticut case:³ "Where the disposition of a person or of an animal (as in this case) is to be ascertained, the fact to be

7. Delaware.—*Brown v. Green*, 1 Pennew. 535, 42 Atl. 991 (1899).

Massachusetts.—*Maggi v. Cutts*, 123 Mass. 535 (1877); *Todd v. Rowley*, 8 Allen 51 (1864).

New Hampshire.—*Chamberlain v. Enfield*, 43 N. H. 356 (1861).

Tennessee.—*Turnpike Co. v. Hearn*, 87 Tenn. 291, 10 S. W. 510 (1888).

United States.—*Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. ed. 110 (1888), *sustaining the point in* *Kennon v. Gilmer*, 5 Mont. 257, 6 Pac. 847, 51 Am. Rep. 45 (1885).

Contra, *Stone v. Longworthy*, 20 R. I. 602, 40 Atl. 832 (1898).

"The objection that, being afterward the vicious or unmanageable or timid conduct of the horse may have been occasioned by this fright, and that therefore the evidence must be rejected is not sound. It assumes that the fright was the necessary, provoking cause, which it may or may not have been. This affects the weight, not the admissibility, of the

evidence." *Turnpike Company v. Hearn*, 87 Tenn. 291, 292, 10 S. W. 510 (1888), per Snodgrass, J.

8. Chamberlain v. Enfield, 43 N. H. 356 (1861) (six or eight months after accident); *Kennon v. Gilmore*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. ed. 110 (1888) (twenty months after accident).

Discretion of court.—"The length of time afterwards to which such evidence may extend is largely within the discretion of the judge presiding at the trial." *Kennon v. Gilmer*, 131 U. S. 22, 25, 9 Sup. Ct. 696, 33 L. ed. 110 (1888), per Mr. Justice Gray.

9. Brown v. Green, 1 Pennew. (Del.) 535, 42 Atl. 991 (1899).

§ 3347-1. §§ 3340, 3341.

2. Sydleman v. Beckwith, 43 Conn. 9 (1875); *Noble v. St. Joseph, etc., Ry. Co.*, 98 Mich. 249, 57 N. W. 126 (1893).

3. Sydleman v. Beckwith, 43 Conn. 9, 13 (1875), per Loomis, J.

proved, being latent, can be ascertained only by symptoms and outward manifestations. If these happened to be very striking they may remain in the memory and can be stated, but in many cases they are very slight in each particular instance, and only the impression of an indefinite number of such appearances remains, resulting in an opinion that the quality or disposition in question exists."

§ 3348. (*Proof of Character; Proof Other Than by Reputation; Animals*); Administrative Considerations.—The influence of volition is so greatly diminished in case of the lower animals as to make the relation between character and conduct more invariable and easily traced. The conduct of an animal when the same stimulus is applied in the same way on different occasions shows a uniformity which makes the effect highly probative of the cause. In other words specific acts and conduct are more highly probative as to the psychological traits from which they spring in case of lower animals than in that of a man. The necessity for receiving the opinions of observers and evidence of specific acts to prove the disposition of an animal is much greater than in the case of a person, owing to the fact that a person's character is a natural topic of interest and discussion, hence a reputation can generally be shown, while an animal may have no reputation worthy of consideration. Furthermore the objections which have been mentioned ¹ to the use of such evidence in relation to persons assume much less prominence in the case of animals. Collateral issues will necessarily be raised by offering proof of specific acts of an animal; but, ordinarily, this will cause little delay or confusion, as the range of possible evidence is much narrower than in the case of a person. Unfair surprise to a party may likewise result but the narrow range of the animal's activities makes a serious situation of this character unlikely. The animal not being a party to the action, the danger of arousing a prejudice in the minds of the jurors can hardly be regarded as an objection. These reasons seem to justify the use of evidence of specific acts and the opinions of observers to prove the character of animals, in spite of the rule against the use of such evidence in the case of human beings.

§ 3349. **Weight.**—Great variety of opinion is manifested by courts as to what probative weight should properly be attached to the inference of conduct from character. So great is the variety which different cases present in this particular that generalization can seldom be helpful to any marked degree. It may, however, not be entirely without value to suggest that while the inference of conduct from character is, when the *res gestae* of any particular case are established by direct evidence, at best but a deliberative one, it may, when the *res gestae* are to be proved by circumstantial evidence, be more highly probative, especially in connection with the corroborative influence of other facts. The evidentiary weight of the inference will be found, moreover, to increase in proportion as the psychological element becomes constituent or probative. It is always to be remembered that, while the inference of physical conduct from actual character is one of that slight degree of probative force, classed as deliberative, the much closer relation between the mental and moral nature of man may confer upon inferences, with regard to the existence and intensity in operation of a mental state, which arise from proof of actual character, an easily recognizable probative force. This distinction, while it cannot be said to be recognized by the authorities, apparently tends to explain and reconcile the variations so apparent upon the surface.

§ 3350. (*Weight*); **Judicial Truisms.**—This suggestion that the probative force of the inference of conduct from character varies in proportion to the influence of a psychological state, serves, for example, to throw light upon the solemn announcement by the courts of propositions that seem in the nature of truisms. Thus, that the probative force of character evidence is great in proportion as the testimony of the case as to which it suggests a deliberative doubt is weak, is unquestionably true.¹ Apparently the pro-

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| § 3350-1. <i>Alabama.</i> — <i>Armor v. State</i> , 63 Ala. 173 (1879). | <i>Georgia.</i> — <i>Epps v. State</i> , 19 Ga. 102 (1855). |
| <i>Arkansas.</i> — <i>Edmonds v. State</i> , 34 Ark. 720 (1879). | <i>Indiana.</i> — <i>Walker v. State</i> , 136 Ind. 663, 36 N. E. 356 (1893). |
| <i>Delaware.</i> — <i>State v. Smith</i> , 9 Houst. 588, 33 Atl. 441 (1892). | <i>Iowa.</i> — <i>State v. House</i> , 108 Iowa 68, 78 N. W. 859 (1899); <i>State v. Donovan</i> , 61 Iowa 278, 16 N. W. 130 (1883); <i>State v. Turner</i> , 19 Iowa 144 (1865). |
| <i>District of Columbia.</i> — <i>U. S. v. Gunnell</i> , 5 Mackey, 196 (1886). | |
| <i>Florida.</i> — <i>Long v. State</i> , 11 Fla. 295 (1867). | |

bative force of any fact or argument is relatively increased in proportion as that of the opposing facts or arguments is diminished. No possible proposition can be more axiomatic than that one of a pair of scales may be made to preponderate by taking weight from the opposite one as readily as by adding weight on its own side.

§ 3351. (*Weight*); The Defendants' Privilege Where the Res Gestae are Directly Proved.—It follows from what has been said, that where the evidence of the *res gestae* is direct the proof of good character by a defendant can have but little probative effect in overcoming its logical force. This, however, does not impair the right of the accused to offer the deliberative inference in his own favor. As has been more fully said elsewhere¹ it is the characteristic privilege of the non-actor, the defendant in a criminal case,² to introduce such deliberative facts. This is a privilege which, by virtue of the procedural nature of the present rule, cannot be restricted in this connection, by the feeling of the court as to the reasonableness of the jury's acting upon it. For the court to adopt the contrary rule and say, as has been done, that where a strong case of direct evidence³ has been made out against the prisoner,⁴ the jury are justified in disregarding the inferences

Massachusetts.—Com. v. Nagle, 157 Mass. 554, 32 N. E. 861 (1893).

Mississippi.—Wesley v. State, 37 Miss. 327, 75 Am. Dec. 62 (1859).

Missouri.—State v. McMurphy, 52 Mo. 251 (1873); Schaller v. State, 14 Mo. 502 (1851).

Nebraska.—Olive v. State, 11 Nebr. 1, 7 N. W. 444 (1880).

New Jersey.—State v. Wells, 1 N. J. L. 424, 1 Am. Dec. 211 (1790).

New York.—People v. Hammill, 2 Park. Cr. Rep. 223 (1855); People v. Vane, 12 Wend. 78 (1834); People v. Kirby, 1 Wheel. Cr. Cas. 64 (1822).

Pennsylvania.—Com. v. Platt, 11 Phila. 421 (1876).

United States.—U. S. v. Means, 42 Fed. 599 (1889); U. S. v. Jones, 31 Fed. 718 (1887); U. S. v. Johnson, 26 Fed. 682 (1885); U. S. v. Emerson, 25 Fed. Cas. No. 15,051, 6 McLean 406 (1855); U. S. v. Noblom, 27 Fed. Cas. No. 15,896 (1878).

§ 3351-1. § 3277.

2. § 373.

3. State v. Beebe, 17 Minn. 241 (Gil. 218) (1871); State v. Wells, 1 N. J. L. 424, 1 Am. Dec. 211 (1790); People v. Hammill, 2 Park. Cr. Rep. (N. Y.) 223 (1855); State v. Ford, 3 Strobb. (S. C.) 517 (1839).

4. *Massachusetts*.—Com. v. Hardy, 2 Mass. 303 (1807).

Mississippi.—McDaniel v. State, 8 Sm. & M. 401, 47 Am. Dec. 93 (1847).

Missouri.—Schaller v. State, 14 Mo. 502 (1851).

New Jersey.—State v. Wells, 1 N. J. L. 424, 1 Am. Dec. 211 (1790).

New York.—Wagner v. People, 54 Barb. 367; affirmed, 41 N. Y. (2 Keyes) 684, 4 Abb. Dec. 509 (1866); People v. Hammill, 2 Park. Cr. Rep. 223 (1855).

South Carolina.—State v. Ford, 3 Strobb. 517 (1839).

from the evidence of character produced by him seems utterly indefensible from point of principle and as viewed by practical administration.⁵ Until the evidence of character has been weighed by the jury it cannot be declared, as a finality, that the case is strongly proved against the accused, and it is a general rule that, however strongly the case against the owner may be proved, evidence of good character will be received,⁶ the weight to be given

Tennessee.—Bennett v. State, 8 Humphr. 118 (1847).

United States.—U. S. v. Allen, 24 Fed. Cas. No. 14,432 (1868); U. S. v. Mayer, 26 Fed. Cas. No. 15,753, Deady 127 (1865); U. S. v. Roudenbush, 27 Fed. Cas. No. 16,198, Baldw. 514 (1832).

5. State v. Turner, 83 Kan. 183, 109 Pac. 983 (1910); People v. Weis, 129 App. Div. (N. Y.) 671, 114 N. Y. Suppl. 236 (1908).

On the trial of a criminal case, an instruction to the jury to the effect that the evidence of the good character of the defendant should be given no weight unless they thought that the case against the defendant was weak and doubtful was erroneous. Hanney v. Com., 116 Pa. St. 322, 9 Atl. 339 (1887).

6. *Alabama*.—Armor v. State, 63 Ala. 173 (1879); Hall v. State, 40 Ala. 698 (1867); Felix v. State, 18 Ala. 720 (1851).

Arkansas.—Rhea v. State, 147 S. W. 463 (1912).

California.—People v. Raina, 45 Cal. 292 (1873); People v. Josephs, 7 Cal. 129 (1857).

Delaware.—State v. Short, (Gen. Sess. 1910) 75 Atl. 787; State v. Stewart, (Gen. Sess. 1907) 67 Atl. 786; Daniels v. State, 2 Pennew. 586, 48 Atl. 196, 54 L. R. A. 286 (1901).

District of Columbia.—U. S. v. Gunnell, 5 Mackey (16 D. C.) 196 (1886); U. S. v. Neverson, 1 Mackey (12 D. C.) 152 (1880).

Florida.—Long v. State, 11 Fla. 295 (1867).

Georgia.—Seymour v. State, 102 Ga. 803, 30 S. E. 263 (1898).

Illinois.—Guzinski v. People, 77 Ill. App. 275 (1898).

Indiana.—Eacock v. State, 169 Ind. 488, 82 N. E. 1039 (1907); Holland v. State, 131 Ind. 568, 31 N. E. 359 (1891); Wagner v. State, 107 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79 (1886); Kistler v. State, 54 Ind. 400 (1876).

Iowa.—State v. Wolf, 112 Iowa 458, 84 N. W. 536 (1900); State v. Cunningham, 111 Iowa 233, 82 N. W. 775 (1900); State v. House, 108 Iowa 68, 78 N. W. 859 (1899); State v. Lindley, 51 Iowa 343, 1 N. W. 484, 33 Am. Rep. 139 (1879); State v. Gustafson, 50 Iowa 194 (1878); State v. Northrup, 48 Iowa 583, 30 Am. Rep. 408 (1878).

Kansas.—State v. Turner, 83 Kan. 183, 109 Pac. 983 (1910); State v. Pipes, 65 Kan. 543, 70 Pac. 363 (1902); State v. Deuel, 63 Kan. 811, 66 Pac. 1037 (1901); State v. Douglass, 44 Kan. 618, 26 Pac. 476 (1890).

Massachusetts.—Com. v. Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485 (1886).

Minnesota.—State v. Beebe, 17 Minn. 241 (1871).

Missouri.—State v. Anslinger, 171 Mo. 600, 71 S. W. 1041 (1902); State v. Howell, 100 Mo. 628, 14 S. W. 4 (1890).

New Mexico.—Frujillo v. Territory, 6 N. M. 589, 30 Pac. 870 (1892).

New York.—People v. Conrow, 200 N. Y. 356, 93 N. E. 943 (1911); Peo-

it being a question solely for the determination of the jury.⁷ The inference to be drawn as to character continues to operate in favor of its possessor at all stages of the trial and properly affects the action of the tribunal both before, during and after trial.

§ 3352. (Weight); Scope of Defendant's Privilege.—Good character, while it effects the whole case rather than any isolated fact in it¹ is still, in itself, considered a substantive fact like any other which tends to establish the defendant's innocence and ought to be so regarded both by court and jury.² It is therefore competent, whatever may be the grade of the offense,³ and whether

ple v. Friedland, 2 App. Div. 332, 37 N. Y. Suppl. 974, 11 N. Y. Cr. Rep. 62, 73 N. Y. St. Rep. 516 (1896); *People v. Sweeney*, 133 N. Y. 609, 30 N. E. 1005, 4 Silv. Ct. App. 554 (1892); *People v. Pollock*, 51 Hun, 613, 4 N. Y. Suppl. 297, 22 N. Y. St. Rep. 64 (1889); *Stover v. People*, 56 N. Y. 315 (1874).

Ohio.—*Harrington v. State*, 19 Ohio St. 264 (1869).

Pennsylvania.—*Hanney v. Com.*, 116 Pa. St. 322, 9 Atl. 339 (1887); *Heine v. Com.*, 91 Pa. St. 145 (1879).

Texas.—*Lee v. State*, 2 Tex. App. 338 (1877).

Utah.—*State v. Blue*, 17 Utah 175, 53 Pac. 978 (1898).

Vermont.—*State v. Totten*, 72 Vt. 73, 47 Atl. 105 (1899); *State v. Daley*, 53 Vt. 442, 38 Am. Rep. 694 (1881).

West Virginia.—*State v. Madison*, 49 W. Va. 96, 38 S. E. 492 (1901).

United States.—*Edington v. U. S.*, 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467 (1896); *U. S. v. Hutchins*, 26 Fed. Cas. No. 15,430 (1876); *U. S. v. McKee*, 26 Fed. Cas. No. 15,686, 3 Dill. 551 (1876).

7. *Alabama*.—*Jones v. State*, 104 Ala. 30, 16 So. 135 (1893).

Delaware.—*State v. Short*, (O. & T. 1912) 82 Atl. 239; *State v. Reese*, (O. & T. 1911) 79 Atl. 217.

Florida.—*Mitchell v. State*, 43 Fla.

188, 30 So. 803 (1901); *Bacon v. State*, 22 Fla. 51 (1886).

Illinois.—*Hartzell v. Warren*, 77 Ill. App. 274 (1898).

Indiana.—*Shields v. State*, 149 Ind. 395, 49 N. E. 351 (1897); *Wagner v. State*, 107 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79 (1886).

Iowa.—*State v. Donovan*, 61 Iowa 278, 16 N. W. 130 (1883).

Minnesota.—*State v. Beebe*, 17 Minn. 241 (1871).

New York.—*People v. Moett*, 23 Hun, 60, 65 (1880); *affirmed*, 85 N. Y. 373 (1881).

Pennsylvania.—*Com. v. Carey*, 2 Brewst. 404 (1868).

Tennessee.—*Bennett v. State*, 8 Humphr. 118 (1847).

Wisconsin.—*Jackson v. State*, 81 Wis. 127, 51 N. W. 89 (1892).

United States.—*United States v. Clement*, 171 Fed. 974 (1909).

§ 3352-1. *People v. Milgate*, 5 Cal. 127 (1855).

2. *Com. v. Howe*, 35 Pa. Sup. Ct. 554 (1900); *Hanney v. Com.*, 116 Pa. St. 322, 9 Atl. 339 (1887).

3. *Iowa*.—*State v. Wolf*, 112 Iowa 458, 84 N. W. 536 (1900).

Massachusetts.—*Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711 (1850).

North Carolina.—*State v. Hice*, 117 N. C. 782, 23 S. E. 357 (1895).

Ohio.—*Harrington v. State*, 19 Ohio St. 264 (1869).

the evidence of it be circumstantial or direct.⁴ It should moreover be borne in mind that, in a criminal case, the defendant may introduce evidence of good character not only where a conflict of testimony exists or to strengthen an existing doubt but for the purpose of creating a conflict or generating the doubt.⁵ Thus, for example, on an indictment for murder, even where the facts proved in evidence against the accused would otherwise be regarded by the jury as establishing a perfect case, it is still the

Oregon.—State v. Porter, 32 Oreg. 135, 49 Pac. 964 (1897).

Pennsylvania.—Hanney v. Com., 116 Pa. St. 322, 9 Atl. 339 (1887).

In a criminal case, it is error to charge the jury that proof of the defendant's good character is entitled to less weight where the crime charged is of an atrocious nature than in a case where the crime charged is of a lower grade. Harrington v. State, 19 Ohio St. 264 (1869).

4. *Illinois.*—Mark v. Merz, 53 Ill. App. 458 (1893).

Indiana.—Voght v. State, 145 Ind. 12, 43 N. E. 1049 (1895).

Iowa.—State v. Turner, 19 Iowa 144 (1865).

Massachusetts.—McDonald v. Savoy, 110 Mass. 49 (1872).

Minnesota.—State v. Beebe, 17 Minn. 241 (1871).

New York.—Stover v. People, 56 N. Y. 315 (1874).

Ohio.—Harrington v. State, 19 Ohio St. 264 (1869).

South Carolina.—State v. Tarrant, 24 S. C. 593 (1885).

Tennessee.—Fry v. State, 96 Tenn. 467, 35 S. W. 883 (1896).

Wisconsin.—Jackson v. State, 81 Wis. 127, 51 N. W. 89 (1892).

5. *Alabama.*—Bryant v. State, 116 Ala. 445, 23 So. 40 (1897); McQueen v. State, 108 Ala. 54, 18 So. 843 (1895); Newsom v. State, 107 Ala. 133, 18 So. 206 (1894); Springfield v. State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85 (1892); Armor v.

State, 63 Ala. 173 (1879); Carson v. State, 50 Ala. 134 (1873).

California.—People v. Lee, 68 Cal. 20, 8 Pac. 685 (1885).

Florida.—Bacon v. State, 22 Fla. 51 (1886).

Georgia.—Brazil v. State, 117 Ga. 32, 43 S. E. 460 (1903); Seymour v. State, 102 Ga. 803, 30 S. E. 263 (1898).

Indiana.—Wagner v. State, 107 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79 (1886).

Iowa.—State v. Northrup, 48 Iowa 583, 30 Am. Rep. 408 (1878).

Louisiana.—State v. Garic, 35 La. Ann. 970 (1883).

New Jersey.—Baker v. State, 53 N. J. L. 45, 20 Atl. 858 (1890).

New York.—People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650n., 12 Am. & Eng. Ann. Cas. 745 (1907); affirming judgment, 118 App. Div. 511, 103 N. Y. Supp. 249; People v. Ellenbogen, 114 App. Div. 182, 99 N. Y. Suppl. 897; affirmed, 186 N. Y. 603, 79 N. E. 1112 (1906); People v. Sweeney, 133 N. Y. 609, 30 N. E. 1005, 4 Silv. Ct. App. 554 (1892); People v. Pollock, 51 Hun, 613, 4 N. Y. Suppl. 297, 22 N. Y. St. Rep. 64 (1889); People v. Nileman, 8 N. Y. St. Rep. 300 (1887).

Pennsylvania.—Com. v. Cate, 220 Pa. St. 138, 69 Atl. 322 (1908); Becker v. Com., 9 Atl. 510, 6 Sad. 428 (1887); Com. v. Carey, 2 Brewst. 404 (1868).

duty of a tribunal to whom the defendant has produced evidence of his good character to weigh this further element in connection with the other facts before them, and then, from the mass of facts so supplemented, decide whether their minds are still free from any reasonable doubt as to the guilt of the defendant.⁶ In considering the weight which is to be attached to character evidence the jury are warranted in considering the demeanor of the defendant while giving his testimony,⁷ and the nature and disposition of the witnesses who give testimony as to character.⁸ It has been held that, where a serious doubt exists as to the guilt of the accused upon the consideration of all the other evidence, the fact that he has proved a good character should prevail;⁹ but good character, of itself, does not, as a matter of law, raise a reasonable doubt;¹⁰ and an instruction to the effect that, in doubtful cases, evidence of good character is conclusive in favor of the party accused of crime does not state the law correctly.¹¹ Where the jury in view of all the evidence entertain no reasonable doubt as to the defendant's guilt, it is their duty to convict, notwithstanding the evidence of good character.¹²

Texas.—*Lee v. State*, 2 Tex. App. 338 (1877).

Washington.—*Klehn v. Territory*, 1 Wash. 584, 21 Pac. 31 (1889).

United States.—*Edgington v. U. S.*, 164 U. S. 361, 17 S. Ct. 72, 42 L. ed. 467 (1896).

But see, *McClellan v. State*, 140 Ala. 99, 37 So. 239 (1904).

Effect of character evidence alone.—It has been held that proof of a defendant's good character, standing alone, is not sufficient to raise a reasonable doubt as to his guilt. *Coppin v. State*, 123 Ala. 58, 26 So. 333 (1898); *Cobb v. State*, 115 Ala. 18, 22 So. 506 (1896); *Murphy v. State*, 108 Ala. 10, 18 So. 557 (1895); *Springfield v. State*, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85 (1892); *State v. Donovan*, 61 Iowa 278, 16 N. W. 130 (1883).

6. *State v. Keefe*, 54 Kan. 197, 38 Pac. 302 (1894).

7. *People v. Ellenbogen*, 186 N. Y.

603, 79 N. E. 1112 (1906); *affirming* 114 App. Div. 182, 99 N. Y. Supp. 897; *Wells v. Territory*, 14 Okla. 436, 78 Pac. 124 (1904).

8. *United States v. Clement*, 171 Fed. 974 (1909).

9. *City of Chicago v. Perdue*, 147 Ill. App. 536 (1909). See also *Kilpatrick v. Com.*, 31 Pa. St. 198 (1858).

10. *Mitchell v. State*, 43 Fla. 188, 30 So. 803 (1901).

11. *Guzinski v. People*, 77 Ill. App. 275 (1898); *Shields v. State*, 149 Ind. 395, 49 N. E. 351 (1897).

A request to charge that "in doubtful cases the good reputation of the defendant will compel an acquittal" states the rule too strongly and was properly refused. *Webb v. State*, 6 Ga. App. 353, 64 S. E. 1001 (1909).

12. *State v. Wilson*, 230 Mo. 647, 132 S. W. 238 (1910); *State v. Brown*, 181 Mo. 192, 79 S. W. 1111 (1904).

§ 3353. (*Weight*); Requirement of Quantum of Evidence Unscientific.—It would seem highly unreasonable in point of principle and devoid of administrative necessity for the court to insist as has sometimes been done that the party offering evidence of character should be required to produce a specified *quantum* of evidence to that effect, or be required to prove some other facts¹ in corroboration of the character evidence as a condition that the latter be given any weight. Obviously, the logical rule requires that a party should be given the benefit of whatever weight the jury deem such character evidence as he is able to offer entitled to, in connection with all the attendant facts and circumstances. This seems especially clear in view of the fact that the accused in a criminal case, where the evidence for the prosecution is purely circumstantial, may often have nothing to rely on, outside of his own testimony, except evidence of good character.

§ 3353-1. *Coppin v. State*, 123 Ala. (1895); *Springfield v. State*, 96 Ala. 58, 26 So. 333 (1898); *Cobb v. State*, 81, 11 So. 250, 38 Am. St. Rep. 85 115 Ala. 18, 22 So. 506 (1896); *Murphy v. State*, 108 Ala. 10, 18 So. 557 (1892); *State v. Donovan*, 61 Iowa 278, 16 N. W. 130 (1883).

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